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DEFINITIVE MAP MODIFICATION ORDERS

Barrier and allegation of connivance inadequate to oust deemed dedication

Essex CC made this order under s 53 of WCA 1981 to add to the definitive map bridleways 26, 27, 28, 29 and 30 Ashingdon and bridleways 40, 41, 42 and 43 Hockley, and to upgrade an 80m section of footpath to bridleway status, on the basis of presumed dedication through long usage. There were four objectors and Inspector Adrian I'Anson held a public inquiry in January 2008.

It was common ground that (for the purposes of s 31(2) of HA 1980) the public status of the ways was brought into question in 1983 when Mr J R Steward, one of the objectors, bought Beckney Wood and nearby housing land and took several measures to prevent access by riders.

128 people submitted evidence forms, many for each particular route whose use they claimed. 61 testified to use on horseback of all the routes during 1963–1983. The objectors made no effective challenge to this; but, since it was untested, the Inspector would give only a small amount of weight to it. 10 witnesses testified at the inquiry; none had been challenged, and only one reported an obstruction. In cross-examination the users were challenged on several points but this did not detract from the clear evidence which showed adequate use of the routes to satisfy the statutory test.

Mr T Steward, brother of the landowner, said he lived in the area from the late 1940s. Initially he said that he did not recollect seeing horses in the wood; later he acknowledged seeing horses occasionally but not frequently. They rode indiscriminately, there being no recognised route. He did not challenge the evidence of those who had completed evidence-forms but said that they had been encouraged to describe routes which were not 100% accurate.

Mr J R Steward had lived in the area since 1943. He went into Beckney Wood occasionally; more frequently 1978–1983 when he was negotiating to sell the land as agent, and subsequently to buy it himself. The routes were used indiscriminately, being unmaintained and undefined. Mr J F Steward, son of Mr J R Steward, said that use had been on undefined routes. There had been an explosion in horse use since the early 1980s but little before then.

The objectors claimed that the Essex Bridleways Association ('EBA') had conspired with the CC to concoct evidence of equestrian use. They based this claim on the similarity between the routes marked on the plans attached to the evidence-forms, without precisely spelling out what were the mechanics of this conspiracy-theory; but the implication was that the witnesses had been instructed to mark their maps in a particular way. In a letter to the CC Mr J R Steward had written: 'It is my considered belief that the Council have caved in to the incessant demands for bridleways made by a small section of the community who derive pecuniary benefit from their activities'.

The Inspector preferred the account of the EBA—corroborated by the CC—that the maps were distributed to users who marked them up themselves. The witnesses completed the forms in their own hand and signed the plans that they themselves completed. This did not mean that they were 'led'. He said that the objectors' view that there was an arrangement by which the maps were marked prior to being given to witnesses ran counter to the EBA and CC witnesses' testimonies (and he judged these to be credible witnesses), and it was contradicted by most of the user-witnesses who appeared at the inquiry. The Inspector dismissed this allegation.

The second major challenge by the objectors to the evidence as a whole was the need for the routes in the order map to match precisely the routes on the witnesses' maps. The Inspector noted that some of the witnesses' drawn routes bore little resemblance to those in the order-map. This tended to show that these particular witnesses rode about indiscriminately. But overall he could conclude that equestrian use of the order-routes was sufficient to prove their deemed dedication as bridleways.

Turning to the question of whether there was evidence of lack of intention to dedicate, the Inspector noted that one witness recalled a barrier or hoop of metal in one place. She could pass by it with a child's push-chair, but she asserted that it was to keep horses out and that Mr J R Steward had asked the CC to erect it in the 1970s, and that it was removed 5 years ago. Mr J F Steward said that he recalled it. The Inspector had no doubt that it had stood in place for a considerable part of the 20 year period. It prevented access by some riders,

but others asserted that they could push past it. But there was no clear evidence, despite research at the CC and Rochester DC offices, about who authorised its erection, or what its purpose was. It might have been put there to keep out motor-bikes, or cars—or horseriders. But in the absence of any evidence linking this obstruction with the owner of the land or with any specific purpose, the Inspector said he could not consider it to be evidence of lack of intention to dedicate.

An objection had been received from the Byways and Bridleways Trust to the use of the word ‘approximately’ in the order’s width-measurement. In the light of the Planning Inspectorate’s Advice Note 16, the Inspector agreed that a precise width, not an approximate one, should be given.

He therefore confirmed the order with a modification to the width-measurement, and with other technical modifications.

Ref: The Essex County Council Definitive Map Modification No 359 Bridleways 26, 27, 28, 29 and 30, Ashingdon Parish and Bridleways 40, 41, 42 and 43, Hockley Parish. PINS ref: FPS/Z1585/7/30, order decision issued 06.02.08

Common law dedication satisfied by 10 or 11 years’ user on tenanted land

On the direction of the Secretary of State following a successful Schedule-14 appeal by Mr M Atkins, a local resident, Suffolk CC made this order under s 53(2)(b) of WCA 1981 to add, to the definitive map and statement, a footpath at Waldringfield running east-north-east from the U3107 road (Mill Road) to join FP 15 which connected with the beach, with part of the route crossing glebe land. The order was made in consequence of the occurrence of an event in s 53(3)(b), the expiration of a period such that use of the way during it by the public raised the presumption that the way had been dedicated. There were two objectors, the Revd J Waller and Mr D Glossop, in consequence of which a public local inquiry was held by Inspector Mr Peter Millman. Mr R Pinfold represented the objectors; Mr Atkins acted as advocate for the confirmation of the order, the CC taking a neutral stance.

The route had been shown on the Ordnance Survey for much of the 20th century, first appearing on a 1927 1:2500 plan annotated ‘FP’ at each end, and annotated ‘path’ on a 1969 revision. Most user witnesses said this was the

route they had always used, though a substantial number referred to alteration at the western end. Both objectors and several supporters said that before the new rectory was built in 1980 the point of termination on Mill Road was about 25m south of that of the claimed route. One supporter wrote that ‘when the new rectory was built ... the path could no longer go through its original route so it was diverted to the side of the adjacent field’; another said that ‘the line was slightly diverted’ at this time; a third marked the relevant section as ‘route before new rectory was built’. The plan in the CC’s report showed the alleged ‘new’ section of the path as A–C, and the section allegedly used before the rectory was built as F–C. OS plans from before 1980 showed A–C as physically existing, but not F–C. The Revd J Waller, one of the objectors, said that his grandfather Canon A P Waller had created F–C in 1906 as a private footpath to the (then) new rectory. The route—Mr Waller now stated—had joined the claimed route, a farm track, at a place along it. The Inspector noted that if the OS did not depict F–C, it could have been because it was too minor to show.

Five of the users said that they had always followed the order route. But all noted, some vaguely and some with more certainty, that it had changed: and the Inspector considered it more likely that those witnesses whose forms covered the period prior to 1980 but stated that the path had always followed A–C were mistaken. The second objector, Mr Glossop, said that when he first came to the land in 1962 the public used F–C, not the order route. The Inspector found that the order route was clearly different from the route which, pre-1980, included F–C; yet descriptions of F–C were too vague for it to be shown now as a line on the order map.

Turning to the issue of bringing the route’s public status into question, the Inspector noted that the objectors asserted that a gate at the western end had been closed and locked for many years. Mr Waller stated that in the late 1950s his father, Canon T Waller, and his uncle, the Revd A H N Waller, were concerned about people ‘taking liberties’ and so met a land agent who advised padlocking the gate at A. This was principally to prevent vehicles driving to the beach; but there had been small ‘private’ notices on this gate since the 1950s.

Mr Glossop, who had worked on the land since 1962, gave evidence at the inquiry. The gate at A had been chained and padlocked during this time. Canon Waller told the then tenant to lock the

gate, which was opened only for cultivation or harvesting, possibly 30 days a year. It was not possible to get round its sides.

The Inspector noted that it was not disputed that the gate was locked at some point in the 1980s or 1990s, but if this evidence about earlier locking or notices was correct, then the way's status was brought into question much earlier: in the 1950s.

On the other hand, supporters of the order gave a very different account, asserting that they had free access to the order route at the Mill Road end until the way was locked more recently. Estimates of when this occurred varied from the late 1970s to the early 1990s, and some recollections were vague; but some were able to link the date of locking to some event in their lives. Mrs R Waller, for example, was sure the gate was locked when she came to Waldringfield in 1982; Mr T Burslem recalled no locked gate in the 1980s. Written statements put the appearance of a gate to about 1990.

It was possible, said the Inspector, that non-residents visiting in the summer would have encountered the route only when the gate was open for agricultural purposes. Apart from this the supporters' accounts were irreconcilable with the objectors'. It had not appeared that anybody at the inquiry was deliberately untruthful (though cross-examination by neither side was rigorous). Mr Pinfold suggested that the coherence of the objectors' accounts should be preferred to the supporters' differing recollections, but the Inspector disagreed: most recollections of things that happened 20 or 30 years ago of things which would have seemed unimportant at the time might be unclear now, and the widely differing recollections of the dates of the locking of gates did not support the view that they were locked consistently. It might have raised a suspicion of collusion had the supporters' accounts been the same. But here none of the testifying supporters seemed to be pretending to have clearer memories than they actually possessed. The Inspector intended no slur on Mr Gilbert, who appeared an honest and forthright witness; but if his memories were completely accurate, a large number of people must be colluding in an untruth or an exceptionally large number of people must have faulty memories. He concluded that on balance of probability, public use of the order route was not actively opposed during the 1980s.

It did not matter, found the Inspector, whether the gate at A was locked in 1981 or in

1991. In neither case could there have been 20 years' uninterrupted use, if he was correct in concluding that the order route had been fully in use since about 1980 (following alteration to its line when the new rectory was built). The gate at A was locked well before 2000: this was not disputed. So the statutory test failed.

The Inspector next considered the position under common law. He noted that part of the land was owned until 1981 by the Revd A H N Waller, and for the latter part of the period by his son, Canon T Waller. Some of the land was glebe, so for the whole of the period after 1980 it would have been (and still was) owned by the Diocesan Board of Finance ('DBF'). The rest of the land was owned by the Revd A H N Waller until 1982, then by his daughter Mrs J Norris. Before 1989 it was all tenanted by a Mr Everard or Mr Glossop.

Mrs Norris stated that she and Canon T Waller had done nothing to prevent public use of the order route during the time of their ownerships. They both supported the order. The issue was what was done or not done by the DBF or on its behalf during the years of public use of its part of the order route after 1980. At the inquiry Mr J Chapman on behalf of the diocese acknowledged that he (as a member of the Diocesan Glebe Committee) had had no knowledge of the order route until he received a letter from Mr Atkins about it in 1996.

It appeared to the Inspector that the DBF did nothing between 1980 and 1996—when Mr Atkins' request for a dedication was declined—to indicate that it did not want to dedicate a public footpath, and there was no evidence to suggest that any action taken by the Revd J Waller to indicate that the route was not public was done on behalf of the DBF or authorised by it.

The Inspector found evidence of reasonably substantial use of the route throughout the 1980s, continuing until the gates were locked. 21 people provided evidence of use during this time, on forms, sometimes supplemented by letters; 9 people testified orally. 9 of the 21 said they had used the route for the whole of the 1980s, some during the whole year, some monthly or more frequently, with a couple claiming daily use. Six said their use was in holiday times, three of them frequently. Only four stated that their use was less frequent than monthly.

The amount of use which would be sufficient to allow to be drawn the inference that it must have come to the landowner's attention—and so to give him the opportunity of taking

action to prevent it if he wished—would vary depending on whether he was resident or an absentee, said the Inspector. The DBF was not based locally and was unlikely to have taken any active part in land management. But the land was tenanted by Mr Everard and then Mr Glossop, both in occupation and actively farming it. The Inspector considered that these must have been aware that the public were using the path. On balance the evidence of use judged against that of locking showed that there was acquiescence in public use during the 1980s and possibly in the early 1990s. The tenants' acquiescence must be taken as the landowner's acquiescence in the absence of evidence that it should not be. The period of uninterrupted public use was probably 10 or 11 years.

The Inspector concluded that the quantity of use during the period of acquiescence and the lack of action on behalf of the landowner to prevent it when it would have been possible to take action led to an inference that the DBF intended to dedicate a public footpath over its part of the order route and that the public, by its use, accepted the dedication.

Having regard to this and other matters raised, the Inspector confirmed the order.

Ref: the Suffolk County Council (Deben Rural District Definitive Map and Statement) (Parish of Waldringfield) Modification Order 2007. Planning Inspectorate ref: FPS/V3500/7/9, order decision issued 06.02.2008

Route at Morchard Bishop confirmed as a restricted byway

In the last edition of FW (25/2 p14), Graham Plumbe reported on a case at Morchard Bishop in Devon where it was argued that a route should be recorded as a BOAT on the grounds that it had, more than twenty years ago, been the subject of a BOAT application and was thus exempt from the provisions of the NERC Act, even though Devon County Council had considered the claim and dismissed it in 1987.

On 13 February, Inspector Mr Peter Millman issued his final decision on the matter. In his interim decision Mr Millman had said that in his view the Defra advice extant at that time was wrong: all that the legislation required for a route to be exempt from extinguishment of motor

vehicular rights under the NERC Act was for there to have been an application for BOAT status prior to January 2005.

As a result of the objections, including an opinion from George Laurence QC, to the proposed modification to show the route as a BOAT Defra issued new advice on the subject (see FW 25/2 p 15). In his final decision Mr Millman said:

'It is my understanding that the interpretation of a statute by means other than the language of the section only becomes permissible when the language is not clear and unambiguous. The Trail Riders' Fellowship argues that the wording of section 67(3) of NERC is 'crystal clear' in this instance; there is nothing about 'spent claims' in the statute. If it was intended that they should not be preserved it would have said so.

The advice from Defra, however, appears to be that the purpose behind the words of section 67 of NERC is part of the context in which they must be read. It is clear from exchanges in the Commons during the passage of the Bill that it was not the intention of Parliament that applications such as that made in 1983 and subsequently determined were to be preserved.

As to the second issue, I had previously decided, in my interim decisions, that I was entitled to determine whether an application for a modification order made under Schedule 14 to the 1981 Act was valid, and that it was therefore legitimate for me to inquire into the question of whether the 1983 application (see 2007 interim decision, paragraph 10) had or had not contained a map [a requirement of Schedule 14] and, if not, to conclude that that application was invalid. I now consider that I was wrong. It was for DCC to consider whether it had received a valid application and, once it had treated it as such, it was not for me to enquire further into the matter.'

He therefore confirmed the order to show BR 55 Morchard Bishop as a restricted byway.

Ref: The Devon County Council (Bridleway No. 55 Morchard Bishop) Definitive Map Modification Order 2004. Planning Inspectorate ref: FPS/J1155/7/46M2, order decision issued 13.02.08

NEWS FROM NATURAL ENGLAND

End of the road for ‘Discovering Lost Ways’?

Most readers will probably have heard by now that in February of this year the Board of Natural England (NE) made a formal recommendation to Ministers about the future of the ‘Discovering Lost Ways’ project. Having reviewed the effectiveness of the project to date they had *‘concluded that researching lost ways is extremely resource intensive’* (no surprise there) and went on to say that even if NE were to adopt a policy of pursuing ‘high quality’ routes, it would still require exhaustive and costly research. They do however still believe that NE has an important rôle to play in offering support and guidance to those who wish to carry out research into unrecorded rights of way. The package of proposals which they put to Ministers is as follows:

- NE to progress from its current rôle of researching and claiming individual lost ways to providing advice and guidance to those that wish to do so at their own initiative;
- Facilitating a fundamental review of the legislation and current processes that underpin the provision of access;
- Working with stakeholders on the review;
- Building on and encouraging further progress with the rights of way improvement plans;
- Seeking to invest the money saved on the current DLW project approach to deliver this work.

Without a doubt the biggest challenge in this list is that of the ‘fundamental review of the legislation’. Quite how far reaching this will be remains unclear, but top of the list, for user groups

at least, will be repeal of the CRWA provisions which will close the definitive map for the purposes of recording historic routes in 2026. The purpose of the ‘Discovering Lost Ways’ project was to ensure that routes would not be lost in 2026, and now that the impracticalities of a once-and-for-all sweep of the archives are truly apparent, there can be no excuse for keeping this ill-fated proposal on the statute book. So far, all that Defra has said is that Jonathan Shaw, the Minister for Marine, Landscape and Rural Affairs, has agreed to the NE recommendations and ‘that implementation of sections 53 to 56 of the Countryside and Rights of Way Act 2000 (which would extinguish any historic rights of way not shown on the definitive map and statement by 2026 and are not yet in force) will not be pursued, at least until the stakeholder group proposed by Natural England has reported to Defra on its conclusions’.

Review of National Trails

Natural England is planning to undertake a ‘fundamental review of the National Trail network, with the aim to make the network more integrated with national routes and rights of way. Natural England are now deciding whether to pursue extensions to the network by: concentrating on trail creation; making greater efforts to link national trails to the surrounding ROW network; seeking to raise standards across the network; or simply to ensure that current standards are maintained’.

Natural England wish to involve partners in their review of the Trail network and keep everyone informed of the progress.

FROM PARLIAMENT

Written answer: column 1495 (Commons), 21 January 2008

David Taylor: To ask the Secretary of State for Environment, Food and Rural Affairs how many local authorities had adopted rights of way improvement plans at (a) 21 November 2007 and (b) the latest date for which information is

available; and which local authorities have not yet adopted a plan.

Jonathan Shaw: By 21 November 2007, 34 out of 126 individual and joint local highway authorities had adopted rights of way improvement plans, and as at 31 December 2007 this number had not changed.

The local authorities which have not yet adopted a plan are:

North East region

Northumberland CC; Northumberland National Park; Durham CC; Darlington BC; Stockton BC; Middlesbrough BC; Redcar/Cleveland Council; Tyne and Wear Joint (Gateshead; North Tyneside; South Tyneside; Newcastle; Sunderland).

North West region

Blackburn with Darwen Council; Oldham MBC; Rochdale MBC; Bolton MBC; Bury MBC; Tameside MBC; Merseyside (Wirral; Liverpool; Sefton; St. Helens; Knowsley); Manchester City Council; Salford City Council; Trafford MBC; Warrington BC; Halton BC; Wigan MBC.

Yorkshire and Humberside

East Riding Council; Hull City Council; North East Lincolnshire Council; North Lincolnshire Council; North Yorkshire CC; City of York; Barnsley MBC; Doncaster MBC; Sheffield City Council; Bradford City Council; Calderdale MBC; Kirklees MBC; Leeds City Council; Wakefield MBC.

West Midlands

Shropshire CC; Herefordshire Council; Staffordshire CC; Walsall MBC; Solihull MBC; Telford and Wrekin Council; Coventry City Council; Sandwell MBC; Dudley MBC; Wolverhampton MBC; Stoke on Trent City Council.

Eastern region

Luton BC; Essex CC; Norfolk Broads Authority; Norfolk CC; Southend BC.

South West region

Cornwall CC; Dorset CC; Wiltshire CC; Bristol City Council; South Gloucestershire Council; Bath and North East Somerset Council; Torbay Council; Plymouth City Council; Poole and Bournemouth Councils; North Somerset Council; Swindon BC.

South East region

Buckinghamshire CC; East Sussex CC; Kent CC; Medway Council; Milton Keynes Council; Portsmouth City Council; Reading BC; Slough BC; Southampton City Council; Surrey CC; West Berkshire Council; West Sussex CC; Wokingham DC.

Outer London boroughs

Barnet; Barking and Dagenham; Bexley; Brent; Croydon; Ealing; Enfield; Haringey; Harrow; Havering; Hillingdon; Hounslow; Kingston; Merton; Newham; Redbridge; Richmond; Sutton Waltham Forest.

Written answer: column 1868 (Commons) 28 February 2008

Mr. Paice: To ask the Secretary of State for Environment, Food and Rural Affairs

(1) what the cost of the Discovering Lost Ways Project has been to date;

(2) how many unrecorded historic rights of way have been recorded on definitive maps and statements as a result of the Discovering Lost Ways Project; and if he will list them;

(3) what assessment he has made of the implications of changes to Natural England's budget for the future of the Discovering Lost Ways Project.

Jonathan Shaw: The cost of the Discovering Lost Ways Project to date has been £4.5 million.

The project concentrated initially on developing research procedures and evidence standards. Five lost way claims were lodged in Cheshire with the county council during a county-wide pilot of a claiming process. None of these have yet reached the stage of being recorded on the definitive map and statement.

It is a matter for Natural England to propose in its corporate plan what priority to give to individual projects in the light of the financial settlement it has received. In the case of the Discovering Lost Ways Project, Natural England has recently concluded a fundamental review to ensure that its investment in the project is cost-effective, and that the approach delivers the best prospect of lasting progress in this area. I have recently been advised of these recommendations. Natural England will announce shortly how it will take the project forward.

Written answer: column 186 (Lords) 5 March 2008

Lord Skelmersdale asked Her Majesty's Government:

Which section of the Wildlife and Countryside (Amendment) Act 1991(*sic*) prevents a planning inspector from considering evidence on the impact on the environment when determining a definitive

map and public path order through a site of special scientific interest.

The Minister of State, Department for Environment, Food and Rural Affairs (Lord Rooker): The rights of way legislation in the Wildlife and Countryside Act 1981 provides only for the recording, on the definitive map and statement, of public rights of way that already exist and that consequently the public may already use. Therefore, when making a decision under this Act, a local highway authority, or the Secretary of State, would be beyond their jurisdiction to consider anything other than the existence of the public right of way in law. There are provisions in the Countryside and Rights of Way Act 2000 that enable local authorities to manage any impact from a public right of way through a site of special scientific interest.

Written answer: column 566 (Commons) 13 March 2008

Mr. Leigh: To ask the Secretary of State for Environment, Food and Rural Affairs what discussions he has had with the Secretary of State for Transport on the contribution of public transport links to the implementation of the right to roam.

Jonathan Shaw: I have held no discussions with the Secretary of State for Transport on the contribution of public transport links to the implementation of the right to roam.

Natural England are taking forward the recommendations of the Committee of Public Accounts 32nd Report including looking at the provision of more sustainable travel to the natural environment and areas of open countryside. Natural England's aim is to produce a national policy-based action plan by the end of 2008–09.

Written answer: column 948 (Commons), 18 March

Mr. Pickles: To ask the Secretary of State for Environment, Food and Rural Affairs how many rights of way have been restored by local authorities under Discovering Lost Ways since the scheme's inception.

Jonathan Shaw: At present, no rights of way have been added to the definitive map as a result of the Discovering Lost Ways project.

Five claims have been submitted in Cheshire and are currently being processed. A further 21 case-files have been passed to Shropshire County Council for its consideration.

PUBLICATIONS

Access to Public Rights of Way Information in England & Wales

For many years voluntary groups have struggled to obtain copies from some surveying authorities of definitive maps to enable them to carry out monitoring and survey work, or simply to enable them to accurately report the existence of path problems. Very often the excuse cited by the authorities is that copies cannot be provided because of Ordnance Survey copyright restrictions. This is not the case and the Rights of Way Review Committee has lobbied OS and the Improvement and Development Agency (I&DeA) to produce updated guidance on the subject. The result is a document entitled 'Access to Public Rights of Way Information in England & Wales', produced by OS and the Local Government Information House (LGIH). A key point made in this document is that section 47 of the Copyright, Designs and Patents Act (CDPA) 1988 allows the public to be issued with copies of any map that is

open to public inspection under a 'statutory requirement'. Clearly definitive maps fall into this category and the document goes on to say that 'It is a criminal offence for anyone to obstruct inspection of a definitive map or to obstruct anyone entitled to make a copy.' There is a caveat to this in that the map provided must be limited to the actual area of the request, and the copy must be annotated with a form of words to make it clear the copy is being provided under the provisions of s 47 of the CDPA.

Although some of the wording in the document could be more generous (for example, 'OS prefers that the area of the mapping provided be as limited as possible, this means a preferred maximum paper copy size of A4, limiting the copy to the specific area of interest', and the local government officer must decide if a request for a copy of definitive map is 'genuine' when there is no such condition in the Wildlife and Countryside Act (quite how the officer would determine if a request was genuine isn't clear)), this is clearly a

step in the right direction. However, user groups will have to see how well it works in practice before delivering final judgment on its value.

The 'frequently asked questions' about definitive map copies as set out in the document reads as follows:

Q A member of the public or a user group requests a copy of the complete PRow definitive map for their area. Can we supply the map without breaking copyright?

A You must decide if the request is genuine. If the person just wants to use the map solely as a reference when walking, then the answer is no. They should be advised to buy an up to date commercially available map of the area that shows PRow routes.

Extracts of the PRow definitive map could be provided without breaking copyright if the person has a specific interest in the PRow, for example if they are a landowner or if they are seeking clarification as to the exact line of a route.

There is no restriction in the area of mapping to be provided but the area should be limited to the area of interest. (Further advice on this is given elsewhere in the document.)

In some circumstances, it may be acceptable to provide a whole copy of the PRow definitive map. If the request for the map is say for a systematic survey by the Ramblers, or an individual, then this would be acceptable. In this instance, local authorities could work in partnership and use contract arrangements to ensure copyright is maintained.

The document was made available to local authorities on 27 February, but does not yet appear to be available in the public domain. We will publish full details as soon as we have them. In the mean time if you are in urgent need of a copy please contact Janet Davis (tel. 020 7339 8538; janet.davis@ramblers.org.uk).

Waymarking public rights of way

Natural England has produced a new edition of its waymarking booklet. This is little changed from the previous edition, although it does now, of course, include the recommended 'plum' coloured waymark for restricted byways.

Natural England publications are available as PDFs from:

www.naturalengland.co.uk/publications. If an alternative format is needed you should contact their enquiries line on 0845 600 3078 or e-mail enquiries@naturalengland.org.uk

The illegal use of public rights of way and green spaces with public access by mechanically propelled vehicles

This research was commissioned by Defra and the Countryside Council for Wales (CCW) to investigate the illegal use of public rights of way (PRow) by mechanically-propelled vehicles (MPVs). Faber Maunsell Limited was contracted to undertake the research and has documented the results in case studies which can be downloaded from:

<http://www.defra.gov.uk/wildlife-countryside/issues/public/illegal-use.htm>

along with the substantive report. The key findings of the report are as follows:

Illegal use includes passage by an MPV on a PRow or within a green area with public access where there is no right of passage for the public and where passage is not otherwise authorised. The use of a MPV on a PRow or within a green area with public access may also be illegal, even if there is a right of passage for the public, where other legislation, for example on driver licensing, vehicle insurance or environmental protection, is broken. Both forms of illegal use of MPVs were identified in the research.

On a significant proportion of the PRow network, probably half of the network in England and Wales, passage by any kind of MPV is not possible because of width, stiles, terrain or other reasons. For a large proportion of green space with public access, the researchers believed that MPV use was not practicable because of the steepness of the land, the rugged nature of the terrain, vegetation, lack of adequate drainage or obstacles ranging from watercourses to fallen trees.

Illegal use of MPVs where there is no right of passage, and where use is not otherwise authorised, is dispersed across both England and Wales. There are hotspots where activity is at a high level but there are also many places which do not appear to be affected. Between these extremes there are many PRows and green areas where illegal MPV use is an occasional concern but not a serious problem.

On the basis of their findings the researchers concluded that on at least 50%, and probably 75%, of the PRow network, there is not a problem with illegal use of MPVs 'as a result of the absence of rights of passage' (it's not clear what they mean by this). Based on the findings of

this research they believe that in broad terms the proportion of the PRoW network where there is a major concern is likely to be less than 5% of the PRoW network in England and Wales.

The use of MPVs where there was no right of passage for MPVs was found in both upland and lowland areas, a key determinant being that passage by MPVs was reasonably unhindered, for example by vegetation, gradient, terrain, stiles, fences, hedges or surface water. The upland areas where passage by MPVs is relatively easy are characterised by plantation forestry with numerous forestry roads and moorland used as rough grazing. Where terrain is steeper, more rugged and/or poorly drained, the use of MPVs is less practical and illegal use of MPVs is less or not present.

Lowland areas attractive to illegal use by MPVs are characterised by open access to the public and/or a low intensity of active land use. In some cases, land with open access or PRoWs are used to gain access to private derelict land. Where passage along a route is difficult because of terrain or obstruction, the illegal use of MPVs is less or not present.

The illegal use of MPVs in terms of non-compliance with legislation relating to driver licensing, vehicle registration and taxation, vehicle insurance, vehicle roadworthiness and driver behaviour is widespread. Cases were recorded of MPVs being driven without registration plates, without due care and attention and/or by juveniles below the age at which an MPV can be driven.

The case studies suggested that illegal off-road MPV users comprise the following types:

- juvenile males out for vehicle recreation using small motorcycles without registration plates and typically riding solo or in small groups;
- mature people, primarily male, who are well aware that they have no right to use a route, out for vehicle recreation, often in groups and predominantly on motorcycles but sometimes on quads;
- mature people, primarily male, out for vehicle recreation, often in groups, who believe that they have a right to use a route, predominantly on full size off-road motorcycles but sometimes in 4x4 vehicles;
- groups, typically of young people, who travel to out-of-the-way places for social reasons; and

- people using public routes and public access areas to dump vehicles or fly tip.

Illegal use of MPVs primarily involves motorcycles, although some evidence was found for the illegal use of quads, 4x4 vehicles and other motor vehicles. For most of the logger sites used in the case studies, it is likely that all motorcycle use was illegal and in many cases all MPV use was likely to have been illegal. The number of MPVs counted was generally low, fewer than ten per day even at peak times. Even on sites where there was clear visual evidence of the passage of motorcycles, the average flow could be less than one vehicle per day, but even these low flows appear to result in significant damage in sensitive environments.

The effects of illegal MPV use were significant, particularly at a local level. They included:

- physical damage to PRoWs, routes or public access areas. In the extreme this could be very inconvenient for other users but in most cases the effects were less;
- adverse effects on environmental resources, notably the landscape, wildlife habitats and sites of historic interest. In sensitive areas this is a major issue but the number of places where illegal MPV use affects sensitive areas appears relatively small;
- nuisance to other recreational users, for example noise, visual intrusion, loss of amenity and physical intimidation. Often this will be no more than a passing irritation but in the extreme can discourage all but the hardiest from using an area or route;
- nuisance to landowners and occupiers, for example of noise, damage to land and disturbance to livestock. This appears to be a particular concern near to housing;
- nuisance to local residents, for example noise and visual intrusion; and
- safety concerns both for illegal users and for others because of the use of MPVs, particularly at higher speeds. In the extreme this has resulted in serious injury and even death and, while such instances appear infrequent, this is a major concern given that people expect to be safe on PRoWs and green areas open to public access.

Control and management appeared most effective when all stakeholders were involved and

a range of measures adopted.

COURT CASES

Lack of use by the public not evidence that a highway is unnecessary when caused by a highway authority's failure to maintain

This was Stockport Metropolitan Borough Council's third attempt at extinguishing contiguous highways known as Stringer Street and Stringer Street Steps under section 116 of the Highways Act 1980. The application was made by the authority at the request of Nelson Tool Company Ltd, a private company which owns the land adjacent to the route. Heard at the same time was a section 56 action against Stockport MBC in respect of Stringer Street Steps. District Judge Berg, sitting in the magistrates' court, declined to make the extinguishment orders on the ground that the highways were necessary for public use. In respect of the section 56 action Stockport MBC was ordered to return before the court in March 2008 with a full schedule for repairs.

Background

Stringer Street Steps, which date from the Victorian era, began to fall into disrepair in the 1980s, and by the early 1990s nearly one-third of the steps were missing. Although people tried to continue to use the Steps throughout this time, the illegal obstruction of the lower portion from 2000 onwards (by Nelson Tool Company—the very same landowner which has repeatedly sought to extinguish the highway), effectively prevented further use of the through-route over Stringer Street and Steps. Stockport MBC failed to take measures to protect the public right of way; instead it claimed that the existence of public rights over the Steps was uncertain.

The Council's first attempt to extinguish both Stringer Street and Stringer Street Steps in 2003 failed on a technicality. At the second attempt in 2005 the magistrate ruled that Stringer Street Steps were not public highway (thereby obviating an extinguishment order) and went on to order the extinguishment of Stringer Street on the basis that it was a cul-de-sac, and therefore unnecessary for public use. The Ramblers' Association appealed the 2005 ruling in the Crown Court and succeeded in getting the extinguishment order quashed, following the presentation of evidence, uncovered by a local historian, which demonstrated that Stringer Street

Steps were highway and had in fact been so for over a century. That being so, the public status of both Stringer Street and Stringer Street Steps was not disputed at the time of the latest extinguishment application.

Judgment

DJ Berg dealt quickly with the question of whether Stringer Street and Steps were public highways, pausing only to praise Esmée Brooker (the local historian who uncovered the true status of Stringer Street Steps) for her researches and to castigate Stockport MBC for its '*ineptitude or indifference*' in ascertaining the Steps' correct status which, it transpired, was recorded no less than three times in the council's own records.

DJ Berg dealt first with the extinguishment application. Section 116 of the Highways Act provides that if it appears to a magistrates' court that a highway (other than a trunk road or a special road) is unnecessary, the court may by order authorise it to be stopped-up. The applicant for an order must persuade the magistrate that on the balance of probabilities the highway is unnecessary, but even then the magistrate has a discretionary power not to make the order sought. Following Woolf LJ in *The Ramblers' Association v Kent County Council*, DJ Berg approached the necessary question on the basis that '*Magistrates are, on the whole, best left to determine what is unnecessary for themselves. In deciding if a highway is unnecessary I have to consider to whom it is unnecessary and if it is for the public I must ask myself for what purpose the highway is unnecessary.*'

Stockport MBC advanced the following grounds in support of its contention that the highways were unnecessary: (1) that the highways could be said to be unnecessary because they were not used; and (2) that the highways could be said to be unnecessary because they were superfluous, the rest of the pedestrian network being adequate for the needs of the public. DJ Berg gave the council's first ground short shrift, finding that Stringer Street and Steps were not used because the council's own neglect had precluded use by the public. It was held that given the circumstances it would be spurious to ascribe to the public a lack of interest in Stringer Street and Steps and unreasonable to conclude that the

highways were unnecessary on that basis *‘The council can’t gain an advantage as a result of their own wrongdoing and rely on what flows from that wrongdoing to show an absence of use by members of the public and because of that assert that the route is therefore unnecessary. To do otherwise, in my view, flies on the face of commonsense.’*

On the second point the court heard from a number of witnesses—amongst them Edgar Ernstbrunner for the Ramblers’ Association, Gloria Gaffney for the Manchester Pedestrians’ Association, and a representative of a local historical society—who contended that were it not for the council allowing the Steps to fall into disrepair the route would be well used. The witnesses drew the court’s attention to the directness of the route offered by Stringer Street and Steps to a number of local amenities and pointed out to the potential for recreational use as a consequence of the Steps’ unique historical significance. It was argued by the objectors that alternative routes were both less commodious and less safe, particularly for vulnerable people walking alone at night, than the route offered by Stringer Street and Steps.

DJ Berg approached the council’s submission as to the adequacy of the existing network on the basis that he would be entitled to take any alternative route or proposed alternative route into account in his determination of whether the highways were necessary (following Woolf LJ *Ramblers’ Association v Kent County Council*). But on the facts of the case it was held *‘There is no doubt in my view, bearing in mind the presence of a bus stop, a post box, a resource centre, and a public house, as well as a conservative club on Newbridge Lane that [Stringer Street and Steps] would be both more convenient and a more direct and shorter route for [the public] than any other existing route ... I also consider the evidence from Mrs Brooker and Mrs Gaffney was persuasive on the question of them feeling more secure eg at times of darkness.’* As the necessary test should be informed by the purposes for which the highway was used by the public, the heritage value of Stringer Street Steps was deemed material and in light of the objectors’ *‘compelling and persuasive evidence’* that the retention of Stringer Street Steps was important for utility and heritage reasons, DJ Berg declared that nothing he had heard from the council persuaded him that Stringer Street and Steps were unnecessary.

The Judge then turned to the council’s submissions in respect of its plans for a completely new alternative route, which it had originally offered as a *quid pro quo* for the withdrawal of objections, but was now on the table as an unconditional offer which the council intended to proceed with irrespective of the outcome of the extinguishment application. The council’s submission was that its proposed alternative would provide the public with a way of equal amenity to Stringer Street and Steps, and that a path which was to be provided at a future date was something which could reasonably be taken into account in the court’s determination of the necessary test. The latter part of the submission was not rejected on principle, but on the facts of the case the proposed alternative route was found to be lacking on the grounds that: (1) it would not be an adequate replacement for Stringer Street and Steps for the purposes for which the public used, or would in future use, the highways, ie transport and recreation; and (2) the high degree of uncertainty DJ Berg ascribed to the likelihood of the alternative ever being constructed—*‘I must say also on this point that if the council shows as much enthusiasm for the provision of a new alternative route as they have shown for establishing the status of the Steps then maintaining them then I fear the new route will never materialise.’*

In light of the considerations rehearsed above the Judge declined to make the extinguishment order and ordered Stockport MBC to pay the objectors’ costs.

On the matter of the section 56 application in respect of Stringer Street Steps the Council was ordered to return before the court in March with a detailed schedule for putting the highway back into repair.

BMW stops up Roman road and bridleway

Oxfordshire CC made an application under HA 1980 s 116 to stop up Roman Way, BR 75 and part of a footway of Garsington Road. The application was made at the behest of BMW whose production plant was bisected by Roman Way and BR 75. The hearing took place over eight days, concluding on 15 October 2007, and presided over by District Judge Brian Loosley.

BR 75 was 2.75m wide and made of compacted grit, running in a northerly direction from Garsington Road. After 512m the BR 75 joined what was originally part of Roman Way

but what was now an internal road used by BMW. There was a footway to the western side of Roman Way and for reasons which remain unclear BR 75 continued along the first 151m of the footway to the north of Gate 8. Although this part of Roman Way was open to all traffic it was a cul-de-sac, and so far as vehicular traffic is concerned, it was used only by BMW, their suppliers, and those members of the public who wished to access either the Sports and Social Club or the Nursery on the eastern side of the roadway. The part of a footway on Garsington road was only a fragment of highway and it was deemed necessary to extinguish it to allow the creation of the alternative route.

Oxfordshire CC and BMW were separately represented during the proceedings; however their positions were essentially the same. They both submitted that the Roman Way and BR 75 were 'unnecessary' as an alternative would be provided for pedestrians and cyclists. It was submitted that they were unnecessary for equestrians exercising public highway rights because there had been no genuine equestrian use of the route in the past 40 years, and nor was there likely to be in future, having regard to the physical characteristics of the route and the routes to and from it, which were not lawfully available to equestrians. It was submitted that BR 75 and Roman Way were 'unnecessary' to enable access by pedestrians and cyclists to the land served by the route (ie BMW employees travelling to/from work) because suitable alternative access would be provided.

Objecting to the Order were the BHS, RA, Berkshire Downs Riding Club and individuals including an Oxfordshire County Councillor. Both the RA and BHS were represented by legal professionals. The BHS submitted that there was sufficient use of the route by equestrians to show that it was necessary and that the alternative was not 'reasonably suitable' as it did not contain provisions for equestrians. The RA submitted that the highways could not be unnecessary as there was a high level of pedestrian use and that the proposed alternative footway/cycleway could not be considered to be a 'reasonably suitable alternative' as it would be noisier and subject to higher levels of exhaust pollution. Other objectors spoke of preserving the historic nature of the route.

Both the BHS and RA also raised arguments that the order should not, and, indeed, could not, be made on legal grounds due to the

misuse of HA 1980 s 116. The first point was that, given government advice (DOE circular, 2/93 para 35) Oxfordshire CC should have used HA 1980 s 118 to extinguish BR 75 so keeping the case out of the courts. Mr Loosley judged that paragraph 35 allowed for certain circumstances, for example the stopping up of a bridleway simultaneously with a vehicular highway, where HA 1980 s 116 could be used to stop up a public right of way, and that this was one such occasion. He argued that as local authorities were allowed to use this procedure, magistrates had no choice other than to rule on those applications.

A further point made by the RA was that as both the Oxfordshire CC and BMW accepted the need to provide an alternative route, and as there was clear evidence of use of both Roman Way and BR75, it could not be said that the existing highways were 'unnecessary'. Mr Loosley drew on *Ramblers Association v Kent County Council* (1990) 60 P&CR 464 where Woolf LJ stated 'In my view, where there is evidence of use of a way, *prima facie*, at any rate, it will be difficult for justices properly to come to the conclusion that a way is unnecessary unless the public are or are going to be provided with a reasonably suitable alternative way.' Mr Loosley conceded Woolf LJ's comments were *obiter* but found them to be a greatly persuasive because the learned judge deliberately set out to provide guidance for justices and also because the comments had been approved by Laws J in the case of *Maile v Manchester City Council* (1997) 74 P&CR 443, Scott Baker J in the case of *Stevens v Dorset County Council* (unreported 16 March 1999) and Ouseley J in the case of *R (Spice) v Leeds City Council* (2006) EWHC 661.

The RA, supported by the BHS, also argued that at the moment of making the order there would not be an alternative continuous and legally enforceable right of way in place; therefore the court could not or should not make the order. Reliance was placed on the case of *Hertfordshire County Council v Department of Environment Food and Rural Affairs* (2007) JPL 1207 where in considering the question of public path extinguishment orders under section 118 of the Act Wall LJ stated that: '... it is in my judgment wholly contrary to the statutory framework and the public interest in the context of a scheme such as the present for extinguishment orders to be made without alternative routes, where needed, being in place. Such alternatives should not, in my view, be dependent on uncertain

future events deriving from a private agreement between landowner and local authority.’ Mr Loosley judged that HA 1980 s 116 was worded entirely differently to s 118 and so he did not have to disregard the stopping up or any consequences which would flow from it in deciding whether any of the highways were unnecessary. Mr Loosley was also fully satisfied that the agreement between BMW and Oxfordshire CC to provide the alternative would be carried out.

Mr Loosley then moved on to the main point of the order, whether the highways were ‘unnecessary’, by first considering for whom, and for what purpose. This was bounded by his view that, ‘...where there is evidence of use of a way, *prima facie*, at any rate, it will be difficult for justices properly to come to the conclusion that a way is unnecessary unless the public are or are going to be provided with a reasonably suitable alternative way.’

Mr Loosley heard that BR 75 and Roman Way had not been used by equestrians for over 35 years prior to the spring of 2006 when BMW made public its desire to stop up the highways. Between 19 May 2006 and the start of these proceedings on 24 July 2007 Roman Way had been used by equestrians on 14 occasions, but on all of those occasions the purpose of the use had not been for genuine recreational purposes but in order to try to establish that Roman Way and BR 75 were used by equestrians and/or to protest against the proposed stopping up order. Mr Loosley drew on *Stevens v Dorset County Council* (above) in which Scott Baker J accepted that magistrates were entitled to find that a way was unnecessary for a particular category of user when there was evidence that those users were making some use of the way but had only begun to do so once the proposals for closure had been announced. The example given was where trail riders travelled 80–100 miles to drive over a 350 m route just to say they have used it.

Although surveys carried out by BMW showed 428 movements on BR 75 on an average day, Mr Loosley accepted the argument that the vast majority were employees of BMW. As BMW

would be providing an alternative access point to the site, so it was argued, retaining the highway would not be necessary. Mr Loosley admitted that pedestrians and cyclists who used the order route and who were not employees of BMW would be disadvantaged by the alternative route in that overall it would be some 478m longer, it would cross a number of entrances to Plant Oxford, it would be noisier than Roman Way and BR75 and the air quality might be poorer than that on Roman Way and BR75. However, Mr Loosley found, ‘... it will also have considerable advantages in that for most of its distance cyclists will be segregated from pedestrians, it will have a far more open aspect and thus feel safer, it will be lit, properly surfaced and drained and depending on start and finish points the proposed alternative may actually reduce the length of some journeys.’

In addition to the legislative test HA 1980 s 116(1) allowed a certain amount of discretion in the decision making process. Mr Loosley felt that ‘BMW is a substantial employer and it is clearly in the economic and social interests of both the City of Oxford and the County of Oxfordshire that BMW not only continue to produce the *Mini* but also expand Plant Oxford. BMW have clearly established that both the present production of the *Mini* and the future expansion of Plant Oxford would be greatly enhanced by the stopping up of the three highways. ... BMW will be providing the residents of East Oxford with a new footway/cycleway costing BMW in excess of £500,000 as well as the free transfer of a considerable amount of land.’

The order was granted, and costs were awarded against the Ramblers’ Association and the BHS (sums of almost £20,000 and £30,000 respectively).

Ref: Oxfordshire County Council Section 116 Highways Act 1980, the stopping up of (1) the highway known as Roman Way, Cowley, Oxfordshire, and (2) the highway known as Oxford City Bridleway 75, Cowley, Oxfordshire, and (3) part of the footway of the highway known as Garsington Road, Cowley, Oxfordshire.

DEPARTMENTAL AND PLANNING INSPECTORATE NEWS

DOE Circular 2/93 replaced

After 15 years, two departmental name changes and some very significant changes in legislation (not least the CRWA 2000 and the NERC Act

2006), Defra has now produced a new general circular for local authorities in England on public rights of way: ‘Rights of Way Circular (1/08)’ replaces the old DOE Circular 2/93. (Circulars 3/93, 17/90, 18/90 and 32/81 are also replaced and

are no longer valid.) The new Circular is only available on-line, at:

<http://www.defra.gov.uk/wildlife-countryside/issues/public/rowcircular1-08.pdf>

The Department is not planning to publish a paper version and envisages that more frequent updates will therefore be possible.

The new Circular is shorter than its predecessor but the advent of the Internet means that it includes many links to other information and advice. The Blue Book Extra website has been updated in the light of the new Circular. See <http://www.ramblers.co.uk/rightsofwaybook/bbe/>.

Like its predecessor, the new Circular says that the provisions described 'do not involve additional local authority manpower or increased expenditure. Funding for rights of way functions, including additional burdens imposed through the Countryside and Rights of Way Act 2000, is provided through the revenue support grant. Authorities should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way, and that the network is in a fit condition for those who wish to use it.' Whilst the sentiment is welcome we fear that cash-strapped local authorities will continue to struggle to meet the Department's aspirations.

We are also disappointed to see that the advice on not using s 116 HA 1980 to close or divert public rights of way has not been strengthened.

PINS and procedural matters under Schedules 14 and 15

Dave Waterman, Head of Recreation and Access at Defra, has sent the following letter to the Planning Inspectorate. The implications of this are that objectors cannot rely on an Inspector dismissing an order because of failings by the surveying authority or applicant in the stages of the procedure leading up to the decision to make the orders. We suspect that we shall hear more about this in the months to come.

To: Annie Owen, The Planning Inspectorate

Date: 15th February 2008

Dear Annie,

We have received a letter questioning the extent to which Inspectors can, when considering the merits of orders made under Part III of the Wildlife and Countryside Act 1981, examine procedural matters in schedules 14 and 15 of that Act. In light

of this, we have taken legal advice and our conclusions are as set out below. This letter is concerned only with definitive map modification orders. Orders made under the Highways Act 1980 and the Town and Country Planning Act 1990 will be the subject of a further letter.

Schedule 14

If an Inspector considers that an order is intrinsically and fatally flawed, the Inspector may decline to confirm it. However, compliance with the procedures that led to the making of the order, as set out in schedule 14, would not be a matter for consideration by the Inspector. In our view an Inspector appointed by the Secretary of State under schedule 15 of the Wildlife and Countryside Act 1981 is not appointed to determine whether all or any of the statutory requirements set out in schedule 14 have been complied with. He or she is appointed to determine only the merits of the order itself. Any failure by the Order Making Authority to meet any requirement under schedule 14 is subject to judicial review at the time that the order is made.

Schedule 15

Although procedural matters in schedule 15 are subject to the opportunity provided by paragraph 12 of schedule 15 to apply to the High Court, Inspectors should satisfy themselves that any procedural aspects of the Inspector's (*sic*) determination have been complied with. Inspectors should also satisfy themselves that the requirements of Paragraph 3 of schedule 15 have been complied with before determining the order. If a failure to comply with a requirement in schedule 15 is brought to light, either at or before any inquiry or determination, Inspectors should, wherever appropriate and provided this would avoid the likelihood of prejudice to the interests of any party, offer the order-making authority the opportunity to redress any procedural omissions before proceeding to determine the order. If prejudice cannot be avoided then the order should be considered as flawed and should not be confirmed.

Rights of way already shown on the definitive map and statement

When considering whether a right of way already shown on definitive map and statement should be deleted or shown as a right of way of a different description, the Inspector's rôle is not to adjudicate on whether any procedural defects

were made at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence concerning a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason for an Inspector to consider it and a procedural defect would not of itself be grounds for re-opening a case. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all.

Yours sincerely
Dave Waterman
Recreation & Access

Change to PINS Advice Note No. 9

Paragraph 28 of Advice Note No. 9, which deals with temporary circumstances which prevent or diminish the use of way proposed for diversion under s 119 HA 1980, has been amended following representations from the Byways and Bridleways Trust. It now reads:

28. ... [it is the Inspectorate's view that] when considering [diversion] orders made under section 119 (6), whether the right of way will be/will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. Therefore in all cases where this test is to be applied, the convenience of the existing route is to be assessed as the way were unobstructed and maintained to a suitable standard for those users who have the right to use it.

Changes to the PINS Consistency Guidelines

Section 5 of the Guidelines (see http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/consistency_guidelines_10.htm) has been revised to take into account the *Godmanchester* and *Drain* ruling in the House of Lords. Inspectors are advised that this case

provides the leading judgment on the operation of the proviso to s 31(1) HA 1980, and they are recommended to read it in full.

Planning applications and rights of way

In January of this year, following representations about the Government's plans to introduce a national mandatory standard planning application form and new information requirements for the validation of planning applications, the Chairman of the Rights of Way Review Committee, John Grogan MP, received a letter from Iain Wright, Parliamentary Under Secretary of State at the Department of Communities and Local Government. This said '*The Standard Application Form will require applicants to provide details of public rights of way. In addition, the new guidance issued in December 2007, 'The Validation of Planning Applications: Guidance for local planning authorities' will require the submission of "Site and other plans" that list all public rights of way crossing or adjacent to the site (ie footpath, bridleway, restricted byway or byway open to all traffic). This requirement will ensure that public rights of way are discovered and considered by applicants at the start of the planning process and allow the local planning authority to assess whether a particular proposal might impact on public rights of way.*'

This was a cause of general rejoicing in rights of way circles but closer examination of the paperwork reveals that the situation may not be as clear-cut as the Minister implied.

The Validation of Planning Applications document, which is available only on line and can be downloaded from the DCLG website at <http://www.communities.gov.uk/publications/planningandbuilding/validationplanningapplications> does indeed say, at section 40, in respect of information requirements for applications for full planning permission, that a site plan must be submitted showing, amongst other things, 'all public rights of way crossing or adjacent to the site' (with rights of way specified as being footpaths, bridleways, restricted byways or byways open to all traffic). However, when one turns to the Appendix to the document which sets out a series of lists of information which must be provided in respect of the various types of consent regimes, there is no mention of rights of way. Whilst the Government has specified that certain information must be provided with planning applications, it is giving individual planning

authorities the freedom to decide if other types of information should be provided and authorities have been consulting locally about this. Reports suggest that some authorities are asking if rights of way should be included on that second 'local requirements' list. It is also difficult to access the new Standard Planning Application Form. Whilst it can be reached via the Planning Portal website at www.planningportal.gov.uk the only way of viewing its content appears to be to actually make a planning application on line.

This is clearly a subject to which we will have to return in a future edition of 'Footpath Worker'.

Also see the DCLG Circular dated 12 March, 'Standard Application Form and Validation', available from www.tsoshop.co.uk; and TSO PO Box 29, Norwich, NR3 1GN; tel. 0870 600 5522; price £8.

More changes to the handling of national highways casework

Following the establishment of NATROW, the National Rights of Way case team at the Government Office for the North East (dealing with all Schedule 14 WCA representations and appeals), the Government has now changed the way in which certain other kinds of highways planning case work is to be handled. As from 1 April 2008 further centralised teams have been established as follows.

The National Transport Casework Team, Government Office for the North East, Citygate, Gallowgate, Newcastle upon Tyne, NE1 4WH (e-mail: casework@gone.gsi.gov.uk) will deal with the following matters:

(A) **Orders under the TCPA 1990**

(i) Under section 247 (for stopping up of all purpose highways as well as footpaths and bridleways where such stopping up is necessary to enable development for which planning permission has been granted to take place),

(ii) under section 248 (for stopping up of highways and [under section 125 HA 1980] private access in relation to a main new highway proposal) and

(iii) under section 249 (by application of a local authority for extinguishment of vehicular rights (ie pedestrianisation of highways).

(B) **Extensions to orders/consents under the Road Traffic Regulation Act 1984**

(i) for temporary closure of highways under s 14 to allow works to be undertaken on the

highway or land adjacent thereto, or because the closure is necessary because of likely danger to the public, etc. and

(ii) Consents under s 16 for closure or restriction of highways for facilitating the taking place of [public participatory] special events.

(C) **Classification (of new)/reclassification of local authority highways**

(D) **Rare transport cases (eg Cycle Tracks Orders, cattle grids, etc.)**

The Traffic Signs Policy Branch, Department for Transport, Zone 2/08 Great Minster House, 76 Marsham Street, London, SW1P 4DR (catherine.soley@dft.gsi.gov.uk) will deal with applications for consent to local authority proposals for all types of non-prescribed Road Traffic Signs (where currently some types of non-prescribed signs are authorised by Government Offices).

Pesticides Safety Directorate (PSD)

The PSD, which is responsible for the production of the 'Pesticides: Code of practice for using plant protection products' (see FW 24/1, p 18), has become part of the Health and Safety Executive as from 1 April 2008. This code of practice contains important advice on the use of pesticides on or near public rights of way and other places to which the public has access.

In joining HSE, PSD has become part of an organisation that is already responsible for the regulation of both biocides and chemicals. For the time being at least, PSD will retain its distinct identity within HSE.

Strategic policy responsibility for pesticides will remain with Defra Ministers and sit alongside strategic policy responsibility which Defra has for chemicals under the EU chemicals assessment and approval regime REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals).

'Combined' orders

Readers will recall that paragraph 2 of Schedule 5 to the CRWA 2000 included a provision which provided for a new section 53A to be inserted into the WCA 1981 which would empower surveying authorities, when making public path orders of a prescribed type, to include in those orders provisions which specify the amendments to be made to the definitive map and statement as a consequence of the coming into operation of the

order. The intention behind this is to avoid authorities having to make separate 'legal' event orders under section 53(3)(a) of the 1981 Act.

By way of SI 2008 No 442 Highways, England: The Public Rights of Way (Combined Orders) (England) Regulations 2008 this provision was commenced on 6 April 2008 (see http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080442_en.pdf). Note that it is not available to order-making authorities other than surveying authorities and that it applies to the following types of order: (a) those made under any of these provisions of the Highways Act 1980—

- (i) section 26 (compulsory powers for creation of footpaths, bridleways and restricted byways);
- (ii) section 118 (stopping up of footpaths, bridleways and restricted byways);
- (iii) section 118A (stopping up of footpaths, bridleways and restricted byways crossing railways);
- (iv) subsection (4) of section 118B (stopping up of certain highways for purposes of crime prevention, etc);
- (v) section 119 (diversion of footpaths, bridleways and restricted byways);
- (vi) section 119A (diversion of footpaths, bridleways and restricted byways crossing railways);

- (vii) subsection (4) of section 119B (diversion of certain highways for purposes of crime prevention, etc);
- (viii) section 119D (diversion of certain highways for protection of sites of special scientific interest);
- (b) those made under section 32 (power to extinguish certain public rights of way) of the Acquisition of Land Act 1981;
- (c) those made under section 294 (extinguishment of public rights of way over acquired land) of the Housing Act 1985;
- (d) those made under any of these provisions of the Town and Country Planning Act 1990—
- (i) subsection (2A) of section 247 (highways affected by development: orders by Secretary of State);
- (ii) section 257 (footpaths, bridleways and restricted byways affected by development: orders by other authorities);
- (iii) subsection (1) of section 258 (extinguishment of public rights of way over land held for planning purposes).

The relevant date required to be specified in a section 53A order is the date upon which the stopping up, diversion or creation of the path effected by that order comes fully into effect.

LOCAL GOVERNMENT OMBUDSMAN

Eric Mawer, a Ramblers' Association footpath worker in east Devon heavily involved in definitive map work, complained to the Local Government Ombudsman about the way in which Devon County Council had dealt with a number of his applications for definitive map modification orders.

The council delayed making decisions on the applications for several years, but eventually reached a decision not to make the orders. Eric then exercised his right under Schedule 14 to the WCA 1981 to appeal to the Secretary of State. In letters dated 1 June 2005, 2 August 2005 and 25 August 2005 the Secretary of State, through the Government Office for the South West (GOSW), directed that the orders should be made. Eric complained to the Ombudsman that subsequent on those directions the council unreasonably delayed publishing the orders and that, given that the directions would not be the end of the process, he doubted that he would see the use of the footpaths involved in his lifetime. He said that the council's delays had deprived him of the use of the paths

which, were their legal existence established, he would have expected to use every few weeks.

Devon County Council has, since 1989, sought to keep its definitive map up to date by way of a rolling parish-by-parish review. By spring 2005 246 (58%) of parishes had been reviewed. The review of a further 52 (12%) was in progress. In August 1997, Eric attended a public meeting, held as part of the review. At that meeting he made 18 claims for the addition or upgrading of routes. These claims were investigated by the council's officers but decisions were not reached until 2005. It was then that Eric appealed to the Secretary of State against the decisions not to make orders.

At the Public Rights of Way Committee meeting on 13 September 2005 the County Environment Director reported orally that the Secretary of State had directed that orders be made in respect of a claimed path at Northleigh / Southleigh / Colyton / Farway and another path at Widworthy / Shute. In relation to these directions to publish order the Director advised Members

that he considered the decisions to be 'legally flawed' and he sought their approval to ask the GOSW for clarification of the decision. Members approved that approach.

The council wrote to GOSW on 7 October 2005, contesting the test applied in coming to the decision to direct the making of the orders. The GOSW response was to say that if the council considered the directions to be '*Wednesbury*' unreasonable then the appropriate challenge was by way of judicial review.

Because of the January 2006 Committee meeting being cancelled, this response was not considered by Members until 7 March 2006 and at that meeting they resolved to approve the making of the necessary orders.

In September 2006, the Honorary Solicitor of the RA wrote to the council and pointed out that 12 months had elapsed since the Secretary of State had directed that the orders be made. The council's response dated 13 September said that they would be made within the next month. The solicitor wrote again on 25 October and on 1 November the council replied, apologising for the delay and saying that the publication of the orders would start 'next week'. On 5 December he wrote again and was advised by the County Solicitor in a letter dated 15 December that one order had been published and the others would follow in mid to late January.

In responding to the Ombudsman's enquires, the council explained that publication of the orders had been delayed while the council considered a letter from local landowners, received in October 2006, which had enclosed counsel's opinion in relation to the tests for confirming modification orders.

In response to a draft version of the Ombudsman's report the council commented 'There are many people across the county who feel that "their" path is important and the council must try to strike the best balance if can within the resources it has available.'

In coming to his conclusion the Ombudsman noted that the council's own policy, set out in its ROWIP, states that an order will normally be made with six months of the relevant Committee decision. These orders were not made for 16 months or more. The council said that part of the delay was due to the representations made by the landowners (which had included counsel's opinion) but the Ombudsman could see no reason why this should have delayed the process: the counsel's opinion had not reached the council

until October 2006 by which time it was reasonable to have expected the orders to have been made. In any case, the subsequent statutory procedure would have allowed for any objections to be heard at a public inquiry.

In the Ombudsman's view the council's delays prevented the matter moving to the next stage of the statutory process and that reduced the likelihood of Mr Mawer, who was by then 80 years old, being able to use the routes in question.

The Ombudsman commented that the council's policy in respect of the making of orders was unclear. Did it mean that Committee approval was needed before the council acted on a direction from the Secretary of State? If so, he considered that there should have been a written report to the meeting on 13 September 2005 so that the reasons for disputing the Minister's decision were clearly laid out. In his view the oral report was inadequate and relying on it was maladministration. In any event, the GOSW response in November 2005 had quickly rebutted the council's thinking and reminded the officers of the appropriate mechanism for challenge. From this point onwards that was no reason why the matters could not have been progressed quickly. The delay between November 2005 and December 2006, when the first of the orders was made, was maladministration, and there was further maladministration in the series of broken promises made to Eric about when the orders would be made.

In the Ombudsman's view the maladministration identified caused Eric frustration, inconvenience, aggravation and uncertainty and he was also put to some financial cost in urging the council to do its job properly.

The council agreed to implement a set of recommendations from the Ombudsman as a remedy to the complaint. The Ombudsman expressed his gratitude to the council for its cooperation in doing so, however, he finished his report by saying that he had completed the investigation and issued a report because the complaint 'raised issues of public interest, affecting all those desiring access to the countryside in the council's area.'

To remedy the complaint the council agreed to:

- apologise for the delays;
- fund £500 of new footpath work in recognition of the delays, uncertainty and inconvenience in pursuing this matter, the work to be agreed with the complainant;

- ensure, if not already done, that there was no further unreasonable delay and that orders were properly made; and
- review procedures to ensure that the failings identified here were unlikely to recur.

Ref: Complaint No. 06/B/12820 against Devon County Council, report issued 27 February 2008

BRENDA PARKER

RA members, footpath workers, family, friends and colleagues across the country were greatly saddened to hear of the death, on Easter Saturday, of Brenda Parker, long-serving Area Footpath Secretary for Hampshire.

George Williams of Hampshire Area gave the following tribute at her funeral. 'I first met Brenda in 2000 when I joined the RA, and it quickly became apparent to me that Brenda was *the* RA in Hampshire! Not only did she have an encyclopaedic knowledge of the footpaths in Hampshire, but she also realised the "broader view" of the RA's work, quickly adopting new ideas and policies, and encouraging others to follow suit.

'Brenda started to lead walks in 1966, and moved to Hampshire in 1967. Since then she continued to organise and lead walks, not just for the RA, but also for Hampshire County Council's Guided Walks Programme. She was elected on to the Hampshire Area Council (then called the Wessex Area) in February 1970 and started to be involved with footpath work.

'In 1972 Brenda helped to found the North East Hants Group and became their Footpath Secretary. In 1982 she was elected joint Hampshire Area Footpath Secretary (with Rowan Brockhurst), taking over fully in 1983. She gave up this post in 1997, but as no one person would take on the job, became one of four members of the Area Footpath Secretariat who split the work between them. This arrangement has continued ever since. For 35 years Brenda has been representing the RA regarding the route of the South Downs Way through the Meon Valley; three public inquiries later, and just two weeks before her death, the route was agreed. Brenda has attended virtually every General Council, either as a delegate or visitor, from 1972 to 2007. However, the real value of her work was the

inspiration which she gave to others, especially with regard to footpath work. Brenda was to have been nominated for Honorary Life Membership of the RA at General Council 2008.'

Kate Ashbrook, chairman of the Ramblers' Association, who has known Brenda since the early 1980s, sent the following message: 'Brenda was the life and soul of the RA in Hampshire for decades, working tirelessly and without complaint to win a better deal for walkers throughout the county. It is thanks to her dedication and commitment that so many people can enjoy excellent walking today in Hampshire and that so many volunteers have been inspired to work with us. We could do with many more Brendas in the RA, and we shall miss her greatly.'

John Trevelyan (co-editor of the 'blue book' and former Deputy Director of the RA) adds: 'Brenda also undertook a little-known task for the RA nationally that was as valuable as it must have been tedious. For a considerable number of years she went through the "London Gazette", in which all notices of public path orders were then published, and kept a record in exercise books, matching notices of confirmation back to those of the making of the order. From those records she compiled what were the only national statistics of the numbers of orders made and confirmed. She also kept card indexes linking dates when notices were published with order-making authorities.

'Today the "London Gazette" archive is accessible via the internet, and so it would be possible to check Brenda's work (and indeed extend it back in time to the first orders made after the 1949 Act introduced the order-making procedure). I have no doubt that it would be found to have been very thorough and accurate.'

Blue book extra website

Please note that the latest cumulative update to the blue book (to 20 April 2008) is now available to download at:

<http://www.ramblers.co.uk/files/BB4%20cumulative%20supplement%20at%202008.04.20.pdf>