

CONTENTS

DEFINITIVE MAP MODIFICATION ORDERS

Dr Drain's path added to the definitive map after Lords' ruling 2

PUBLIC PATH ORDERS

Inspector gives 'garden path' contention little weight 5

Inspector considers re-instatement costs are 'material factor' in public interest test 5

COURT CASES

RA challenges a gating order 8

The weight given to factors material to determination of s 118B order is matter for decision-maker's discretion 9

The NERC Act bites—the Winchester case 10

FROM PARLIAMENT

16

DEPARTMENTAL AND PLANNING INSPECTORATE NEWS

Version 5 of Defra Guidance on Part 6 of the NERC Act 18

Combined orders—more from Defra 19

Defra's conclusion on the 'right to apply for orders' 20

Planning Inspectorate Annual Report and Accounts 2007–08 21

Planning Inspectorate Consistency Guidelines 22

FROM NATURAL ENGLAND

Discovering Lost Ways 22

The Stakeholder Group 22

NEWS

Repeal of 2026 cut-off date 23

ROWIPs 23

Training courses 23

Request for information 24

BBE cumulative supplement 24

Contributors to this edition: Alexis Badger, Janet Davis (editor), Martin Key, Eugene Suggett

BBE cumulative supplement The fourth cumulative supplement to the fourth edition of the blue book (to 25 July 2008) is now available on the BBE website at:

<http://www.ramblers.co.uk/files/BB4%20cumulative%20supplement%20at%202008.07.25.pdf>

DEFINITIVE MAP MODIFICATION ORDERS

Dr Drain's path added to definitive map after Lords' ruling

After two public inquiries, hearings in the Divisional Court, the Court of Appeal, and the House of Lords, and a further determination by an Inspector on behalf of the Secretary of State, an attractive and strategically-placed public footpath near the hamlet of Westridge Green at Aldworth and Streatley, West Berkshire, has at last been added to the definitive map and statement. It was in 1994 that Dr Leslie Drain, on behalf of the RA, applied under s 53(5) of WCA 1981 to the then surveying authority, Berkshire County Council, for this path to be recorded, on the grounds of long usage culminating in 20 years' use pursuant to s 31(1) of HA 1980. BCC rejected the application, but Dr Drain made a Sch 14 appeal which resulted in the surveying authority—by then West Berkshire Council, since Berkshire was abolished in 1998—being directed by the Secretary of State to make an order.

The present landowner, Yattendon Estates ('the estate'), objected, so the matter went to public inquiry in April 2002; Inspector Mr C J Rougier rejected the order but omitted take into account a possible earlier 20-year period, so the RA sought judicial review and the Secretary of State submitted to judgment. So in March and April 2003 there took place a second inquiry, before Inspector Ms Helen Slade, at which the RA were represented by Miss Ross Crail (instructed by Naeem Siraj of Brooke North, Leeds) and Yattendon Estates by Edwin Simpson (instructed by Blandy & Blandy, Reading). The Inspector at that inquiry appeared to accept that there had been adequate user for 20 years without challenge to the users of the way, but noted that during part of the period of user there had been in force a tenancy agreement between the landowner and the tenants of the land crossed by the way, which contained a (fairly standard) clause to the effect that the owners were not to allow any footpaths to be created (ie, by preventing the acquisition of rights through user). This, said the Inspector, who was correctly following the precedent set in *Billson* and *Dorset*, demonstrated no 'intention' to dedicate a right of way, so she declined to confirm the order. Aware that this precedent needed to be challenged, the RA took the issue to the courts, eventually succeeding in the House of Lords (see *FW 25-1* for this saga). Their Lordships found that the tenancy agreement did not communicate the landowner's intention to the users of the way, and

directed the Secretary of State to redetermine the matter in the light of their ruling.

So the matter came before Inspector Slade again, who (by agreement with the parties) determined it by written representations rather than a third inquiry. She had access to documents produced at the second inquiry and to the notes she took at it. Representations were made on behalf of Yattendon Estates, including a statement by Mr N Petter, the resident land agent, and of Dr Drain. Some letters had been received too.

She found that 1992 was the date of calling into question of the way's public status for the purpose of s 31(2) of HA 1980, when notices saying 'Private No Footpath' were erected. There seemed to be universal agreement about these, unlike with the other signage alleged to have been erected. On behalf of the objectors it was said that there had been many oral challenges to users throughout the period of claim; but none of the user-witnesses said that they had been challenged at any time prior to 1992.

The objectors did not deny any use, but contended it was insufficient to count as public user as of right: it was neither high enough in volume, nor broad enough in the community. They stressed the changes in the nature of the area brought about by alterations in the estate's running over many years, and in agriculture and social structure. The definition of 'public' depended on circumstances being examined, said the objectors.

The Inspector said that the term should have its normal meaning: the people as a whole or the community in general. In a rural location such as this, the community might be relatively small. The user evidence showed distinct groupings: long-term residents of Westridge Green, who had lived and worked there most of their lives, and their close relatives who were also well acquainted with the place; others who had arrived more recently, mainly since the local farming was taken in hand by the estate—this freed-up houses which were sold off; people from neighbouring villages and towns, some of whom claimed to have used the route on longer walks, or particularly to the Bell, at Aldworth, or the cricket-ground; and others who claimed use on horseback as part of much longer rides.

During the material time some claimed daily, others infrequent, use. The objectors argued that those who had occupied estate-houses could not be considered members of the public: their evidence must be disregarded. But the Inspector (with a couple of specific exceptions) disagreed:

no evidence was brought forward to indicate that their tenancy entitled them to any access other than to the property they occupied. She would treat these as members of the public.

27 people testified to use at the inquiry. 62 witnesses provided evidence of claimed use over a total period of 75 years, one of them going back to 1925. Before the 1960s, use was mainly by villagers, each five or six times a year, though one said weekly. From the mid-1960s this pattern tailed off, with use more by residents of nearby villages. Since 1988, claimed use by more recent residents of Westridge Green was evident. 54 people claimed use during part of the period 1972–1992, 16 on horseback. Frequency varied: some used it six times a year, some daily for part of the time. 17 people used the path in 1972, the number not dropping below that in any year over the next 20. Use was virtually all leisure-related.

The Inspector recollected that at the second inquiry, several user-witnesses described occasions when they had seen farm-workers or gamekeepers, even passing the time of day with them. One or two users said that they had been advised of impending shoots and to keep clear of the route on these occasions, though the 'keepers disputed this. Some of the objectors' witnesses said they always stopped and challenged people, but under cross-examination admitted that this may have been post-1992. Users who said they had spoken with workers stood up well to cross-examination and would not acknowledge having been challenged. This led her to conclude that the challenges referred to did in fact occur after 1992.

It was said on behalf of the objectors that a sign or signs saying 'Private' had been displayed before 1992. The Inspector noted that there had been ambiguity about location and even a witness for the objectors agreed that it or they had been in a tree in the edge of a wood (and so not necessarily aimed at users of the way). The Inspector found that it would be reasonable for users to interpret the signage as meaning that it was the woodland—managed for sporting purposes—and not the path, that was private.

The objectors had also contended at the inquiry that the challenges to users prevented the use from being without force. The Inspector had concluded that challenges in earnest did not begin until after 1992, and that if any challenges had occurred during the 20-year period, the robust cross-examination of user-witnesses failed to show that they themselves had been challenged during the material time. She gave slightly less weight to the written evidence forms, but had no reason seriously to doubt their veracity. It was not

at odds with the evidence of the witnesses who appeared in person.

The objectors submitted a letter from a walks-leader, Mr Garroway, to support a contention that use was by permission. In the Inspector's view, all this actually showed was that prior to 1992, the public in general did not consider that permission was required. Mr Petter also said that he had given permission orally to a Mr Raymont once in the 1980s; but in the absence of corroboration the Inspector could give this little weight.

The situation was complicated by the fact that it was the tenant-farmer who employed the farm-workers, and who was responsible for the track itself, while it was the estate who employed the 'keepers, who were also responsible for the syndicate shoot. The former tenant farmer declined to take part in the inquiry, but in a letter of 1995 he said that the track was for farm use only, not for the public. The Inspector noted that in relation to the clause in the tenancy agreement, the letter provided no evidence of any action the tenant actually took to prevent public use, or of any permissions. The 'keepers' jurisdiction was less clear. There was no evidence of what their powers might have been to prevent or permit access along the track; it had not been demonstrated that the 'keepers had any responsibility except regarding the management of birds and shoots. Mr Petter appeared to acknowledge that there was no liaison between farm and shoot over this issue.

The Inspector said that the user-witnesses' evidence indicated that the use they made of the route was no different to the use they made of adjoining definitive routes. It did not suggest that permission was ever granted. She therefore concluded user was as of right.

Turning to the issue of whether use had been interrupted, the Inspector had already found that if any challenges took place in the material time—and she was not sure that any did—they were not frequent enough to cause the public to question their right to use the way. At the inquiry, some of the objectors' witnesses referred to obstructions along the route: ploughing, and sheep-fencing. This amounted to obstruction, they said. A witness who had worked for the tenant farmer for 30 years prior to 1986 said that the fencing ran alongside the route, never obstructing it; his son, however, said that in the 1970s, 4-foot-high sheep netting blocked the way occasionally. Some of the users said that sheep had grazed alongside the path, not on it; only one said she had found a fence across the path, and it was there for less than a week. The Inspector found that the

picture emerged of the track being unfenced prior to 1970, and afterwards occasionally temporarily fenced in winter on very few occasions to allow sheep-grazing. But most of the use was in summer, so the chances of someone being interrupted by a fence were relatively low.

One witness for the objectors had claimed that the track was ploughed every 18 months between 1970 and 1996. This, said the Inspector, was inconsistent with both sides' evidence. And this witness was not at the inquiry, so the evidence was untested. The Inspector gave no weight to the claim, not least because even if it were correct, since the way was in frequent use by farm and estate vehicles, it could not have remained out of use for any length of time.

Concluding on this point, the Inspector did not find either that the sheep hurdles were placed, or (if it occurred) the ploughing was done, with the intention of interrupting use.

The Inspector next turned to the issue of whether during the period 1972–1992 there was sufficient evidence of lack of intention to dedicate. Previously she had found that no notice that was claimed to have been displayed during that time was effective, but that the clause in the tenancy agreement sufficed. But in the light now of the Lords' *Godmanchester* and *Drain* opinions, it was clear that a clause in a private agreement, not known to the path users, could not satisfy the requirement.

Counsel for the objector now submitted that a combination of the alleged notices and alleged challenges *and* the clause in the tenancy agreement, was evidence of continuing dialogue between owner and public, and that *together* they constituted sufficient evidence of lack of intention. Counsel relied on Lord Hope of Craighead's words at paragraph 57 of the opinions: 'As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public. It is conducted by acts on the part of the public which indicate an assertion of its right to use the way and, if he wishes to deny the public that right, by acts on the part of the landowner to indicate the contrary.' Against that, counsel for the applicant submitted that the burden of proof with regard to the proviso rested squarely with the party wishing to take advantage of it; thus it was for the landowner to show that this 'dialogue' was effective in demonstrating to the public that he had no intention of dedicating a right of way.

Plainly, nothing in the *Godmanchester* and *Drain* opinions would alter the Inspector's view of the signage or challenges, which were inadequate. Increasing usage over the years

indicated that any 'dialogue' was ineffective in indicating to users that the way that there was no intention to dedicate.

The written representations made since the Lords' quashing the decision in the second inquiry contained a reference to a lady who retreated from using the path on discovery that a shoot was in progress. Counsel for the objectors urged that this was part of the 'ongoing dialogue' and her recognition of the estate's right to prevent public use. The Inspector disagreed, preferring the view of the applicant's witnesses that this was a practical decision of a sort taken near rights of way anywhere (it was common in the shooting season on open moorland, for example).

The Inspector agreed with the applicant's counsel that Mr Petter's recent statement should be treated with caution. Under cross-examination at the inquiry, said the Inspector, Mr Petter had retreated from several statements he made during evidence-in-chief, conceding: that he had no knowledge of who put up signs at the eastern end; he had never seen signs at the western end; that he had not been employed by the estate at the time he said that instructions were given to one of the 'keepers; that some instructions were so general they applied not specifically to the path but to the whole estate; and that he had no personal knowledge of any challenges to users of the track before 1992. He now appeared to be returning to a view he had previously relinquished, concerning the sign at the eastern end. The Inspector said that not only would she treat his evidence with caution; she found it rather unreliable. It was certainly not strong evidence of a dialogue capable of conveying the landowner's lack of intention to dedicate to users of the route.

Returning to the point as to whether the tenancy-agreement coupled with the signage and challenges satisfied the proviso, the Inspector recalled Lord Hoffmann's observations in the *Godmanchester* and *Drain* opinions [where his Lordship effectively said that, since there is nothing improbable in not having an intention to dedicate, evidence which 'corroborates' a landowner's lack of intention has no place in the reckoning if it is not communicated to users of the way], particularly paragraph 33: 'section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate.... There would seldom be any difficulty about satisfying that requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts ... rather than simply

proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in *Billson's* case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.' With that in mind the Inspector rejected the contention that the agreement somehow reinforced the evidence of challenges and signs.

The Inspector therefore found that no evidence of anything done during the 20-year period was capable of satisfying the proviso, and

so confirmed the order (with a minor technical modification to correct the route's description).

Ref: The West Berkshire Council Footpath 25, 25a and 25b Aldworth/17 Streatley Modification Order 2000. PINS ref: FPS/W0340/7/2RD, decision issued 29.05.2008

The Editor congratulates Leslie Drain on this success and on being made an MBE in the Queen's Birthday honours for services to the environment in south Oxfordshire.

PUBLIC PATH ORDERS

Inspector gives 'garden path' contention little weight

West Sussex CC made an order under s 119 of HA 1980 to divert FP 14, Bolney. Objections were received, and an inquiry was held by Inspector Mr Peter Norman on 28 May 2008. Mr John Cribb represented the RA, Mr Ted White the OSS, and Mr Barry McMenamain the Footpaths Conservation Society for Ditchling, Westmeston, Streat and neighbouring parishes.

The Inspector found that the diversion was expedient in the interests of the owner of the land crossed by the path, since the route passed through the garden of a residential property and so 'would impinge upon the privacy of those who live there'. The objectors had contended that public safety would be compromised as a result of the diversion, since the new termination-point on a nearby lane had less good visibility than the existing one; this the Inspector rejected, since drivers did not make much use of the lane, and the quietness of the location meant that approaching vehicles would 'be clearly heard'. He found that safety of walkers would be affected to a negligible extent if at all. He also rejected the objectors' argument about convenience; true, there would be more road-walking, but it was a quiet road with verges (which the objectors, however, had said were narrow, rough, boggy and not continuous); and for the most part there was little to choose between the surfaces, he said.

He also found that the proposed diversion would not have an adverse effect on enjoyment of the path as a whole. The existing route was somewhat closed-in, and the views were to the landscaped gardens of the property. By contrast, the diverted route would cross a broad pasture, with views of farmland and of the property's main building in the middle distance, surrounded by mature trees. Opinions would differ on the relative merits of such views, but he was not persuaded

that on a country walk, landscaped gardens were necessarily to be regarded as preferable to views of farmland. The prospect from the new route was no less attractive than from the existing one, said the Inspector.

He therefore concluded that the order should be confirmed.

But he noted that the order-making authority had submitted that some people would find the diversion route more enjoyable than the original 'because they are embarrassed to find themselves passing through what appears to be a private garden when out walking.' To that, the Inspector had this to say. 'I give little weight to that submission, partly because it was supported only by generalised anecdotal evidence, but also because the whole concept of public access to the British countryside via public rights of way is founded on the right of people to pass unchallenged across land which appears to be, and is, otherwise entirely private. The fact, if it is a fact, that some people are embarrassed to exercise a right seems to me a poor basis on which to decide to take away or modify that right'.

That said, he confirmed the order with a minor modification to correct an error in it.

Ref: The West Sussex County Council (Bolney) Public Path (No 14) Diversion Order 2007. Planning Inspectorate ref: FPS/P3800/4/46, order decision issued 16.06.2008

Inspector considers re-instatement costs are 'material factor' in public interest test

Devon CC made an order under s 119 HA 1980 to divert sections of BRs 23 and 24 at Otterton and BR 116 and FPs 27 and 28 at Sidmouth. There were two objections to the order, from Eric Mawer on behalf of the OSS, and a Mrs Pankhurst. Inspector Alan Beckett held an inquiry to determine the matter on 3 June 2008.

The sections of path in question formed part of a network of routes located on Mutter's Moor and Harpford Common, an area of registered common north-west of Sidmouth, characterised by lowland heath vegetation. When the Inspector made his site visit there was no physical indication of the existence of the paths on the ground; however the proposed alternative routes which followed broad and well defined rides through the heather had already been signposted and waymarked by the Council.

The 1906 25" to the 1-mile Ordnance Survey map of the area showed the existence of defined tracks crossing the common on the alignment of the rights of way shown on the Definitive Map (relevant date June 1957), but the 1958 25" map and subsequent large scale mapping showed that the alignment of the defined tracks over the common had changed from that shown on the 1906 map and the definitive map to those on the ground when the Inspector made his site visit.

The definitive line of BR 24 crossed the course of a stream while the alternative route followed a track which avoided the spring line. This route was shown on the 1958 and subsequent maps and appeared to have been present since at least the late 1950s.

Mrs Pankhurst said that Mutter's Moor had been used extensively by the army during the Second World War, and suggested that the change in the defined tracks recorded by the 1938 and 1958 maps may have been as a result of the army needing serviceable routes over the common which avoided the springs and stream found there. The Inspector conceded that whilst there was no evidence to suggest that the army had been instrumental in realigning the tracks, it was a plausible explanation as it was known that Mutter's Moor was used for gun emplacements and by barrage balloons during the war.

The order had been made because the council considered it expedient, in the interests of the public, that the rights of way in question should be diverted. The council argued that this was so because:

- It would regularise the use that had been made of the available tracks—the definitive lines had fallen from favour with the public and the available routes had been adopted in their place.
- The diversions would allow for a more economic use of resources, as the reinstatement of the definitive lines would require the installation of bridges at an estimated cost between £2000 and £3000.

- The clearance of lowland heath cover to allow passage over the definitive lines would be criticised by those who were working to conserve a scarce habitat, particularly when suitable alternative paths were readily available.

Mr Dyson, the representative of Sidmouth Town Council, supported the OMA. He submitted that the proposed bridging of gullies and associated drainage works would have a detrimental effect upon the amenity value of this part of the East Devon AONB.

Eric Mawer submitted that the council was seeking the diversion to avoid having to carry out its statutory duties. This was not in the public interest and there was no provision in the 1980 Act for the cost to the authority of undertaking its statutory duties to be taken into account in determining whether or not the definitive routes should be reinstated.

The Inspector agreed that consideration of the cost of operations did not feature in s 130 HA 1980 Act but he concurred with the council that the relative costs of the proposed diversion as opposed to the re-instatement of the definitive lines was a material factor that should be taken into consideration. He said that 'At a time of increasingly scarce resources within local government I do not consider that the expenditure required to bridge the stream crossed by BR 24 would be the best use of those resources which are available to the council, given that the proposed diversion would result in BR 24 following a course above the spring line on which no such structures would be required. I take the same view with regard to the clearance of vegetation that would be required to make the definitive routes accessible; whilst the council conceded that such clearance would not be particularly expensive, it nonetheless represents an additional expense that the proposed diversion would avoid. If the proposed diversion has the effect of freeing up resources to be spent elsewhere on the local rights of way network, or removing the liability on the public purse to erect and maintain a stream crossing, I am of the view that the proposed diversions can be said to be in the public interest.'

Mr Mawer further argued that the diversion would represent a reduction in the number of routes over the common, as the public already had the right to walk along the proposed routes by virtue of Part I of CRWA 2000. The Inspector was not persuaded by this, reasoning that, by the same token, the public could still walk the lines of the original paths. He also noted that there seemed to be no demand from the public to a walk on the order routes since the council had no

record of any complaints about their condition, although there had been requests for repairs to be made to the proposed routes.

The Inspector said that he was required to take into account the impact the diversion would have upon biodiversity and natural beauty (by virtue of s 40 of the Natural Environment and Rural Communities Act 2006—duty to have regard to the purpose of conserving biodiversity, and s 11 of the Countryside Act 1968—duty to have regard to the desirability of conserving natural beauty and amenity of the countryside). He said that the proposed diversions were unlikely to have any noticeable impact upon the biodiversity of Mutter's Moor as the proposed routes would follow existing tracks. However, if the diversion did not go ahead, the re-instatement of the definitive lines would have a much greater impact. While Mutter's Moor did not fall within the East Devon Pebblebed Heath SSSI, which was located to the west of the common, the lowland heath found there was nonetheless part of a nationally scarce vegetation type.

He noted that Mr Mawer was the only person calling for reinstatement of the definitive lines, and that whilst he was correct in saying that the council had a duty to make these paths available, that part of the public's interests had to be balanced against an equal public interest in the conservation of a scarce habitat.

As there was no demonstrable public demand for these paths to be made available he concurred with Mr Dyson in that it would be inappropriate and against the public interest to diminish the extent of the heather cover on the moor when suitable alternative routes were already available, use of which would not impact significantly upon the biodiversity or conservation interest of the site. He was therefore satisfied that it was expedient to divert the routes in the interests of the public.

Turning to whether the new rights of way would be substantially less convenient to the public, Mr Mawer argued that the definitive routes were as straight as possible and led the walker directly to their objective. The proposed routes in contrast were circuitous and were therefore less convenient for walkers irrespective of whether the length of the path was increased or reduced. The council submitted that the proposed diversions would not result in any significant difference in the lengths of the paths (BR 23 and FP 27 would increase in length by 25m and 5m respectively whereas BR 24 and FP 28 would be reduced by 20m and 30m respectively).

The Inspector commented that the proposed diversions would result in some routes

being longer, and others shorter; some would be more direct, other less so. What he had to consider was whether the proposed diversions would result in a substantial inconvenience to the public. Anyone contemplating a walk or ride on the proposed routes would already have walked or ridden a significant distance to reach this part of the moor. Approaching from the west or south would involve journeys of between 0.5km and almost 1km. Journeys of a similar magnitude would be required if the order routes were approached from the north or east on other parts of the rights of way network. Set in this context, the increases in distances that would result from the proposed diversions were in his view insignificant, and would not inconvenience the public. He found no evidence that the routes were used for any utilitarian purpose where an increase in journey distance and times might be critical. He therefore concluded that the alternative routes would not be substantially less convenient for use by the public.

No objections were raised in respect of the effect the diversion would have on public enjoyment of the paths as a whole, and the Inspector commented that since the definitive and proposed routes ran in close proximity to one another the views of the surrounding common would be little different. He concluded from this that the enjoyment of those who sought pleasure from informal recreation on the routes would not be diminished as a result of the diversion.

He found no evidence that the order would have any effect separately identifiable from those considered above in relation to the other requirements of s 119. In respect of the provisions of Devon CC's ROWIP, he did not consider that the order was incompatible with the policies published in the Plan.

Having regard to this and all the matters raised at the inquiry, the Inspector confirmed the order.

Ref: The Devon County Council (Bridleway Nos. 23 & 24, Otterton and Bridleway No. 116 & Footpath Nos. 27 & 28, Sidmouth) Public Path Diversion Order 2006. PINS ref: FPS/J1155/4/32, order decision issued: 23.06.08

Editor's comment: This decision introduces a worrying interpretation of 'public interest' in the context of s 119 HA 1980, moving far beyond the interests of the users of the path in question. If the cost of maintaining and repairing existing routes is a reason for diverting them, then the outlook for other paths which are more expensive to maintain could be uncertain. The OSS queried various

aspects of this decision with the Planning Inspectorate and received the following response from the Quality Assurance Unit:

‘You take issue with the Inspector’s statement that he needed to give consideration to what impact if any the proposed diversion would have upon the biodiversity and natural beauty of the area. The Inspector cites s 40 NERC 2006 and s 11 Countryside Act 1968. I can only agree that the duties in these two sections are general and are not specific to path diversion orders. However, the legislation places a duty upon public authorities to have regard to such matters when exercising its functions, one of which is the consideration of public path diversion orders. The duty to have regard to the conservation of biodiversity includes “restoring or enhancing a population or habitat”.

The Inspector explains ... that while Mutter’s Moor was not part of the East Devon

Pebblebed Heath SSSI, it is nonetheless an area of lowland heath, a nationally scarce habitat type, and located within the East Devon AONB. The Inspector considered matters of biodiversity and natural beauty in relation to whether the diversion of the paths at issue could be said to be expedient in the interests of the public.

With regard to the relative cost of the proposed diversion against those of re-instatement of the definitive lines, the Inspector discusses this in paragraphs 12 and 13. He concluded that “If the proposed diversion has the effect of freeing up resources to be spent elsewhere on the local rights of way network, or removing the liability on the public purse to erect and maintain a stream crossing, I am of the view that the proposed diversions can be said to be in the public interest.” This was a matter for the Inspector’s judgement.’

COURT CASES

RA challenges gating order

The Ramblers’ Association –v– Coventry City Council [2008] EWCH Admin 796

The RA applied under HA 1980 s 129D for the quashing of two gating orders made by Coventry City Council (CCC). The case was heard before Mr Michael Supperstone QC (sitting as a Deputy High Court Judge) in the Administrative Court on 14 and 15 February 2008. Acting for the claimant was Miss Ross Crail, and for the defendant, Mr Simon Bird. Mr Supperstone QC found in favour of the defendant and dismissed the consolidated actions.

The hearing concerned the correct interpretation and application of the provisions of Part 8A of HA 1980 s 129A–29G. Part 8A was inserted by s 2 of the Clean Neighbourhoods and Environment Act 2005 with effect from 1 April 2006. It empowers highway authorities to make, vary, and revoke orders restricting the public right of way over highways in their areas, and enforce the restrictions by physical barriers, for the purposes, and on the conditions prescribed, by the statute. This was the first occasion on which these provisions have been considered by the courts.

The two orders made by CCC were in respect of the same footpath. The first was made on 17 January 2007 and the second, which varied the first, was made on 22 November 2007. Both orders received objections from the local Ramblers’ Association and it was agreed that both orders would be consolidated at the High Court hearing.

Four main issues were identified by Miss Crail, on behalf of the RA. First, whether CCC could reasonably and properly directing itself in law have been satisfied on the evidence that the conditions for making the gating order were fulfilled. In particular that by reason of the number of incidents of crime/ASB relied on as justifying an order, their distribution over time, and their lack of proximity in time to the date of the decision to make the first order, the defendant could not reasonably have been satisfied that they amounted to ‘the persistent commission of criminal offences or ASB’ (HA 1980 s 129A(3)(b)). Miss Crail said that all but one of the listed incidents were concentrated in a single 6-week period and that the cabinet report appeared to have double- and even triple-counted incidents. It was submitted that but for the double-counting CCC itself would not have regarded this as a suitable case in respect of which to make an order according to its own policy (a minimum of 10 reported incidents before a gating order is considered).

The deputy judge’s view was that the claimant adopted too restrictive a view as the evidence of the incidents of crime/ASB extended to the two supporting letters from local police constables. The cabinet report also referred to further evidence in recent history of crime/ASB and there had been no change (between the date of the reported incidents and the making of the first order) in the characteristics of the footpath and its propensity to facilitate crime/ASB. With regard to the double-counted incidents, Mr Supperstone said they were given separate references, and in

circumstances where neither the identity of the perpetrator or the time of the offence was known, it was not unreasonable to treat them as separate incidents.

The second main issue considered the extent of the restrictions. Article 2 of the Second Order stated that, 'No person shall at any time proceed or at any time cause or permit any vehicle or pedestrian to proceed' over the footpath (save as provided in Article 3 of the order). It was contended that the evidence did not justify such an extensive restriction. Miss Crail submitted that the correct approach was to impose restrictions no greater than appeared 'reasonably necessary' to reduce crime and ASB attributable to the highway. However it was Mr Supperstone's view that this was not the test in the statute. HA 1980 s 129A(3)(c) required the Council to be satisfied that 'it is in all circumstances *expedient* to make the order for the purposes of reducing crime and anti-social behaviour. What is "expedient" will, as the provision states, depend on "all the circumstances"'. Therefore utility, cost and practicality of a lesser restriction were all factors which may be taken into account when considering whether or not to impose a blanket restriction.

The third main issue submitted by Miss Crail was that CCC failed to take reasonable steps to acquaint itself with the relevant information in order to determine the extent of any restriction to be imposed. The criticism was that the focus of the evidence was on the timing of the reports of the incidents rather than the incidents themselves. She said that there was no record of enquiries or investigations having been made into the timing of the incidents.

It was Mr Supperstone's view that CCC did take reasonable steps to acquaint itself with the relevant information to enable it lawfully to decide on the question in hand. Several incidents were reported to take place 'on the night of ...', and further enquiries into the timing of the incidents would not have led CCC to a different conclusion as to the need for a blanket restriction.

The fourth main issue looked into what consideration had been given to alternative measures, other than gating, as a means of reducing crime/ASB. Mr Bird accepted that this was a material consideration in a decision to make a gating order and referred to the cabinet report. It stated that '... motorcycle barriers would be insufficient to stop a wide range of ASB perpetrated within this area. The length of the

footpath [400m] reduces viability of improving lighting or installing mobile CCTV.' The report went on to refer to guidance issued by the Home Office: 'Home Office guidance advises local authorities to consider alternative interventions before making a Gating Order; but significantly also advises that "Gating Orders should not be seen as a last resort". Therefore the Council need not exhaust every possible intervention before proceeding to use a Gating Order'. The deputy judge accepted that these actions gave reasonable consideration to tackling crime/ASB by alternative measures.

The consolidated actions were dismissed.

The weight given to factors material to the determination of a s118B order is a matter for the decision-maker's discretion

Manchester City Council applied for judicial review of an Inspector's decision not to confirm an order made under HA 1980 s 118(B) to extinguish four paths which were purportedly facilitating crime at Wallace Avenue, Manchester. The Secretary of State indicated early on that he would not defend the appeal, but later changed his mind. The Ramblers' Association appeared as an interested party.

Section 118B of the Highways Act 1980 allows an authority to extinguish a right of way where it is satisfied that it is expedient to do so for the purposes of preventing or reducing crime. The crime must be persistently affecting properties adjacent to the highway and the authority must be satisfied that the highway is facilitating the crime. If these conditions are satisfied there is a further hurdle: s 118B(7) says–

'The [decision-maker] shall not confirm a special extinguishment order ... unless satisfied that ... it is expedient to confirm the order having regard to all the circumstances, and in particular to:

- a) whether and, if so, to what extent the order is consistent with any strategy for the reduction of crime and disorder prepared under s 6 of the Crime and Disorder Act 1998,
- b) the availability of a reasonably convenient alternative route or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the highway under s 119B below rather than stopping it up, and

- c) the effect which the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation contained in s 28 above as applied by section 121(2) below.’

Objections to the order by the local Ramblers’ Association and others brought the matter before an Inspector who made the following findings of fact: the properties adjacent to the highway were affected by high levels of crime; the highways were facilitating the persistent commission of criminal offences; it would be expedient for the prevention of crime in the area to extinguish the highways; but that ‘in all the circumstances’ it was not expedient to extinguish the highways. Accordingly, the Inspector declined to confirm the order.

Mr Justice Sullivan who heard the case in the High Court spent some time listening to arguments as to the relevancy of the Inspector’s findings of fact, the intelligibility of his reasoning and—of particular interest among the claimant’s minor grounds—the admissibility of a petition from users of the path who opposed closure. Mr Neill for Manchester City Council argued that the Inspector was not entitled to have given weight to the petition in reaching his decision, relying for that on the *dicta* of Hobhouse J in *R v Secretary of State for the Home Department ex p Venables* (1997) who ruled that a petition from the public was not an admissible factor in the determination of the appropriate custodial sentence for the boys convicted of murdering James Bulger. But Sullivan J was unimpressed by the argument that a principle of general application on the matter of public petitions could be extrapolated from a judgment given in the context of a criminal trial. He noted that the public had a legitimate, direct interest in the outcome of an application to extinguish a highway—relevant authorities are expressly enjoined to invite and have regard to public opinion on proposed changes to the highway network—whereas the public has no rôle in the criminal sentencing process. The legal and public policy frameworks were altogether different and the analogy could not therefore be made: the ground was rejected.

The principal matter which fell to be determined by the court was the operational effect of the words ‘in particular’ within s 118(B)7. The words ‘in particular’ before the three criteria (a–c)

in s 118B(7) had the effect of elevating those considerations to the level of greatest importance among all the circumstances, said the claimants. As the Inspector had made findings of fact on the basis of criteria (a–c) which were favourable, or at least not fatal, to the success of the order, he had erred in law by concluding that it was not in all the circumstances expedient to confirm the order.

Mr Buley for the Secretary of State contended that the decision-maker was entitled to conclude as he did that the order should not be confirmed. The effect of the words ‘in particular’ was only to mark out its object conditions as mandatory considerations, not to imbue them with a deterministic effect that would always outweigh other considerations that might ‘in all the circumstances’ reasonably be taken into account. None of the named criteria a–c would always give an absolute or emphatic result (ie the order might be deemed consistent with some aspects of a relevant crime and disorder strategy but not others, or an alternative route might exist that could only just be considered reasonably convenient). If each of these criteria were decided in the positive, but only just so, and other factors were to point overwhelmingly to the conclusion that the order should be rejected, treating factors a–c as ‘deal breakers’ and confirming the order accordingly would make for a perverse outcome.

Miss Crail for the Ramblers’ Association added that to interpret subsection 7 on the claimant’s view would be to misconstrue the legislative intention behind section 118B as a whole, which had been to confer on the decision-maker a broad discretion in his determination of an order. The instruction to ‘have regard to all the circumstances’ anticipated that a wide range of factors could be material to a decision and that these would vary in substance and weight from case to case. It would therefore be very much against the tenor of the statute if a decision-maker were to be hamstrung by the three named factors a–c in deciding whether the order should succeed or fail. Moreover the claimant had failed to appreciate the implication of the negative couching of the section, ie ‘The [decision-maker] shall not confirm unless ...’, not ‘The [decision-maker] shall confirm if ...’ (emphasis added) – which suggested that Parliament anticipated circumstances in which the decision maker might not find it expedient to confirm the order, even where the mandatory considerations pointed toward confirmation.

Held by Sullivan J—

'The weight to be given to the various factors in issue in a planning or highway inquiry, provided those factors are legally relevant, is entirely a matter for the Inspector's expert judgment. The use of the words "in particular" in the context of a subsection which is expressly conferring a very broad discretion on the decision-taker to decide whether confirmation of the order is "expedient", and is expressly enjoining him when doing so to have regard to all material circumstances, was not intended to displace that underlying principle. For these reasons I do not accept [the claimant's ground].'

The Inspector's decision was accordingly upheld.

NERC Act bites—the Winchester case

R on the application of the Warden and Fellows of Winchester College and Humphrey Feeds Ltd and Hampshire County Council v Secretary of State for Environment, Food and Rural Affairs [2008] EWCA Civ 431 (29 April 2008)

Introduction

The claimants were landowners in Hampshire. They appealed against the decision of Mr George Bartlett QC (sitting as Deputy High Court Judge) to refuse their application for judicial review of the refusal of Hampshire County Council to reconsider the decisions which it made, in its capacity as surveying authority, to make DMMOs to upgrade a bridleway and a RUPP to the status of BOATs.

The question to be addressed was whether the judge was right to hold that rights for mechanically propelled vehicles to use the routes in question had not been extinguished by the provisions of Part 6 of the Natural Environment and Rural Communities (NERC) Act 2006.

Legislative background

The key sections were at s 67 of the 2006 Act and paragraph 1 of Schedule 14 to the WCA 1981. S 67(1) extinguishes an existing public right of way for mechanically propelled vehicles which before commencement (2 May 2006) was not shown in a definitive map and statement 'DMS' or was shown in a DMS only as a footpath, bridleway or restricted byway. But this was subject to subsections (2) to (8).

S 67(3) provides:

'Subsection (1) does not apply to an existing public right of way over a way if—

(a) 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, [or]

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application....'

The 'relevant date' is 20 January 2005 (subsection (4)).

Section 67(6) provides:

'For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.'

Paragraph 1 of Schedule 14 to the 1981 Act provides:

'An application shall be made in the prescribed form and shall be accompanied by—

(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.'

The principal issue of law raised by this appeal was what was meant by 'an application made in accordance with paragraph 1 of Schedule 14 to the 1981 Act' within the meaning of section 67(6) of the 2006 Act. Mr George Laurence QC and Miss Ross Crail on behalf of the claimants contended that the applications in respect of Chilcomb Bridleway 3 and Twyford RUPP 16 were not made in accordance with that provision and that it was not open to the Council to waive compliance with the requirements of the statute. The questions had implications for cases throughout the country and were important for landowners and users, as well as the Secretary of State.

The applications

David Tilbury made the application for Chilcomb BR 3 on 11 June 2001. The application stated that he had appended 'a list of documents' on which he based the application. A map was annexed to the application. The list of documents that was 'appended' was in the body of the application and included reference to some 25 maps and plans, in

respect of each of which Mr Tilbury added a comment. For example, the fifth document was '1838 Tithe map' and the comment was 'The lane is shown, coloured yellow, and marked *Church Lane & 'Cowards Lane'*. It is numbered 3. It is shown as a through route from the village to the *Bishop's Waltham* road.'

Mr Tilbury also sent to the defendant a certificate of service, certifying that the requirements of paragraph 2 of Schedule 14 to the Act had been complied with, and giving as the name of the landowner, 'Mr J Seale' and his address. The certificate was also dated 11 June 2001.

Sean Fosberry had made three applications in respect of Twyford RUPP 16. He made two separate applications on 14 March 2005 because he was under the impression that part of the route in question was RUPP 15. He replaced these two applications with a single application dated 16 June 2005. The Council treated the original applications as the effective application ('the Fosberry application').

The Fosberry application was made on a printed council pro forma, on behalf of the Trail Riders Fellowship, and it stated that the applicant applied for an order under section 53(2) modifying the DMS by 'upgrading to a byway open to all traffic ... RUPP 16 from SU 48325 25584 to SU 50210 27410 and shown on the map annexed hereto.' In the body of the application were the words: 'I/we attach copies of the following documentary evidence (including statements of witnesses) in support of this application'. Under the heading 'List of documents' appear the words 'see attached report'. The attached 'Detailed Evidence Report' identified some 30 maps. Against each of them, under the heading 'evidence entry' there was a commentary. Thus, for example, in relation to the map in the 1855 enclosure award for Twyford, the following was stated:

'The map of Twyford Down, Hants, 1851, No3, Part 2A shows the RUPP from SU485263 north eastwards as Chilcombe Road, 24 feet wide. Annotated *From Twyford* at its south western end and *To Chilcombe* at its north eastern end.' A detailed description of the route taken from the Award was then set out.

Mr Fosberry also sent to the Council a certificate certifying that the requirements of paragraph 2 of Schedule 14 had been complied with. Under the heading 'Name and address of

landowner(s)' the certificate said: 'Notice served on site. Please see photos sent by e-mail.'

The applications were considered by the Council at a meeting of its Regulatory Committee on 22 March 2006. The report by the Director of Recreation and Heritage set out the evidence, the statutory tests, the view of the landowners and the comments of consultees. Its conclusion, in respect of both paths, was that the claims to upgrade them should be accepted and the orders made.

The first issue raised in the appeal was whether the Tilbury and Fosberry applications were made in accordance with paragraph 1 of Schedule 14 to the 1981 Act for the purposes of section 67(3) of the 2006 Act. The claimants' contention was that they were not 'qualifying applications'. It was common ground that if that was right then both appeals must succeed. If that was wrong then Mr Laurence accepted that the appeal in respect of the Tilbury application must be dismissed.

The second issue only arose in the case of the Fosberry application if it did prove to be a qualifying application. This issue was whether defects in the certificate of service of notice purportedly given by Mr Fosberry pursuant to paragraph 2(3) of the 1981 Act rendered unlawful the council's decision to make the order.

Claimants' argument

Mr Laurence and Miss Crail submitted that for any of the three exceptions in section 67(3) to apply, a section 53(5) application must have been made in accordance with all the requirements of paragraph 1 of Schedule 14, ie it must have been (i) made in the prescribed form; and (ii) accompanied by a map drawn to the prescribed scale and showing the way(s) to which the application related; and (iii) accompanied by copies of any documentary evidence (including statements of witnesses) which the applicant wished to adduce in support of the application. Lord Justice Dyson said that, at first sight, this seemed unanswerable. The words were expressed in clear and ordinary language; so why not give them their plain and ordinary meaning?

In the High Court judgment, Mr Bartlett said that the requirement that the map should be accompanied by a map and copies of documentary evidence is a 'procedural' requirement which the authority may be able to waive in the light of the principles stated in *London and Clydesdale Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 188–190 and *R v Secretary of State for*

the Home Department, ex p Jeyeanthan [2000] 1 WLR 354. Thus, if the authority had all the information it needed to determine the application in the absence of all or any of the documents that are required to accompany the application, it had the right to waive the requirement and determine the application. There would be no point in insisting on the provision of documents which were not needed to enable the application to be determined. On the other hand, if documents that were needed for this purpose were not supplied, the authority would no doubt take the view that, until they were supplied, it would not be 'reasonably practicable' under paragraph 3(1) to investigate the matters stated in the application and to decide whether to make the order.

Mr Bartlett had then applied this approach to the two applications, holding that the council was entitled to treat each application as valid and that on the facts of the case there was no need for copies of the documentary evidence to be provided—the council was entitled to waive the procedural requirement. In case this conclusion was wrong, he had reached the same conclusion by a different route. He said that what had to be sent was 'copies of any documentary evidence (including statements of witnesses) which the applicant wished to adduce in support of the application'. He said that 'adduce' was used to mean 'put forward' or 'provide', and not 'rely upon'. Thus the applicant did not have to provide copies of all the documentary evidence on which he relied in support of the modification of the DMS for which he had applied. He could rely on documentary evidence in the possession of the authority (or to which it has access) without sending copies of it. What the applicant must do, however, was to provide copies of any documentary evidence that, because it was not already available to the authority, he wished to put forward. He might not wish to put forward any such evidence because he was relying on evidence that was already before the authority.

Discussion on the first issue

Dyson LJ said that the precise question raised by the first issue was whether, for the purposes of section 67(3) of the 2006 Act, the Tilbury and Fosberry applications were made in accordance with paragraph 1 of Schedule 14 to the 1981 Act. This question was not the wider question of whether it was open to the Council to treat an application which was not made in accordance with that paragraph as if it had been so made

because the failure could be characterised as a breach of a procedural requirement rather than a breach which was so fundamental that (to use the judge's language) the application failed to 'constitute an application' at all. He readily accepted that the wider question was relevant and important in the context of applications made under section 53(5) generally and whether an authority had jurisdiction to make a determination pursuant to paragraph 3 of Schedule 14.

The question that arose in relation to section 67(6) was not whether the council had jurisdiction to waive breaches of the requirements of paragraph 1. It was whether the applications were made in accordance with paragraph 1. For present purposes, the question of whether the applications were made in accordance with paragraph 1 was only relevant to whether extinguishment by subsection (1) was disapplied by subsection (3). It had nothing to do with the wider question of whether, absent the 2006 Act, the Council would be entitled to treat a non-compliant application as if it complied by waiving what the judge referred to as breaches of 'procedural' requirements.

He accepted Mr Laurence's submission that the purpose of s 67(6) was to define the moment at which a qualifying application was made because timing was critical for the purpose of determining whether subsection (1) was disapplied. The moment identified by Parliament as the relevant moment was when an application was made in accordance with paragraph 1. A purported subsequent waiver of the obligation to accompany the application with copies of documentary evidence could not operate to alter the date when the non-qualifying application was made, or to treat such an application which was made on a particular date as having been made in accordance with paragraph 1 when it was not. All a waiver could do, with effect from the date of the waiver, was to permit the decision-maker to treat itself as free to determine the application even though it was not made in accordance with paragraph 1.

As a matter of ordinary language, an application was not made in accordance with paragraph 1 unless it satisfied all three requirements of the paragraph. Moreover, there were two particular indications that an application was only made in accordance with paragraph 1 of Schedule 14 if it was made in accordance with all the requirements of the paragraph. First, paragraph 1 was headed 'Form of applications'.

The word 'form' in the heading was clearly not a reference only to the prescribed form. It was a summary of the content of the whole paragraph. It was a reference to how an application should be made. It must be made in a certain form (or a form substantially to the like effect). It must also be accompanied by certain documents. The requirement to accompany was one of the rules as to how an application was to be made.

Secondly, Schedule 7 to the 1993 Regulations showed that the prescribed form itself required the route to be shown on the map 'accompanying this application' and the applicant to 'attach' copies of the following documentary evidence (including statements of witnesses) in support of the application. This language reflected the content of sub-paragraphs (a) and (b) of paragraph 1. It was artificial to say that, in order for it to be made in accordance with paragraph 1, an application must be made in the prescribed form or a form to substantially like effect, but that it need not be accompanied by a map or have attached to it the documentary evidence and witness statements to be adduced even though these were referred to in the body of the prescribed form itself. The language of the form showed that an application was only made in accordance with paragraph 1 if it was made in the prescribed form and was accompanied by a map and the documentary evidence and witness statements to be adduced.

Mr Timothy Mould QC (for Hampshire County Council) and Mr John Litton (for the Secretary of State) argued that a strict interpretation of paragraph 1 would lead to an absurdity that could not have been intended by Parliament, eg the application might list a number of documents, but by oversight might be accompanied by only some of them. This absurdity would be sharpened if the authority actually possessed the originals. Dyson LJ acknowledged that matters of this kind were relevant to the question of whether the consequences of the failure to make the application in accordance with paragraph 1 were such that the failure could and should be waived in the particular circumstances of the case. But in relation to the specific section 67(6) question, he did not see how they were relevant to whether the application, when it was made, was made in accordance with paragraph 1. In relation to that question, Parliament stipulated that an application was made when it was made in accordance with all the requirements of the paragraph.

He considered, and Mr Laurence conceded, that it would be absurd to hold that an application was not made in accordance with paragraph 1 if copies of documents were not provided because the applicant could not obtain them. To avoid such absurdity, Mr Laurence submitted that the obligation should be construed as being to accompany the application with copies of all the documents which the applicant wished to adduce in support of his application, save for any which it was impossible for him to obtain. Such a construction was justified on the basis that 'unless the contrary intention appears, an enactment by implication imports the principle of the maxim *lex non cogit ad impossibilia* (law does not compel the impossible)'.

Dyson LJ's view was that section 67(6) required, for the purposes of section 67(3), that the application be made strictly in accordance with paragraph 1. That was not to say that there was no scope for the application of the principle that the law is not concerned with very small things (*de minimis non curat lex*). Indeed this principle was explicitly recognised in regulation 8(1) of the 1993 Regulations. Thus minor departures from paragraph 1 would not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances, he considered that neither application was made in accordance with paragraph 1.

His Lordship particularly emphasised that he was not saying that, in a case which did not turn on the application of section 67(6), it was not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the 'trigger' for a decision under section 53(2) to make such modifications to the DMS as appeared requisite in consequence of any of the events specified in subsection (3) (ie, absolute compliance was only an issue where the question of the possible extinguishment of motor vehicular rights arose.

As regards Mr Bartlett's alternative reasoning, Dyson LJ rejected this approach for the reasons given by Mr Laurence. There was no basis in the wording of paragraph 1 (or in the prescribed form) for distinguishing between two

categories of documentary evidence: (i) those on which the applicant relied, but of which he was not providing copies because they were available to the surveying authority and (ii) those on which he relied and of which he was providing copies because they were not available to the authority. The language of the paragraph was clear and unambiguous. The application must be accompanied by copies of any documentary evidence which the applicant wished to adduce. This must mean any documentary evidence, whether it was already available to the authority or not. In any case, an applicant could not reasonably be expected to know, or take steps to discover, what documents or copy documents the surveying authority possessed.

Both Mr Tilbury and Mr Fosberry wished to adduce the documentary evidence to which they referred in the body of their applications, but copies these documents were not provided. Even if the council already had the original documents or copies, that fact would not mean that the applications were made in accordance with paragraph 1.

Thus neither application was a qualifying application. The Tilbury application was made before 20 January 2005 and was not a section 53(5) application for the purposes of section 67(3)(a)—his application did not save the rights for mechanically propelled vehicles over Chilcomb bridleway 3 from extinguishment by section 67(1). The Fosberry application was made after 20 January 2005 and before the commencement date of 2 May 2006. If the rights for mechanically propelled vehicles to which that application was relevant were to be saved from extinguishment, this could only be if a determination was made before 2 May 2006 under paragraph 3 of Schedule 14 ‘in respect of [an application made under section 53(5)]’: see section 67(3)(b). The reference to ‘such an application’ in section 67(3)(b) is to an application made under section 53(5) for the purposes of section 67(3)(a). For this reason, the relevant rights in that case (over Twyford RUPP 16) were not saved from extinguishment by section 67(1) either.

The second issue

Because Dyson LJ had found in favour of the applicants on the first issue, it was not necessary for him to deal with the second issue, but because it had been subject to full argument he did address it. (It had no relevance to the Tilbury application

because, having been made before 20 January 2005, it could only escape from the extinguishing effect of section 67(1) by virtue of section 67(3)(a). If it was not a qualifying application by virtue of section 67(3)(a), it was not a qualifying application at all.)

It was relevant to the Fosberry application because that was made after 20 January 2005. Not only did it have to be made in accordance with paragraph 1 of Schedule 14, it had to be an application in respect of which the Council made a determination under paragraph 3 before 2 May 2006: section 67(3)(b).

The council was required by paragraph 3(1), as soon as reasonably practicable after receiving a certificate under paragraph 2(3), to decide whether or not to make the order to which the application related. Mr Laurence submitted that, because to the knowledge of the council Mr Fosberry had provided his certificate under paragraph 2(3) without complying with the requirements of paragraph 2(2), the Council’s decision in this case could not be a determination under paragraph 3. It followed that the requirements of section 67(3)(b) were not satisfied.

In the High Court, Mr Bartlett had rejected this argument. When Mr Fosberry provided his certificate, the council must have known that the requirements of paragraph 2 had not been complied with. It was aware that notice had not been served on Mr and Mrs Wood or Humphrey Farms Ltd, the registered owners. Mr Fosberry’s certificate stated that notices had been displayed on the site, but no direction had been given by the council pursuant to paragraph 2(2) that notice could be served by affixing it to some conspicuous object or objects on the land. He considered that that these failures to comply with the statutory procedural requirements of paragraph 2(2) did not render the council’s decision on the applications invalid. The purpose of the requirements was to ensure that each landowner and occupier affected by an application was made aware of it. All landowners and occupiers affected by the Fosberry application received notice of it in good time to enable them to consider the application and make representations to the council in respect of it. The council was entitled to waive the formal requirements and to determine the application as it did.

Mr Laurence argued that the council had no jurisdiction to make a decision pursuant to an

application made under section 53(5) if any of the paragraph 2 requirements had to its knowledge not been complied with. That was because in any such case, the resulting paragraph 2(3) certificate would be invalid.

However Dyson LJ thought that the lower court was correct on this issue. Applying ordinary public law principles it was necessary to ask whether and, if so, to what extent any substantial prejudice has been suffered as a result. On the facts of this case, the council was entitled to waive the failure to comply with the procedural requirements. In his view, the difference between the failure to comply with paragraph 1 (the first issue) and the failure to comply with paragraph 2 (the second issue) was fundamental because on the second issue section 67(6) was not in play.

His conclusion was that Parliament could not have intended that, if a paragraph 2(2) certificate was wrongly issued, it must follow that a determination on which it is based was invalid. The facts of the present case showed that the better approach was to examine the consequences of the defect in the certificate. If they were serious and the defective certificate has caused real prejudice, then it might be that the determination on which it was based should be declared to be invalid. But in his judgment, on the facts of this case, the judge had reached the correct conclusion for the right reasons.

Dyson LJ's overall conclusion was that the appeal in relation to both applications should be allowed. Lords Justices Thomas and Ward agreed.

FROM PARLIAMENT

Hansard Written Answers

Rights of way (column 586; 1 May 2008)

Mr. Robathan: To ask the Secretary of State for Environment, Food and Rural Affairs which Minister authorised the establishment of the Discovering Lost Ways project; and if he will instigate an investigation into the reasons for the project not achieving its objectives. [201791]

Jonathan Shaw: The Countryside Agency established the Discovering Lost Ways (DLW) Project following publication of the Rural White Paper Implementation Plan of March 2001, using funds provided by DEFRA under the authority of the then Environment Minister the right hon. Member for Oldham West and Royton.

Section 53 of the Countryside and Rights of Way Act 2000 provided for the extinguishment, in 2026, of public rights of way that existed prior to 1949, unless recorded by 2026 on the definitive map and statement maintained by the highway authority. The DLW project trialled the use of systematic data collection techniques to fulfil the Government's aim as set out in the 2000 Rural White Paper, of recording of such rights before 2026.

Natural England, the successor body to the Countryside Agency, has now reviewed the DLW Project. Its investigations found that even this systematic research approach could not remove the requirement for further detailed research into cases by the highway authority, and for a public inquiry to be held whenever the

recording of such a right was opposed. As a result it considers there is no prospect of processing of the evidence collected by the 2026 cut-off date and accordingly Natural England is terminating the research contract. I do not consider any further investigation to be necessary.

Natural England is preparing to convene a Stakeholder Working Group to consider the scope for an agreed package of the reforms in this area. The Government have endorsed this as an appropriate way forward, and will consider any recommendations from the Group in due course, although this does not mean that the Government are, at this stage, committing to further legislative reform. We have written to stakeholders indicating that we will not bring section 53 into effect at least until we know the outcome of this Group's work.

Gating orders (Column 731; 2 June 2008)

Tim Farron: To ask the Secretary of State for the Home Department how many (a) gating orders have been made under the provision of section 129A of the Highways Act 1980 and (b) public inquiries have been held into proposed gating orders when objections have been received from members of the public.

Mr. Coaker: Details of the number of "gating orders", granted for crime or antisocial behaviour purposes under section 129A of the Highways Act 1980 are collected by the Department for Environment Food and Rural Affairs and are

provided in the table placed in the House Library. These orders came into force on 1 April 2006. Details of the number of public inquiries that have been held into proposed “gating orders” when objections have been received from members of the public are not collected centrally.

Rights of way: vehicles (column 768; 2 June 2008)

Mr. Lidington: To ask the Secretary of State for Environment, Food and Rural Affairs if he will make a statement on the Government’s policy on byways open to all traffic; and what steps his Department plans to take in light of the Court of Appeal judgment in the case of *R on the Application of the Warden and Fellows of Winchester College and Humphrey Feeds Ltd v. Hampshire county council and the Secretary of State*.

Jonathan Shaw: The Government’s policy on Byways Open to All Traffic (BOATs) is set out in a document entitled ‘Use of mechanically propelled vehicles on rights of way—the Government’s framework for action’, which was published in January 2005. In this document we made clear our intention to legislate to curtail claims for vehicular rights of way, where those claims derive from historic use and dedication for use by non-mechanically propelled vehicles. These proposals now form the basis of Part 6 of the Natural Environment and Rural Communities Act 2006.

The case of *R on the Application of the Warden and Fellows of Winchester College and Humphrey Feeds Ltd v. Hampshire County Council and the Secretary of State* was essentially about what is meant by an: “application made in accordance with paragraph 1 of Schedule 14 to Wildlife and Countryside Act 1981”, within the meaning of section 67(6) of the 2006 Act and whether such an application, made for a byway open to all traffic, would have engaged the exceptions in section 67(3) of the Natural Environment and Rural Communities Act 2006 and thereby have preserved public rights of way for mechanically propelled vehicles that were the subject of such an application.

The Court of Appeal ruled that, for the purposes of section 67(6) of the 2006 Act, an application must be accompanied by copies of all the documentary evidence that the applicant

wished to adduce or rely upon and a copy of a map drawn to the prescribed scale.

It seems likely that there are many cases pending where, in light of this judgment, the conclusion will be that, even where there was an application for a BOAT made before the relevant date (as set out in section 67(4) of the 2006 Act), the requirements of paragraph 1 of Schedule 14 will have not been complied with, within the strict terms emphasised by the judgment, and therefore the public rights of way for mechanically propelled vehicles will have been extinguished.

Version 5 of Defra’s online guidance on Part 6 of the Natural Environment and Rural Communities Act 2006, which will be published shortly, will include revised guidance on this aspect of the legislation. We have also issued revised guidance to rights of way inspectors to enable them to deal accordingly with any cases before them.

Rights of way (Column 139; 10 Jun 2008)

Steve Webb: To ask the Secretary of State for Environment, Food and Rural Affairs how many unrecorded historic rights of way were discovered by his Department’s Discovering Lost Ways project; and if he will make a statement. [209177]

Jonathan Shaw: The Discovering Lost Ways project concentrated initially on parts of Cheshire, Shropshire and Nottinghamshire. Following the systematic examination of key historic documents, Natural England has compiled evidence relating to 219 possible unrecorded rights of way.

(Coastal Areas: Land and rights of way (Column 1006; 22 July 2008)

Andrew George: To ask the Secretary of State for Environment, Food and Rural Affairs (1) what estimate he has made of the quantity of private land affected by the creation of the coastal corridor proposed in the draft Marine Bill; (2) what estimate he has made of the amount of compensation payable to private landowners consequent on the creation of the coastal corridor proposed in the draft Marine Bill; (3) what estimate he has made of the cost of the creation of the coastal corridor proposed in the draft Marine Bill.

Jonathan Shaw: Natural England will consult with landowners before making proposals on the most appropriate positioning of the coastal route. The amount of private land affected by the creation of

the coastal corridor will depend on local decisions.

The draft Marine Bill makes no provision for compensation to be paid to private landowners for the creation of the coastal access corridor. Natural England's report to Government recommended that there should be a working presumption against paying compensation for the new right of access in view of the fact that legislation would be simply creating access rights over land rather than depriving landowners of property. The legislation has been drawn up so that implementation will take account of the interests of landowners and minimise any impact on businesses. Natural England will consult with landowners on any necessary conditions on access, for example for land management purposes.

Natural England has estimated a cost of £50 million over 10 years for implementing the coastal access corridor. This figure includes the costs of Natural England and local authority staff, the costs for establishing the coastal access corridor on the ground, and for ongoing maintenance during the implementation period.

Andrew George: To ask the Secretary of State for Environment, Food and Rural Affairs what representations he has received on the creation of a coastal corridor proposed in the draft Marine Bill.

Jonathan Shaw: 3,929 responses were received to the public consultation on the draft Marine Bill which closed on 26 June 2008. We also received about 11,000 postcards from members of the Ramblers' Association supporting the inclusion of coastal access provisions in the draft Bill. We are currently looking at the responses to the consultation and will publish a summary of the responses within 12 weeks of the consultation closing.

Andrew George: To ask the Secretary of State for Environment, Food and Rural Affairs what plans his Department has to improve access to coastal areas in the UK.

Jonathan Shaw: A proposal for Natural England to identify a coastal route and associated coastal margin around the English coast, to which there will be a right of access on foot, is contained in the draft Marine Bill. In Wales, the Welsh Assembly Government is considering appropriate statutory provisions for Wales which might be included in the final Bill. In Scotland, the Land Reform (Scotland) Act 2003 provides a statutory right of access to most land and inland water and access in Northern Ireland is covered by the Access to Countryside (NI) Order 1983.

DEPARTMENTAL AND PLANNING INSPECTORATE NEWS

Version 5 of the Defra guidance on the rights of way provisions in Part 6 of the NERC Act

This has now been published on-line at <http://www.defra.gov.uk/wildlife-countryside/cl/nerc06.htm>.

As with previous versions, it contains a brief overview of Part 6 and a section-by-section explanation of the key provisions in sections 66 to 72, together with flow charts illustrating the process of determining whether public rights of way for mechanically propelled vehicles are extinguished over any given route. It also includes a section on the CRWA restricted byways provisions (which also came into force on 2 May 2006) and explains how these work in conjunction with Part 6 of the NERC Act.

The main change in version 5 is revised guidance, in light of the Court of Appeal judgment in the 'Winchester' case (see above), on whether outstanding applications for BOATs

qualify for exemption under section 67(3) of the Act. There are also additions about (among other things): the recognition of higher rights other than those for motor vehicles; organised motorsport events; and the re-grading, deletion and extinguishment of restricted byways. There are also some amendments to improve clarity. A summary of significant changes from version 4 is appended to the guidance.

On 2 June, Dave Waterman, Head of Recreation and Access Policy at Defra, sent the following letter to all surveying authorities in England. The letter, in light of the 'Winchester' judgement, revokes previous advice given in his letter of 26 March 2007.

Sections 67(3) and 67(6) of the Natural Environment and Rural Communities Act 2006—compliance of definitive map modification order applications with Schedule

14, paragraph 1(b) of the Wildlife and Countryside Act 1981

Implications of the 'Winchester' case

1. On 26th March 2007, I wrote to all highway authorities in England setting out Defra's advice on what constitutes an application that is compliant with Schedule 14, paragraph 1(b) of the Wildlife and Countryside Act 1981, with regard to sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006.

2. This letter revokes that advice following the Court of Appeal judgment in the case of *R (Warden and Fellows of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and SoSEFRA*, 'the Winchester case'. The case was essentially about whether Hampshire County Council were right to have determined to make a definitive map modification order (DMMO) for a byway open to all traffic (BOAT), on the grounds that applications under section 53(5) of the Wildlife and Countryside Act 1981 had been made which engaged the exceptions in section 67(3) of the Natural Environment and Rural Communities Act 2006 (the NERC Act).

3. The judgment can be accessed through the following link:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/431.html>

4. The case turned on two key issues. I will deal with the second of these first, because there appear to be no implications arising from it in terms of the way in which local highway authorities currently deal with applications made under section 53(5) of the 1981 Act. This issue was whether, in order for an application to engage the exception in section 67(3)(b) of the NERC Act, the requirements of paragraph 2 of Schedule 14 to the 1981 Act would have to have been fully complied with. On this issue the Court of Appeal confirmed the view taken by the High Court that the surveying authority was entitled to waive these requirements provided that there was no prejudice to the interests of the parties.

5. Returning to the first issue, this concerned whether, in order to comply with the requirements of paragraph 1 of Schedule 14 to the 1981 Act and therefore satisfy the terms of section 67(6) of the NERC Act, a DMMO application for a BOAT made before the relevant date must have been accompanied by copies of all the documentary evidence that the applicant wished to adduce or rely upon and a copy of a map drawn to the prescribed scale.

6. Here the Court of Appeal ruled that, for the purposes of section 67(6), an application must be accompanied by copies of all the documentary evidence that the applicant wished to adduce or rely upon and a copy of a map drawn to the prescribed scale. It seems likely that there will be unresolved cases where, in light of this judgment, the conclusion will be that, even where there is a section 53(5) application for a BOAT made before the relevant date, the requirements of paragraph 1 of Schedule 14 will have not been complied with in the strict terms emphasised by the judgment and therefore the public rights of way for mechanically propelled vehicles will have been extinguished.

7. However, the judgment emphasised (in paragraph 55) that, in a case which does not turn on the application of section 67(6), it would be open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2). We take this to mean that, where a case does not fall under section 67(6) of the NERC Act, the local highway authority can still use their discretion to accept applications that are not accompanied by copies of all the documentary evidence that the applicant wishes to adduce or rely upon and a copy of a map drawn to the prescribed scale; this will include all applications for footpaths, bridleways and restricted byways.

8. Version 5 of Defra's online guidance on Part 6 of the NERC Act includes revisions to the guidance that covers this aspect of the legislation.

9. One question that has arisen in relation to this judgment, is whether, in order to engage the section 67(3) exception, a section 53(3) application that falls under section 67(6) of the NERC Act must have been compliant with paragraph 1 of Schedule 14 from the date it was first made, or whether it is sufficient for the application to have been compliant by the relevant date. In our view it is the latter. The reasoning for this is that the Court of Appeal judgment (in paragraph 38) confirmed that: "the purpose of section 67(6) is to define the moment at which a qualifying application is made because timing is critical for the purpose of determining whether subsection (1) is disapplied. The moment identified by Parliament as the relevant moment is when an application is made in accordance with paragraph 1."

Combined orders and the power to include modifications in other orders

Dave Waterman has written to local authorities to say that ‘It has been noted that the combined order regulations, “The Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008/442)”, do not include a required form for modifying maps and statements for the “modification order” part of any combined order.

The primary legislation permits the Secretary of State to prescribe the “method of showing” anything required by an order; but does not oblige him to do so.

The “method of showing” is prescribed for free-standing definitive map modification orders in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), and some authorities might have preferred it if, for the sake of consistency, Defra had separately provided for the (identical) method of showing in SI 2008/442. We shall consider whether to make further regulations so as expressly to prescribe the wording, etc. for the modification order part of a combined order.

Whatever is decided, however, our advice and expectation is that surveying authorities use the same “manner of showing” as is contained in SI 1993/12, or something to substantially like effect. This will enable surveying authorities still to make modifications to maps and statements by way of the combined orders process.’

Defra’s conclusion on the ‘right to apply for orders’

A further letter from Dave Waterman sets out the Department’s conclusions following their consultation on the proposed approach to implementation of the ‘right to apply’ for public path orders.

‘This letter sets out our conclusions following the public consultation on the legislation in the Countryside and Rights of Way Act 2000 that provides for a right to apply, and associated rights of appeal to the Secretary of State, for orders to permanently extinguish or divert certain public rights of way.

Background

Local authorities currently have powers to make extinguishment and diversion orders ‘in the interests of the owner, lessee or occupier’, and for school security. However, these powers are

discretionary and it can be difficult for landowners to persuade authorities to act, even where strong land management reasons exist. Some authorities simply refuse to consider requests, and many authorities decline to make orders which they suspect might be controversial. Applicants can also face long delays and high charges.

In recognition of these difficulties, a statutory right to apply was introduced.

The statutory right to apply for orders to permanently extinguish or divert certain public rights of way, and the associated rights of appeal to the Secretary of State was introduced by section 57 and schedule 6 of the Countryside and Rights of Way Act 2000 (CROW Act). This inserts new sections 118ZA, 118C, 119ZA, 119C, 121A, 121C, 121D and 121E (and consequential amendments) into the Highways Act 1980.

Summary

On implementation, the provisions would give certain landowners and occupiers a statutory right to apply to a local authority (or national park authority) for an order to extinguish or divert certain public rights of way across their land, and provide for the timely determination of all such applications.

The provisions would restrict the new rights to:-

- owners, lessees and occupiers of land used for agriculture, forestry or for the breeding or keeping of horses, in respect of public path extinguishment orders and public path diversion orders made under sections 118 and 119 of the Highways Act 1980; and
- proprietors of schools, in respect of special extinguishment orders and special diversion orders made under sections 118B and 119B of the HA 1980.

The rights of appeal would give applicants statutory rights of appeal to the Secretary of State at two stages: firstly, if a local authority refuses to make the order applied for, and secondly where (after having made an order) an authority refuses to confirm it or to submit it to the Secretary of State.

The provisions are prescriptive about how the new rights would operate in several important respects. For example, they require that application charges be fixed by the Secretary of State, and applicants would be entitled after four (or two months) to ask the Secretary of State to direct an authority to determine an application (or

to decide whether to confirm or submit an order to the Secretary of State) within a specified time.

The provisions also prescribe an appeal procedure, whereby if an applicant appeals against an authority's refusal to make the order applied for, the Secretary of State would be obliged to make an order and ensure that it is publicised. The order would then be processed as if it had been submitted to the Secretary of State for confirmation, with a public inquiry, hearing or exchange of written representations as appropriate.

Exercising the new rights would not guarantee that an applicant can obtain an extinguishment or diversion order, but they would ensure that the arguments, both for and against extinguishing or diverting a right of way, would be duly considered in a timely fashion.

Consultation

In May 2007 Defra undertook a public consultation exercise to seek views on a proposed approach to implementing the new rights through the making of regulations. It also sought views on the level of prescribed charges to be paid by applicants and the likely costs, risks and benefits, set out in detail in the partial Regulatory Impact Assessment. The 160 responses that were received were carefully considered and analysis of these responses compiled. An analysis of the responses is available on Defra's website, through the following link.

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

Considerations

Defra is committed to introducing a right to apply and appeal for extinguishment and diversion of public rights of way, particularly as a right of application and appeal already exists for definitive map modification orders.

However, we are keen to ensure that the new rights are introduced in a way which delivers real benefits for applicants, without imposing undue burdens on local authorities and others. In light of consultations with practitioners in local authorities and other key stakeholders, about how the provisions could be put into practice, and the responses from the wider public consultation, we have concluded that the legislation as it stands would not achieve this.

The key concerns are as follows.

- The rights of application and appeal would be limited to certain types of landowner.
- The application charges would have to be prescribed by the Secretary of State and there is

little or no scope to take account of local circumstances or for local authorities to use discretion in charging.

- Given that there is no guarantee of the outcome of an application (only that the local authority would consider the application fully and within a certain timescale), exercising the right could prove costly and be of doubtful benefit to applicants.
- If an applicant were to appeal against a refusal to make an order, the Secretary of State would be required to make an order and offer a public inquiry, even where the order clearly has no prospect of success (because the statutory criteria for confirming an order cannot be met).
- Local authorities could easily shift the burden and cost of order-making onto the Secretary of State simply by refusing all applications.
- Any application could result in a public inquiry if it receives just a single objection—regardless of how minor or misplaced the objection proves to be.

Conclusion

Because the primary legislation is so prescriptive, there is little room for manoeuvre in addressing these shortcomings through regulations. Whilst we remain committed to introducing a right to apply and appeal for extinguishment and diversion of public rights of way, we have concluded that further primary legislation would be required in order to make such a right work effectively. It is not clear at this stage when a suitable opportunity for the necessary primary legislation would arise. However, we will work with stakeholders to develop an alternative solution.

Editor's comment: Whilst it is clear that it may be some time before new legislation can be introduced, the concerns which are highlighted here suggest that any new provisions might make it generally easier for landowners and land managers to secure changes to the network, something which those who seek to protect the network from unnecessary change will have to watch very carefully.

The Planning Inspectorate Annual Report and Accounts 2007/08

This year's Annual Report reveals that in 2007–08 the Inspectorate in England determined 244 public path and definitive map modification orders and proposed modifications in a further 72 cases. Inspectors also prepared reports on 61

appeals under Schedule 14 to the Wildlife and Countryside Act 1981. 28 orders were rejected as invalid or withdrawn.

The Inspectorate has observed a slight rise in the number of orders submitted to them this year. Targets for dealing with orders are set by the Secretary of State at Defra under a Service Agreement and all were met—these are that 80% of all orders should be determined within a specified number of weeks. For written representations the specified number of weeks is 34, and 94% of orders dealt with by that means were determined in that time. For hearings the number of weeks is 36, with 92% being determined on time. For inquiries the number of weeks is 48, with 91% being determined on time. Although the Rules for Inquiries and Hearing came into force on 1 October 2007 no ‘new rules’ hearings or inquiries were held during the period of this report.

For the Inspectorate in Wales there is a curious report:

‘Rights of Way Orders—the numbers submitted remain steady but there is a possibility

Merthyr Tydfil County Borough Council will submit a number of orders next year. One of the orders dealt with this year sought to divert the Ceredigion Coastal path whilst repair works were undertaken.’ There is no explanation as to which provisions were being used here and if any readers can throw light on this we would be most interested to hear from you.

Published by the Stationery Office (TSO), ref: HC 629 and available from the TSO Box 29, Norwich, NR3 1GN; tel. 0870 600 5522; www.tsoshop.co.uk

Planning Inspectorate Consistency Guidelines

PINS has revised Section 11 of its Consistency Guidelines. This is the section which deals with the Finance Act 1910. Go to http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/consistency_guidelines_18.htm for a copy of the latest version.

FROM NATURAL ENGLAND

Discovering Lost Ways

Amanda Earnshaw, of the Access Projects Support Group at Natural England, has advised as follows.

‘Now that the Discovering Lost Ways [project] has been closed down I thought I had better update you on what is happening with all the evidence that was gathered during the course of the project.

We will be transferring project records from the Archive Research Unit (ARU) to Natural England. You will be aware that the ARU used hand-held cameras to capture photographs of the historic documents examined during the course of their research. Where relevant (parts of Cheshire, Shropshire and Nottinghamshire) these images have been incorporated into case files created by the ARU. These case files contain details of the evidence uncovered by the ARU in connection with the possible existence of public rights of way and we will be passing these on to the relevant local authority for consideration.

In addition to the case files a complete set of all the images captured by the ARU is being transferred as well as a database of associated catalogue information. This information is being

made up in DVD format and will also be available for those areas where research was not progressed to the stage of completing case files, eg Wiltshire. Copies of this information have been offered to the relevant archives and it will also be made available on request via our enquiry service. Details of what is available via the enquiry service and how to obtain copies will be posted on the website.

Where case files are to be passed to local authorities for consideration we have had early discussions about their intended approach to handling the information. For all the case files further work is necessary to set them in a local context so it is likely that after an initial assessment the local authorities will undertake some form of prioritisation in line with their normal procedures. We believe that the greatest benefit from the case files will be achieved by the local authorities working in partnership with users and land managers to turn the evidence into routes on the ground.

Natural England has no plans to make any further claims for modifications to the definitive map and statement based on the evidence gathered by the ARU.’

The Stakeholder Group

As we reported in the last edition of FPW, part of the package of proposals put forward by Natural England in the wake of the demise of the ‘Discovering Lost Ways’ project was a review, with stakeholders, of the legislation. An announcement about the ‘Stakeholder Working Group on Unrecorded Rights of Way’ was made in July. The new working group will be chaired by a former civil servant, Ray Anderson. Natural England has said that it wishes the Group to:

- consider the issues and difficulties associated with the recording of pre-1949 public rights of way that are not currently shown on the definitive map and statement maintained by highway authorities;
- work together with the aim of reaching agreement on a balanced package of strategic reforms in law and procedure that in the Group’s view would bring real benefit to the various interests potentially affected by the claimed existence of such rights.

In announcing the Group, Sir Martin Doughty, Chair of Natural England, said: ‘The new group has been established as a result of the review of the Discovering Lost Ways programme. The review revealed that the regime for processing historic rights of way claims is not fit for purpose, with lengthy backlogs and public inquiries required even where there is cast iron evidence of unrecorded public rights. We want to create a new system that works for all involved.’ However, this view that the definitive map system is broken is

not shared by the user groups, or by many local authority officers.

Natural England say that ‘Agreeing a balanced package of reforms between the main stakeholders is a precursor to achieving significant change in this area ...’

The group comprises:

Ray Anderson (chairman)

Representing farming, land management and business interests

Andrea Graham (National Farmers Union)

Alasdair Mitchell (Independent)

Andrew Shirley (Country Land & Business Association)

Sue Steer (Royal Institute of Chartered Surveyors)

Gwyn Williams (Royal Society for the Protection of Birds)

Representing rights of way users

Kate Ashbrook (Open Spaces Society)

Janet Davis (Ramblers’ Association)

Robert Halstead (Independent)

Alan Kind (Byways & Bridleways Trust)

Mark Weston (British Horse Society)

Representing local authority interests

Richard Gething (National Association of Local Councils)

Alex Lewis (IPROW)

Rosalind Shaw (Local Government Association)

Mike Walker (County Surveyors Society)

John Thorp (Warrington Borough Council)

The Stakeholder Working Group’s first meeting will take place on 1 October and will be attended by the Defra Minister, Jonathan Shaw, who is taking a close interest in the matter. Natural England hopes that the group will produce a final report by the end of 2009.

NEWS

Repeal of the 2026 cut-off date

Section 53 of the Countryside and Rights of Way Act 2000 is intended to prevent any claim being successfully made for the addition of a right of way to the definitive map after 1 January 2026 if the claim is based only on documentary evidence of the pre-1949 existence of the rights. User groups were unhappy with this provision from the outset; but the demise of the Discovering Lost Ways project, which we have reported elsewhere, has caused the RA to reinvigorate its campaign for the repeal of the so-called ‘cut-off date’. Many of the ways threatened by this provision are in everyday

use. So far all that the government will say is that it will not commence the provisions until such time as the Stakeholder Group (see p.22), which is being set up to look at the definitive map legislation in the wake of the closing down of Discovering Lost Ways, has reported. Please help by signing our petition on Number 10 Downing Street website at

<http://petitions.number10.gov.uk/repeal2026/>.

ROWIPs

Further to the PQ about which councils had published ROWIPs which we published in the last

issue of FPW (25/3 p.6), we are pleased to announce that Oldham MBC did, in fact, publish its ROWIP on 21 December last year and that Bury MBC published its plan on 1 December. There are bound to be others whose publication dates were not picked up in time for the PQ.

Training courses

Rowtac Ltd provides training and consultancy in public rights of way and countryside access in England and Wales. It is run by John Trevelyan, co-author of the 'Blue Book'. Training courses covering two areas are currently on offer:

- how rights of way can be changed (for example by diversion orders) or their use restricted (for example by gating orders);
- how rights of way come into being and are recorded in definitive maps and statements.

Changes to rights of way and restricting their use (12 November 2008, Cardiff; 20 January 2009, Manchester).

Definitive maps and modification orders (8 October 2008, Manchester; 2 December 2008, London; 4 February 2009, Cardiff).

The course fee for each one day course is £293.75. Full details, including booking forms, are on the website (www.rowtac.co.uk).

The following IPROW courses will be running:

Law and Practice I Residential two day course covering the law and practice of making orders to change the definitive map and public rights of way. Complementary to but independent of Law and Practice II. (6/7 October 2008; Glenfall House, Gloucestershire; £470 non-IPROW members; £400 members.)

Finance Act and Tithe Evidence Looks at the records of the Finance Act 1910 and tithe awards to illustrate how they can be used in public rights of way research. This course takes place at the National Archives in Kew so use is made of real materials to illustrate what can be found, as well as those many instances where little is revealed. (28 October 2008 (£285 non-IPROW members; £215 members.)

Law and Practice II Residential two day course covering the law and practice of maintenance and enforcement in public rights of way. It is

complementary to but independent of Law and Practice I. (4/5 November 2008; Knuston Hall, Northants; £470 non-IPROW members; £400 members.)

Successful Public Path Orders—meeting the tests Looks at the tests that should be considered, whether they can be met, and making the order under the appropriate legislation. With this preparation for a defensible order, the course then looks at writing the statement of case and proof of evidence for public inquiry or other processes of determination. (11 November 2008, Derby; £285 non-IPROW member; £215 members).

All prices are exclusive of VAT. Full details and booking forms available at www.iprow.co.uk

Finally, the next two Rights of Way Law Review Courses are:

Rights of Way Improvement Plan Projects versus Statutory Duties—striking the right balance (24 September 2008) and

Preparing to close the definitive map in 2026 (19 November 2008)

All RWLR courses take place at Wolfson College, Oxford. For further information contact RWLR at 01249 740273 or e-mail RWLR@dial.pipex.com Their website is currently undergoing reconstruction.

Request for information

Dave Ramm from RA Berkshire writes: 'Recently new yellow waymark arrows have been appearing in south Oxfordshire. Unfortunately when we look at the OS Explorer we find ourselves unable to reconcile these waymarked paths with those on our map. Confusions reigns for a while until some bright spark gets his specs out and takes a close look at the waymark.

There we read the words 'Footpath' and (quite often sideways or even up-side-down) 'Permissive'. At other times we have simply taken the path assuming it was the right of way, only to find ourselves hopelessly lost.

For the past 30 years permitted paths have been signed green (or white on green) in Berks and Hants. Unfortunately guidance from Natural England suggests local authorities make their own decision regarding the colour.

How widespread is this practice? Which local authorities have adopted yellow waymarks for routes that are not actually public rights of way? If you have any information on this please contact me.' (daveramm@hotmail.co.uk)