



Footpath Worker

**Volume 26, No.2
August 2009**

ISSN 0140-8690

**A bulletin for all concerned with the care and
protection of public rights of way**

**Contributors to this edition: Janet Davis (editor), Terry Norris,
Eugene Suggett**

**Published by
Ramblers
2nd Floor Camelford House
87-90 Albert Embankment
London SE1 7TW**

www.ramblers.org.uk

ramblers@ramblers.org.uk

CONTENTS

DEFINITIVE MAP MODIFICATION ORDERS

Use of playing-field path ‘as of right’, not <i>precario</i> —footpath added at Leckhampstead, West Berkshire	3
Unchallenged vehicular use leads to addition of BOAT	3
Removal of bridges not same thing as loss of right of way by natural erosion; and more paths saved by <i>Godmanchester</i> principles	4
Strategic path saved by residents’ association in collaboration with Ramblers	6
Bridleways or BOATs? Crucial evidence from NMUs in Derbyshire	9

PUBLIC PATH ORDERS

TCPA diversion orders not justified	11
-------------------------------------	----

FROM THE COURTS

The <i>Horvath</i> case: European Court makes ruling on cross-compliance	12
Way cleared for missing link on South Downs way	15
TROs made by national park authority quashed by High Court	18

FROM PARLIAMENT

20

NEWS FROM THE PLANNING INSPECTORATE AND DEFRA

22

ARTICLES

Public rights of way and agricultural subsidies	24
---	----

TRAINING COURSES

25

NEWS

Changes to public services at National Archives	26
GLEAM website re-launched	26
Blue Book cumulative supplement	26
Natural England Stakeholder Working Group	26

LETTERS TO THE EDITOR

27

OBITUARY

28

The Ramblers had been re-branded and so too has Footpath Worker. However, the new look does not herald a change in the content of our bulletin. We shall still aim to bring you summaries of interesting definitive map modification and path order decisions as well as court judgments and news from Parliament, government departments, the Planning Inspectorate and elsewhere. Contributions are always welcome (articles and letters to the editor), and please do let us know if you think there are aspects of rights of way work of which our coverage is inadequate. Finally, please do accept our apologies for the late appearance of this edition—to make up for that this is a bumper 24-page edition which we hope will reach you in time to provide some summer reading.

Janet Davis
Editor

The Ramblers’ Association is a registered charity (England & Wales no.093577, Scotland no SC039799) and a company limited by guarantee registered in England & Wales (no 4458492)

DEFINITIVE MAP MODIFICATION ORDERS

Use of playing-field path 'as of right', not precario—path added at Leckhampstead, West Berkshire

West Berkshire Council (WBC) made this order under s 53 of WCA 1981 to add to the definitive map and statement a public footpath, Footpath 17, which crossed Leckhampstead playing field. Objections led to a public inquiry before Inspector Mark Yates on 31 March 2009. No objectors attended. After adjourning so that they could be contacted, when it turned out that they either were unavailable or did not wish to attend, the Inspector proceeded with the inquiry.

The Inspector accepted WBC's contention that July 2004 was the date on which the public right to use the way was brought into question, that being when the Leckhampstead Walkers (who made the application) and others noted a locked gate at the start of the path. A sign, 'No pedestrian access', was displayed for a short time as well.

Ten user evidence forms testified to use during the 20 years before to that date, with three signatories giving evidence at the inquiry. A petition was presented too, though the Inspector gave it little weight as it did not speak much about actual use. Use was mainly recreational, sometimes as part of a longer circular walk. Some of the objectors said that little use had been observed. It was true, said the Inspector, that levels of use were not particularly high, but there was evidence of use throughout the period, often regularly. Witnesses also mentioned use by others, such as family members. Aerial photographs were produced which showed a worn strip only on the most recent, 2003; but the Ramblers local representative supplied a statement that the route was well-used when its status was brought into question. By the user evidence, the Inspector was satisfied that there had been public use throughout the relevant period.

Some objectors expressed the view that since the land was a playing field owned by Leckhampstead Parish Council, permission existed to walk over the whole of the field, so use was not as of right. Moreover the title documents stated that 'the

land ... shall not be used otherwise than as a playing field or recreation ground....'

WBC said that no express permission had been given for people to walk over the field, and the title documents did not grant a right: so any use was 'as of right', rather than by right or permission. A supporter pointed out that football teams had to apply for permission to use the field, as did the holders of fêtes and the like. The Inspector agreed that no permission existed, the terms of the title-documents being no more than a restriction on future uses. They granted no permission, and neither were any signs to that effect put up.

It was true that there seemed to have been a general acceptance locally that people could use the field, but a distinction could be drawn between people using the claimed route and those who used it for other activities.

The Inspector noted that football games were played there sometimes, and people walked round the edge of the pitch so as not to disrupt play, and that there was an annual feast and bonfire on the field, but did not regard these as significant interruptions to use. On balance the first part of the test in s 31(1) of HA 1980 was met.

Concerning whether there was evidence of no intention to dedicate, he noted that the parish council had not provided details of any measures taken to indicate no intention; and no users were aware of actions challenging their right. A minute from a parish council meeting appeared to accept the existence of a right of way.

On balance he found that a public right of way existed, and confirmed the order with certain technical modifications.

Ref: The West Berkshire District Council Footpath 17 Leckhampstead Modification Order 2007. PINS ref: FPS/W0340/7/9, order decision issued 28.04.09

Unchallenged vehicular use leads to addition of BOAT

Cornwall CC made this order to add to the definitive map and statement a byway from Byway 48 to Byway 49 at Perranzabuloe. An objection was made, in consequence of

which on 6 April 2009 Inspector Helen Slade opened a public inquiry. In view of the absence of the objector or his representative she then adjourned it while attempt to no avail was made to contact him. The cases for the parties together with appendices having already been submitted, the Inspector asked for views on whether it was acceptable for her to determine the matter on the written evidence. There was disappointment at this from the many who had attended to present evidence of their use, but since it was agreed that all the evidence they wished to submit was in the Inspector's possession, she closed the inquiry and arranged for the objector's views on the proposal to determine the matter this way to be sought, though no reply was received.

BOAT 48 ran from Reen Manor, past Higher Reen Farm, and on to join a road north of Reen Cross. It linked with BOAT 49 at two locations, once at Higher Reen Farm and again 300m to the south, BOAT 49 forming a loop. BOAT 49 extended (as a bridleway) to the north-east, terminating at the county road near Pencrennow Farm. The order route formed an additional link between the byways, forming the third side of a triangle which framed an uneven area overgrown with vegetation, some of it extending over BOAT 49.

Higher Reen Residents Association applied to the CC in October 2004 for the way to be added. This had followed several incidents concerning the use of the way, and the published intention of Mr Jayaraj, the new landowner, to build a wall on the land over which the way ran, and his challenging of some users. The Inspector was satisfied that it was these incidents that brought the way's status into question and that there had been no earlier interruption material to the present inquiry.

11 people or families claimed to have used the way in vehicles—chiefly tractors or cars—at varying levels of frequency from 1949 to 2004. Some said they used it daily, some only occasionally, and some on foot or horseback as well as in vehicles, and some on foot only, or horseback. No evidence had been submitted which significantly contradicted the user evidence or cast any doubt on its veracity.

The Inspector said that the owner was not in a position to challenge the user evidence directly, having owned the land

only since the end of the material period. His statement seemed to imply that there was no need for anybody to go across his land, and that only recent development along the other stretch of BOAT had caused the use of the claimed one. The Inspector found that other evidence did not support that theory. Aerial photographs dated 1988, 1995 and 1999 showed a route corresponding to the order-route. So she found, in the absence of evidence to the contrary, that the user had occurred. She also found that there was no evidence that the use was not public: some of the users owned properties locally but it was not suggested that they had private rights of access. Thus she was satisfied that there was public use over 20 years, a significant proportion in motor vehicles.

She found no evidence of any act prior to 2004 demonstrating no intention to dedicate.

S 67 of the NERC Act 2006 extinguished all previously unrecorded rights for mechanically propelled vehicles, except in certain circumstances, one of which was where an application for the recording of the rights was made prior to 20 January 2005—provided the application was in accordance with the provisions of Paragraph 1 of Sch 14 to WCA 1981 (*R on the application of the Warden and Fellows of Winchester College and Humphrey Feeds Ltd v Hampshire CC and SSEFRA* [2008] EWCA Civ 431). The CC considered that the application accorded with those provisions; and no evidence had been submitted to the contrary.

It had been submitted that a barn, now demolished, would have obstructed the route. The Inspector found that it was sited so as not to have that effect, so her decision was not affected by it.

She therefore confirmed the order.

Ref: The County of Cornwall (Addition of Byway from Byway No 48 to Byway No 49 Perranzabuloe) Modification Order 2008. PINS ref: FPS/B0800/7/211, order decision issued 06.05.09

Removal of bridges not same thing as loss of right of way by natural erosion; and more paths saved by Godmanchester principles

Cumbria CC made these orders, 'A' and 'B', under s 53(2)(b) of WCA 1981 to add to the

definitive map and statement two footpaths at Grange Over Sands. Each route crossed the operational railway which ran between Grange Over Sands and Barrow-in-Furness. Prior to 2006 when they were removed because they were said to be unsafe, footbridges at Clare Lane and Berners Lane carried the paths over the line to the promenade from the town. Network Rail objected and the matter came before Inspector Mr Alan Beckett who held a public inquiry commencing on 13 January 2009.

It was common ground that until 2006 the routes had been used by the public—there were 71 user evidence forms—and that 2006, when the Grange Civic Society applied for the routes to be added, was the date of calling into question for the purposes of s 31(2) of HA 1980. The main issues were whether use of the footbridges was as of right or merely by permission, because since 1971 the bridges had been subject to the terms of a licence between British Railways Board ('BRB') and Grange Urban District Council ('GUDC') and its successor South Lakeland District Council ('SLDC'); and, if the use had been as of right, whether there was sufficient evidence of lack of intention to dedicate.

The railway was constructed under the Ulverston and Lancaster Railway Act 1851. The deposited plans showed there were no public or private rights of access that needed to be accommodated at Clare or Berners Lanes. From the OS edition of 1891 it appeared that by that year Clare Lane had been laid out with a bridge linking it with the sea-front, though it was not clear by whom. SLDC acknowledged that it was owned by GUDC with ownership transferred to SLDC upon reorganisation of local government in 1974. The Berners Lane bridge appeared to have been built by the middle part of the twentieth century, probably in connection with a development of the Lido opened in 1932 (the wording of the souvenir programme for that event mentioned a bridge).

Network Rail submitted that an agreement made in 1971 between BRB and GUDC showed that the use by the public was by licence. Moreover the 1971 agreement had with it a letter suggesting that this agreement was supplemental to another of 1933, showing that use ever since then was by licence, not as of right, even though

its terms were unknown. The 1971 agreement set out GUDC's liability to maintain, repair, renew, alter or remove the bridges. Clause 4 of the first schedule related to Clare Lane bridge and permitted GUDC 'to have use and maintain a footbridge six feet in width (with approach thereto) over and across the Board's railway and property as indicated ... for the convenience of the public at large.' Clause 5 related to the Berners Lane bridge, permitting GUDC 'to have use and maintain a footbridge six feet in width across the Board's railway and property south of the footbridge mentioned in Clause 4.' Clause 2 provided for the determination of the agreement by 12 months' notice being given on either side; Clause 8 required GUDC to remove the bridges following determination. That word 'have' in clauses 4 and 5, contended Network Rail, indicated the ownership of the bridges and meant that public use of them would therefore be at the invitation of GUDC as a licensee of BRB, and so use was by permission and not as of right, and the bridges could have been removed at any time. To this the CC replied that there was nothing in the language of the agreement that determined ownership of the bridges; that the terms of the agreement were about protecting the railway from liability for damage or loss arising from use; and that the agreement was silent about use being by permission, whether express or implied.

The Inspector accepted that the termination clause could have been invoked at any time during the 20-year period of user. But, he pointed out, this did not occur; and he was not persuaded by Network Rail's submission that the agreement showed that use of the bridges was by invitation. He noted, however, that by 1971 it was more likely than not that both parties were aware that the bridges were in public use and it would have been possible for either party to state in the agreement that such use was by permission.

He therefore concluded that that the user evidence showed uninterrupted public use as of right for a period in excess of 20 years ending in June 2006 and was sufficient to raise the presumption of dedication.

Turning to the issue of whether there was sufficient evidence of lack of intention to dedicate, the Inspector noted that there was no evidence of a statutory declaration under

s 31(6), or of notices inconsistent with highway status erected. Network Rail had submitted that the general public's ignorance of the contractual arrangement between the railway and the local authority through the 1971 agreement should not give rise to the creation of public rights. In this matter, said the Inspector, he would be guided by the decision of the House of Lords in *R oao Godmanchester Town Council and Drain v Secretary of State* [2007] UKHL 28, in which the terms of an agreement between landlord and tenant were insufficient to satisfy the landowner's proviso as they were private matters not likely to come to the attention of the users of the way. In the Inspector's view, the 1971 agreement was of a similar nature to that of the tenancy agreement in *Godmanchester*, except there was not even a clause requiring GUDC to prevent the acquisition of rights. He would attach no weight to this agreement as evidence of no intention to dedicate.

He found that given the history of the bridges, it was more likely than not that in taking over the maintenance of Clare Lane bridge in the 1890s and in building Berners Lane bridge in the 1930s, GUDC intended at the outset to provide bridges over the railway for the benefit of the public as a means of civic improvement and for access to recreational and other facilities otherwise isolated from the town by the railway. If the railway company had a contrary intention, there was no evidence that they attempted to convey it to users. Nor was there any evidence of attempts being made during the material 20-year period by Network Rail or SLDC to show the public that use was by permission. And nobody recalled being stopped or turned back, or seeing notices inconsistent with dedication. There was insufficient evidence of lack of intention to dedicate, the Inspector found.

Network Rail submitted that the routes could not be regarded as public rights of way as the paths no longer physically existed, the bridges having been removed. The Inspector did not consider this correct. Dedication of a public right of way under s 31(1) was considered to have taken place at the beginning of the period in question. So here a public right of way would have come into existence in 1986 (when the bridges were in place). So it was possible to record the ways as public even though they could

not currently be used. SLDC had originally made the submission (now withdrawn) that any rights that had existed would have been lost with the removal of the bridges, likening the situation to cases where a coastal or river-bank right of way is extinguished when the soil supporting it collapses through erosion. The Inspector said that in his view the conscious removal of bridges (even though it was done because they were perceived as unsafe) was significantly different from loss of a way through natural processes. Here, the bridges could be rebuilt as the land supporting them remained in place. He ruled that removal of the bridges did not remove the rights of way.

He therefore confirmed each order with minor modifications including the insertion in the schedule of the words 'via a bridge'.

Ref: The Cumbria County Council (Parish of Grange Over Sands: District of South Lakeland) Definitive Map Modification Order No 1 2008 ('Order A') and the Cumbria County Council (Parish of Grange Over Sands: District of South Lakeland) Definitive Map Modification Order No 2 2008 ('Order B'). PINS refs: FPS/H0900/7/56 and FPS/H0900/7/57, order decision issued 09.02.2009

Strategic path saved by residents' association in collaboration with Ramblers

Bourne End Residents' Association have succeeded in securing the addition to the definitive map of a strategic footpath at Wooburn, Buckinghamshire. It is a 360-metre route along the disused railway from Cores End Road to Willows Crossing, Bourne End, and, with two other paths to which it connects, it provides an important off-road link between the two villages of Bourne End and Wooburn. The well-used route became obstructed in 2002, which led Jim Penfold, chairman of the residents' association, to approach the OSS and the Ramblers for advice on how to proceed. He was advised to make an application under s 53(5) of WCA 1981, based on 20 years' user by the public under s 31(1) of HA 1980 or else under common law, for the path to be added to the definitive map. But Bucks CC rejected it, so, further advised by the Ramblers, the

association made a Sch 14 appeal to the Secretary of State. This was successful.

So it was that on the direction of the Secretary of State, Bucks CC made an order under s 53(2) of the 1981 Act to add the footpath. The landowner, Mr Charles Pitcher, of Lude Farm, Penn, and others, objected; and Inspector Mark Yates opened a public inquiry on 13 January 2009. At this the CC took a neutral stance, leaving Mr Penfold to present the case for addition.

In May 1970 the railway line along which the route ran was closed to passenger trains. It was not clear when the line was subsequently dismantled, but the evidence suggested that this had been done by 1974. The land continued to be owned by the British Railways Board 'BRB' or its successor until 1993 when it was sold to Mr and Mrs Pitcher.

Mr Penfold submitted that the date of bringing the way's public status into question for the purpose of s 31(2) of HA 1980 was 2002, the date of his application. But evidence was produced of other possible dates: correspondence involving the BRB and Wooburn Parish Council ('WPC') in the early 1990s, and the erection of fences, and the lodging of a statement and plan by Mr and Mrs Pitcher in 1993. The Inspector was not satisfied that the correspondence was directed at the public, and he had concerns about the validity of the statement, concerning which more below. He concluded that on balance 2002 was the date on which the right was brought into question, and that it needed to be demonstrated that the public had used the way uninterrupted as of right during 1982–2002.

Mr Penfold handed in no fewer than 153 user evidence forms together with additional letters and statements, and called 16 witnesses testifying to use of the route, who confirmed they used the route primarily for recreational purposes, often in conjunction with existing highways as part of a longer or circular walk; some evidence also related to accessing schools and shops. Mr Pitcher (who did not dispute that the route had been used during the material time) pointed out certain discrepancies between a few of the earlier and later statements by a few of the users. The Inspector agreed, but did not consider that they significantly undermined the user evidence. He found clear evidence of consistent and frequent

use by a large number of local residents with nothing to show that they deviated much from the route on the ground, and that there were no details of any significant interruption. Though there was evidence that some fencing was in place in connection with the claimed route, it appeared that use was not prevented by it; and notices erected in 2001 in connection with the foot and mouth outbreak should not be viewed as an interruption for present purposes. The first part of the test was satisfied.

The Inspector turned to consider whether any landowner had demonstrated lack of intention to dedicate. First, however, he considered the issue of compatibility with the role of BRB. Since the material period commenced 12 years after the line's closure and dismantling, he did not consider dedication would be incompatible with BRB's role.

Mr Pitcher submitted that at times, fences were erected at a certain point which signaled a lack of intention to dedicate by BRB following closure of the line, and the Inspector had noted remnants of fencing during his site-visit. A Mr Sabine testified to the existence of a fence made of concrete posts connected by wire, approximately four feet high, of which he produced a photograph taken in 1971 and which, he said, remained in place till 1978, and other witnesses including some of the users mentioned this fence. But the users, including the ones who spoke about the fence, said that it did not hinder or prevent them using the way. Overall the Inspector accepted that this fence was erected on the closure of the line, but had doubts about its effectiveness in deterring access and as to whether it existed at all by the start of the material period. Mr Pitcher said that at some stage it was replaced by a chain-link fence, believing this to have been done in 1981 in connection with the application for planning permission mentioned below. A Mrs Stevens also spoke about this fence, but said too that it had been vandalised by children within a year, and admitted in cross-examination that it might have been put up in the 1970s. A Mr Brown said that he had been contracted to repair this fence in 1988. But there were no available records about these works which could have confirmed their actual dates or location, while a letter of 22 September 1988 suggested that they took place elsewhere

than on the route. These fences could well be construed as evidence of lack of intention to dedicate, but evidence about them was imprecise and it was not possible to determine how long they remained in place. There was also a row of RSJ posts, but there was no suggestion that these deterred pedestrian access and the Inspector did not consider they were meant so to do, though may have been placed to prevent other forms of user.

In the light of all this evidence the Inspector found it likely that access was available shortly after whatever repairs were made. He noted too that a letter dated 1990 from BRB to WPC actually implied that the public could access the claimed route. Though it was not necessary for a landowner to show lack of intention to dedicate throughout the period of claim, he was not satisfied that a fence was ever in place for long enough to make the public aware that the landowner lacked intention.

A publication showed that a metal railway sign stood near the route at some point, though it was not possible to tell from it what it said. The few witnesses who remembered it said that it read 'trespassers will be prosecuted'. The Inspector could not conclude that it was in place during the material period; but, anyhow, it was erected with reference to the operation of the railway, and not necessarily in connection with use made after the railway closed.

Mr Pitcher pointed out that outline planning permission was granted in October 1981 for the construction of two houses, the permission remaining valid for the first few years of the material period; and that objections then placed by Bourne End Residents' Association and WPC made no mention of the route. But, said the Inspector, there was then no recorded path, so there was no need for him to consider why users did not object. Anyhow, as the application was for outline permission, it would not be possible for those who read the notices to determine that the path was not to be accommodated; further to that, there was nothing to suggest that the applicants (BRB) had any firm proposals for the site beyond securing the permission and disposing of the land. Overall, the Inspector did not consider that the application—submitted before the period of claim—or the fact that the resulting permission existed for part of the period

constituted evidence of no intention to dedicate.

A further issue raised by Mr Pitcher was that there was completed in April 1988 between BRB and WPC an agreement which stated that it allowed members of that council and "its employees, agents or duly authorised persons to enter onto the Board's land on the disused branch line . . . for the purposes of carrying out a scheme of planting and environmental improvement", and this showed that user was by permission, not as of right. The Inspector said that this merely authorised certain persons to access the land to carry out environmental works. Moreover, said the objector, there was a letter of March 1990 from BRB complaining to WPC about a signpost which the latter had incorrectly placed pointing to the claimed path, and requiring its removal within 14 days, failing which the land would be securely fenced off. This, he said, showed no intention to dedicate, a thing evidently accepted by WPC, who wrote back in October 1990 accepting that there was no existing right of way. But, said the Inspector, there was no evidence that this correspondence was communicated to users of the route. It was true, as the objector had said, that the Inspector in the Sch 14 appeal had reached a different conclusion; but that was before the decision of the House of Lords in *R oao Drain and Godmanchester Town Council v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28.

Finally the objector referred to a statement and plan which in November 1993 he had deposited with Bucks CC. It acknowledged the existence of other paths on the land, but not this one; so this, too, was evidence of no intention to dedicate. The Inspector disagreed, since the procedure had not been followed through, since no declaration had been made within six years of it to the effect that no additional ways had been dedicated since the deposit. Here, no statutory declaration was made till 2004, which was both after the six years had expired and the date on which the way's public status was questioned. Mr and Mrs Pitcher failed to adhere to the requirements of s 31(6) of the 1980 Act. For these reasons the Inspector did not accept that the deposited statement and plan constituted a

declaration that there was no intention to dedicate the claimed route.

Concluding, the Inspector found that there had been consistent and regular use of the route by the public throughout the claimed period, and that on balance none of the measures referred to by the objectors, taken alone or together, was sufficient to make members of the public aware that there was no intention to dedicate. He therefore concluded that a public footpath subsisted and that there was no need to address the issue of common law dedication.

Consequently he confirmed the order with a modification to specify a width-measurement of 1.8m.

Ref: The Buckinghamshire County Council (Parish of Wooburn) Definitive Map Modification Order 2007. PINS ref: FPS/P0430/7/27, order decision issued 16.02.09

Jim Penfold said: 'We are delighted to have won this vital path which, when joined to other dedicated footpaths, links the two villages of Bourne End and Wooburn, enabling people to walk safely between them, away from the roads. We are especially grateful to the Ramblers' Association for its invaluable legal and technical advice on claiming paths, and to the Open Spaces Society for its support.'

Bridleways or BOATs? Crucial evidence from non-motorised users (NMUs) in Derbyshire

Derbyshire CC made two orders to add bridleways to the definitive map (and to upgrade a linked length of footpath to bridleway status), along Silly Dale (order A) and from Trot Lane to Foolow Road in the parishes of Great Hucklow and Grindlow (order B).

There was a total of three objections to these orders, and the first public inquiry was held by Inspector Barney Grimshaw in June 2008. The objections were made on the grounds that evidence showed that these routes should be recorded as BOATS. Both documentary and user evidence was adduced. The Inspector summarised the documentary evidence as follows:

- The enclosure records clearly showed that part of one route (Order B) was a

bridleway and suggested that the remainder of the order routes were regarded as being of a similar status.

- The colouring of the routes on the Tithe Maps was suggestive of use by vehicles but was not necessarily evidence of the existence of vehicular rights. The annotation suggested that public rights of some kind existed.

- No firm conclusion could be drawn from the Finance Act maps.

- A number of maps from 1824 onwards provided good evidence of the existence of the routes from that time but did not help in determining their status.

- Other highway records (eg 1929–30 'handover maps') were unclear and incomplete.

- A sales catalogue dated 1878 in which the whole of the village of Grindlow and the surrounding land were offered for sale showed most of the order routes either outside the land or forming the boundary. The objectors contended that since access with farm vehicles would have been essential, the routes must already have been regarded as public. The Inspector considered this to be suggestive of the evidence of public vehicular rights, not conclusive.

Overall he considered that the documentary evidence showed the routes to be public bridleways at least, with the possibility of public vehicular rights existing over them.

In respect of user evidence, there had been no challenge to use prior to 2003 when the applications for the routes to be added to the map as bridleways were made. The relevant 20-year period required for dedication to be presumed was 1983 to 2003. During this period there was a great deal of evidence of public use of the routes, both with and without vehicles. The Inspector considered that this raised the presumption that there were dedicated as public rights of way at BOAT status, with insufficient evidence during that same period of any lack of intention on the part of landowners to dedicate them as such.

The Inspector then considered how the NERC Act impacted on this conclusion (did any of the exceptions which meant that motor vehicular rights were saved from extinguishment apply?). Firstly, was use of the routes in the five-year period prior to the

commencement of the Act (2 May 2006) mainly in mechanically-propelled vehicles (MPVs)? Although more of the people who had completed forms had been in motor vehicles than otherwise, their frequency of use was low. Those living nearby stated that use on foot was by far the most prevalent form of use and, in addition, NMUs had not considered it necessary to complete user forms. On the balance of probability the Inspector did not consider that the main use by the public in the period 2001–2006 had been in motor vehicles, so he did not consider that the exception applied other than to a short section of the Order B route which served a farm and bed and breakfast business. However that length of path did not fit the BOAT definition set out in s 66 of WCA 1981 (it was not used mainly for the purpose for which footpaths and bridleways are so used), and in surface and character it was similar to the ordinary public roads of the area. He therefore proposed to delete that length of route from the order.

A further exemption from extinguishment of MPV rights applies to routes shown on the list of streets as highways maintainable at public expense (s 36(6) HA 1980). In this instance, the Order A route and the western part of the Order B route were so shown. MPV rights were therefore preserved on those lengths of path.

S 67(3)(a) of the NERC Act provides that MPV rights are preserved if an application was made prior to 20 January 2005 to show the route in question as a BOAT. Applications in respect of these routes were made in 2003. Whilst that might indicate that the eastern end of the Order B route would be exempt from extinguishment, it fell foul of the *Winchester* judgment (see FW 25/4 p10).

Other concerns relating to damage caused by MPVs, difficulties and dangers caused to other users by MPVs and related matters were also raised but the Inspector pointed out that he could not give these any consideration within the terms of the WCA 1981.

In the light of all relevant matters, he proposed to modify the orders to show the whole of the Order A route (Silly Dale) as a BOAT. In respect of the Order B route, he proposed to delete from the Order the length which did not meet the BOAT definition, and to amend the description of the remaining

routes to show the western end as a BOAT, and the eastern end as a restricted byway. These modifications required advertisement.

Following advertisement of the modification seven objections were received and a second inquiry was held in April 2009. Much of the new evidence submitted related to use of the routes. The new evidence fell into five distinct categories:

1. Insufficient evidence of MPV use before the 1990s to raise the presumption of dedication. The new evidence presented did not persuade the Inspector to change his view that dedication of MPV rights could be presumed.

2. Public nuisance. The arguments under this heading made the crucial difference to the outcome of the case. Notwithstanding that MPV rights could be presumed, the objectors pointed out that vehicular rights cannot arise from long use if that use has resulted in a public nuisance. This was decided in the *Bakewell* case (*Bakewell Management Ltd v Brandwood* (HL [2004] UKHL 14). The evidence which they put forward to illustrate this included serious rutting, prevention of use by horses, prevention of use by schoolchildren on nature walks, disturbance from noise, danger to driven stock, and damage to walls. The Inspector concluded that this new evidence showed that use of the order routes by vehicles, particularly four-wheeled vehicles, had caused, and was likely to continue to cause nuisance to other users. Such user could not be regarded as raising a presumption of dedication. It is of particular note that he concluded that ‘although the nuisance arose primarily on certain sections of the route, the remainder cannot sensibly be considered as public vehicular routes in isolation’.

3. The list of streets. The Inspector rejected the contention that the list of streets exemption should not apply where the ‘list’ was kept in the form of a map rather than a list. S 36(6) HA 1980 did not specify the form that the list should take.

4. The ‘tarmac’ route. The new evidence indicated that use of this length of path was primarily on foot and on horseback, therefore it could have been recorded as a BOAT if MPV rights had not been extinguished.

5. Use of the eastern end of the Order B route. Objectors to the depiction of this length as a restricted byway sought to show

that the main use in the five years prior to 2006 had been in motor vehicles but the Inspector considered that new evidence from users on foot and on horseback confirmed his original view that the main use was not in MPVs.

In the light of the additional evidence presented at the inquiry and in writing, the Inspector confirmed the orders as originally made (ie to show the routes as bridleways).

Refs: The Derbyshire County Council (Bridleway along Silly Dale—Parishes of Great Hucklow and Grindlow) Modification Order 2006. PINS ref: FPS/U1050/7/40; decision issued 2 June 2009.

and

The Derbyshire County Council (Bridleway from Trot Lane, including upgrading for Footpath 15—Parish of Great Hucklow to Foolow Road—Parish of Grindlow) Modification Order 2007. PINS ref: FPS/U1050/7/4; decision issued 02.06.2009.

PUBLIC PATH ORDERS

TCPA diversion orders not justified

Two TCPA diversion orders, both dealt with by written representations, were not confirmed because the lengths of path proposed for diversion were far in excess of that necessary to allow the respective developments to go ahead.

An order made by South Hams DC to divert FP 1 at Kingsbridge in Devon was considered by Inspector Martin Elliot. Planning permission for a redevelopment to provide six dwelling had been granted in March 2008. It was the council's contention that it was necessary to divert the footpath to enable the development to take place and to maintain unrestricted access to the path. The unmarked path followed a line through a car park which, in the council's view, posed a clear risk of injury to users. Also, it terminated at a low wall which restricted access. The council's view was that it would be in the public interest for the path to be diverted along the proposed alternative route. This would also remove the risks proposed posed by the delivery of construction materials during the development works. The sole objector argued that the council had failed to demonstrate that it was both necessary and beneficial to divert the path.

The Inspector agreed that the path was affected by the proposed development since it passed directly into it. However, in his estimation, only 10m of the path was so affected leaving the remaining 120m unaffected and following the route through the car park. In his view it was not necessary to divert that latter section to allow the development to take place ('necessary'

meaning that without diverting the path the development could not proceed). That was the test in the 1990 Act—it did not provide for public interest and safety to be taken into account. The issue of public safety during the actual development works could be addressed by temporary closure measures under separate legislation. He could see no practical reasons for including the remainder of the route in the order.

During the course of exchanges the council put forward a proposal which would have diverted only the minimum length of path necessary to allow the development to go ahead. However, the Inspector considered this to be such a substantial departure from the original order to be beyond his powers of modification.

Whilst he accepted that it was necessary to divert a short length of path to allow the development to go ahead it was not necessary to divert the remainder which was the substantial part of the route. He declined to confirm the order.

The second case, also in Devon, involved a TCPA diversion order made by Teignbridge DC which proposed to divert FP 8 Kingsteignton and FP 20 Bishopsteignton. The order was submitted to the Secretary of State for confirmation to allow modification of the order to define the width of the new path at 2m, following an objection having been 'conditionally' withdrawn to allow the council to make that request to the Secretary of state.

In dealing with the case, Inspector Sue Arnott observed that there were errors regarding the description of the proposal in the press advertisement and in the order schedule which had not been raised by either

the council or the objector. Whilst she felt these might have been dealt with by further advertisement and modification she declined to confirm the order because of a more fundamental issue.

The relevant planning permission was for the erection of an agricultural storage building which would have necessitated the realignment of a short section of path. However the proposed diversion would have taken the remainder of the path around the perimeter of a field, which could not be justified under the ground set out in the

TCPA. She therefore declined to confirm the order.

Refs: South Hams District Council (Public Footpath No.1 Kingsbridge) Public path Diversion Order 2007. PINS ref: FPS/K1128/5/1; order decision issued 29.05.09

and Teignbridge District Council (FP 8 Kingsteignton & FP 20 Bishopsteignton) Public Path Diversion Order 2009. PINS ref: FPS/P1133/5/1; order decision issued 4.06.09

FROM THE COURTS

The Horvath case: European Court makes ruling on cross-compliance

The Queen, on the application of Mark Horvath v Secretary of State for the Environment, Food and Rural Affairs
Opinion of Advocate General Trstenjak delivered on 3 February and
Judgment of the Court of Justice of the European Communities
[2009] EUECJ C428/07 (16 July 2009)

The High Court judgment in the *Horvath* case, which was concerned with the application of the cross-compliance provisions to public rights of way within the Single Payment Scheme, was described in FW 24/2 p7. (Also see p 26 of this edition for a summary of the operation of the scheme in practice.)

Subsequently, in *R (Horvath) v Secretary of State for Environment Food and Rural Affairs* [2007] EWCA Civ 620, the Court of Appeal dismissed the appeal and varied the direction to be made to the European Court of Justice. In February of this year, Advocate General Trstenjak gave a preliminary ruling on the two questions which had been referred to her on the implementation at national level of Council Regulation (EC) No 1782/2003 of 29 September 2003 which established common rules for direct support schemes under the common agricultural policy and support schemes for farmers.

The first question concerned the interpretation of Article 5(1) of and Annex IV to Regulation No 1782/2003. The Court of Appeal sought to ascertain whether a

Member State was permitted to include requirements relating to the maintenance of visible public rights of way in the standards of good agricultural and environmental condition of land. The second question, asked whether it was possible for constituent parts of a Member State to have different standards of good agricultural and environmental conditions. (The rights of way cross compliance provisions operate in England only, not Wales, Scotland or Northern Ireland.)

At a hearing on 26 November 2008, argument was presented by the agents of Mr Horvath, the Governments of the United Kingdom, the Federal Republic of Germany, and Ireland, and by the European Commission.

Mr Horvath's argument was that the maintenance of public rights of way prescribed by the English implementing regulations was not among the minimum requirements for good agricultural and environmental condition which a Member State may define under the relevant Article. Rather, these include the retention of landscape features and farm structures, and avoiding the deterioration of habitats. He also argued that Article 43 of Regulation No 1782/2003 expressly excluded paths on fields used as forage areas and inferred from that that rights of way could not fall within the scope of the regulation because they are paths.

Even if the contested English provisions were to be regarded as environmental protection rules, they would not constitute minimum requirements for

good agricultural and environmental condition.

The UK government contended that the retention of landscape features in Annex IV did cover the maintenance of public rights of way. They argued that a broad interpretation was required because the concept of 'landscape' in Community environmental legislation included features resulting from human intervention and features of historical, cultural or archaeological significance, and it was recognised that the landscape comprised an important component of the environment. The Commission said that the first question concerned the latitude accorded to the Member States under Article 5(1). In its view, Member States enjoyed considerable discretion in defining the minimum requirements for good agricultural and environmental condition of land, with the result that there could be significant variations in the different minimum requirements depending on the Member State, or even depending on the region. Furthermore, many of the concepts contained in Annex IV, such as 'appropriate machinery use' or 'landscape features', were so general that they allowed Member States a wide margin of interpretation. In the Commission's view the concept of 'landscape features' was at the heart of the main dispute. In this connection, a Member State was perfectly entitled to take the view that the maintenance of public rights of way was likely to protect habitats from deterioration. Similarly, a Member State could regard rights of way as 'landscape features'. In addition, in its view the words 'and environmental' following the word 'agricultural' in Article 5(1) of Regulation No 1782/2003 gave Member States the power to define minimum requirements which served purely environmental purposes.

In respect of the second question, Mr Horvath claimed that there was a difference in treatment in identical situations within the United Kingdom, which formed a single state. Its effect was to increase the burden on English farmers. Such a difference in treatment was not objectively justified and breached the general principle of non-discrimination which Member States must respect, irrespective of any internal constitutional arrangements or the allocation of legislative powers at national level. Even

though Article 5(1) left a Member State free to decide the level at which the minimum requirements were to be defined, that Member State was required to prevent any breach of the Community law principles of equality and non-discrimination in its territory.

The UK Government submitted that the case-law of the Court of Justice indicated that Member States were free to implement their Community obligations by measures adopted centrally or at regional or local level. It followed that regional implementation of Article 5(1) of Regulation No 1782/2003 in the United Kingdom was consistent with Community law and did not amount to discrimination contrary to Community law. Discrimination, within the meaning laid down by Community law, could arise only if the same lawmaker treated the same situations differently. This is a logical conclusion, since differences in implementation in different regions were no more discriminatory in principle than differences in implementation in different Member States. Lastly, the United Kingdom Government stated that such conclusions were consistent with the principle of subsidiarity and with the principle which underlies it, to the effect that decisions are to be taken as closely as possible to the citizen.

In making its ruling, the Court concurred with the opinion of the Advocate General.

The preliminary point was made that, according to the wording of Article 5(1) of Regulation No 1782/2003, it is Member States which are to ensure that all agricultural land is maintained in good agricultural and environmental condition. To that end, they are to define, at national or regional level, minimum requirements (as set out in Annex IV of the Regulation) taking into account the specific characteristics of the areas concerned. While Member States were bound, when defining those requirements, to comply with that annex, they were left with a certain discretion with regard to the actual determination of those requirements. Moreover, it was apparent from the wording of the phrase 'good agriculture and environmental condition', that Member States could adopt GAEC requirements for environmental purposes.

Since requirements relating to environmental protection, one of the

essential objectives of the Community, must, according to Article 6 EC, 'be integrated into the definition and implementation of ... Community policies and activities', such protection must be regarded as an objective which also forms part of the common agricultural policy. Measures intended to achieve such protection, adopted under a Community Act having Articles 36 EC and 37 EC as a legal basis, were therefore not restricted to those pursuing agricultural objectives. It followed that an obligation to maintain visible public rights of way may, even if it did not pursue an agricultural objective but concerned the environment, constitute a GAEC minimum requirement.

The Court then considered whether rights of way amounted to landscape features. Since the concept of 'landscape features' was not defined in Regulation No 1782/2003, it had to be interpreted, by taking into account its usual meaning. In the Court's view there was nothing to prevent public rights of way from being defined as landscape features, since only 'visible' rights of way were referred to. A restrictive interpretation of the concept of 'landscape features' would exclude features resulting from human intervention and would be inconsistent with the discretion which Member States enjoy when defining the GAEC minimum requirements.

The temporary destruction of landscape features, as was possible in the case of the public rights of way, could not in itself adversely affect their permanent character. Natural features of the land such as vegetation or stretches of water may undergo seasonal changes and yet still be perceived as part of the landscape. That finding was particularly relevant to rights of way because under English law a farmer who has disturbed the surface of a visible footpath or bridleway (in permitted circumstances) must make good those surfaces within the time-limits laid down by the relevant national legislation.

The Court then considered to what extent an obligation to maintain such rights of way can constitute a measure requiring the retention of landscape features. Firstly it noted that landscape features were physical elements of the environment. The requirements relating to the retention of those features must contribute to their preservation as such. The maintenance

obligations were capable of contributing to the retention of such rights of way as physical elements of the environment.

Secondly, the standards concerning the retention of landscape features in Annex IV to Regulation No 1782/2003 were associated, in that annex, with the issue 'Minimum level of maintenance: Ensure a minimum level of maintenance and avoid the deterioration of habitats'. As pointed out by the referring court and by the Advocate General, rights of way were capable of helping to preserve habitats. In those circumstances, the requirements concerning the retention of those rights of way must contribute to avoiding the deterioration of habitats. It is apparent that obligations stemming from the objective stated in the provisions at issue in the main proceedings, which is to guarantee the exercise of the public right of way, are capable of contributing to it.

The second question sought to establish whether, where a Member State's constitutional system provides that the devolved administrations are to have legislative competence, the adoption by those administrations of different GAEC standards within the meaning of Article 5 of and Annex IV to Council Regulation No 1782/2003 constitutes discrimination contrary to Community law.

The Court made the preliminary point that, in conferring on Member States the responsibility of defining minimum GAEC requirements, the Community legislature gave them the possibility of taking into account the regional differences which exist on their territory.

The Court noted that, where EU provisions confer power or impose obligations on States for the purposes of the implementation of Community law, the question of how the exercise of such powers and the fulfillment of such obligations may be entrusted by Member States to specific national bodies was solely a matter for the constitutional system of each State. It was settled case-law that each Member State was free to allocate powers internally. In addition, the Court had previously held that, where a regulation empowers a Member State to take implementing measures, the detailed rules for the exercise of that power are governed by the public law of the Member State in question. Also, the

possibility for Member States, to the extent authorised by their constitutional system, to permit regional or local authorities to implement Community law measures, was expressly recognised in Article 5(1) of Regulation No 1782/2003. That provision states that 'Member States shall define, at national or regional level, minimum requirements for [GAEC] on the basis of the framework set up in Annex IV'.

In the light of the power which Member States enjoyed to transfer competences to regional authorities for the purposes of defining GAEC minimum requirements, the rules adopted by those authorities may differ as between the regions concerned, because Member States enjoyed a discretion with regard to the definition of those requirements.

However, the Court went on to consider whether, in those circumstances, the mere fact that the rules establishing GAEC laid down by the regional authorities of the same Member State differ did constitute discrimination contrary to Community law. They were of the view that settled case-law provided that the prohibition on discrimination was not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it. Where, as in these proceedings, it was the devolved administrations of a Member State which had the power to define the GAEC minimum requirements within the meaning of Article 5 of and Annex IV to Regulation No 1782/2003, divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination.

The ruling of the Court was therefore:

1. A Member State may include requirements relating to the maintenance of visible public rights of way in its standards for good agricultural and environmental condition under Article 5 of and Annex IV to Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No

1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, inasmuch as those requirements contribute to the retention of those rights of way as landscape features or, as the case may be, to the avoidance of the deterioration of habitats.

2. Where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different standards for good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003 does not constitute discrimination contrary to Community law.

Way cleared for missing link on South Downs Way

The Queen on the application of MJJ (Farming) Limited -v- the Secretary of State for the Environment, Food and Rural Affairs (CO/5061/2008)

Ian Dove QC, sitting as a Deputy High Court Judge, has left the way open for parties to finally resolve the long-running problem of the 'missing link' in the South Downs Way across the Meon Valley between Beacon Hill and Old Winchester Hill in Hampshire.

In 2001, Hampshire CC (HCC) made a suite of creation orders in respect of a number of possible routes for the South Downs Way linking Bridleway 11 and a crossing of the A32. Following receipt of objections, a public inquiry was held between 16 February and 23 March 2004. Much of the dispute at the inquiry centered on two particular alternative routes. One crossed land of high nature conservation value, and the other would, if created, have interfered with shooting activities on land belonging to the claimant in this case.

In August 2004, the Inspector published his interim decision. In this he acceded to the objection of English Nature (as it then was) by downgrading one of the proposed routes to footpath status at a width of 2m because of concerns about the impact of horse riding and cycling on a nature reserve. He also proposed confirmation of a second order, creating a bridleway, but this was subject to modifications which required advertisement because they affected land

not which had not been the subject of the original order. Two orders in the package were not confirmed.

The modifications were advertised in October 2004 and the claimant objected on the grounds that the Inspector had made errors in law (unrelated to the later judicial challenge). PINS decided to hold a further inquiry. The main controversy at this inquiry related to the details of the proposed crossing for pedestrians, cyclists and horse riders over the A32. The inquiry sat for a total of six days between May and July 2006, but shortly before it opened HCC made a submission to the effect that additional land was required to make the crossing safe. During the course of the inquiry they put forward a plan showing an even larger area of land was needed to facilitate the crossing.

The debate at the inquiry was focused on the safety of the crossing point and the opinion of highway engineers that it was necessary to separate horse riders from other users and corral them at the crossing point so as to afford them adequate visibility to see along the road at a distance sufficiently removed from the road edge to safeguard horses from being spooked (traffic on this road was said to travel at around 100km per hour).

With these measures the Inspector concluded that the crossing would be safe; but the additional land required was in the claimant's ownership and so further modification of the order, with re-advertisement, was necessary. The advertisement was made in November 2006. A compulsory purchase order (CPO) for extra land and the partial stopping up of another road were also required as part of the safety package. The claimant's solicitors wrote to PINS to say that there was no point in their client objecting because to do so would simply re-run the arguments rejected at the second inquiry. Since there had been no progress with the CPO or the additional road closure, they argued that the Inspector should simply refuse to confirm the orders.

In April 2007, PINS wrote to HCC setting out the Inspector's view that he could not confirm the order unless there was substantial progress with those measures. The HCC reply in May 2007 indicated that little progress had been made. In June the claimant's solicitors made further representations about the slow progress, but

indicated that their client would have no objection to an alternative footpath creation linking the route already confirmed over Beacon Hill to the A32 crossing point.

In October 2007 the Inspector gave guidance on his position. He indicated that he would not come to a final decision until it was clear either that there was no realistic prospect of the safety measures being achieved, or that they had been achieved. In the absence of the safety measures the bridleway route could not be confirmed but in that case he would consider a modification to achieve the footpath link. In March 2008, the Inspector made his final decision. Only minor progress had been made with the safety measures so he felt that he could not confirm the bridleway route. He said:

'16. It is almost a year and a half since the publication of my interim decision in October 2006. There has been very little progress towards implementing the required safety measures. Such progress as has been achieved has been very slow; it took nine months, apparently, for just the very first steps to be taken to acquire land. I was not informed of the reasons for the delay until November 2007, and since then there has apparently been no further progress. Although it now appears that funding problems have been resolved I have been given no estimate of any kind as to how long the process might take. No part of this delay appears to be directly attributable to the landowner, MJJ.

17. The Order as I proposed to modify it following the 2006 inquiry cannot be confirmed at the present time. I have carefully considered the other options in the light of my previous decisions and all the relevant correspondence I have since seen. Non-confirmation when there is the possibility of completing the pedestrian route of the South Downs Way without disagreement is not a sensible option. The choice is effectively between confirmations now to create the footpath link or further delay with the intention of confirming the Order so as to create a bridleway, provided the safety measures are in place and nothing else has arisen which would mean that it was no longer expedient to confirm the Order.

18. In October 2006 I confirmed the Hampshire (Winchester City No. 115B) (The Parishes of Exton and Warnford) Public Path Creation Order 2001. The route created is

intended to form part of the pedestrian route of the South Downs Way. It runs over Beacon Hill, but ends in a cul-de-sac at its base. If this Order is confirmed, that footpath would no longer be a cul-de-sac. In my opening remarks at the 2006 inquiry I indicated that, if this Order was not confirmed so as to create a bridleway, then it would be possible to modify it so that it created a footpath between what is now the cul-de-sac end of the newly created footpath and the crossing, thus creating a pedestrian through route. No party at the inquiry suggested that this would not be an appropriate course of action in those circumstances ...

21. If I were to confirm the Order so as to create a footpath, then if HCC and NE wished to pursue the creation of a bridleway on the Order route a new order would have to be made. HCC, in its letter of 25 May 2007 to the Planning Inspectorate, stated that: if the question of confirmation is determined negatively now ... HCC and NE [would have to] start all over again, with consequent huge waste of public money and everyone's time and effort. It seems to me that that may be overstating the case. Non-confirmation of the Order to create a bridleway would not negate the conclusions I reached in my previous interim Order decisions as to the expediency of confirming the Order provided certain safety provisions were made. The making of a new order and submitting it for confirmation (on the assumption that there would be objections) while the other safety matters were being progressed would not, I consider, be significantly more difficult, time consuming or expensive than continuing with the present Order. The confirmation of the Order so as to create a footpath would not preclude the later creation of bridleway rights over the route provided the tests in Section 26 of the 1980 Act were met.

22. It is impossible to predict the outcome of HCC's plans to complete the South Downs Way with a bridleway route across the Meon Valley. Were I to decide to delay consideration of the Order pending the implementation of the other necessary safety measures then, for example, MJJ might, as it has intimated, oppose any measures compulsorily to purchase land, or challenge my interim decisions. Were I to decide to confirm the Order now so it created only a footpath it would not be for me, for example,

to suggest to HCC that it should re-make the Order, or, if it did, to anticipate objections or advise how the Order might be progressed in parallel with the other measures HCC believes are necessary to achieve a safe equestrian crossing of the A32. None of these matters is, or should be, for me to influence, beyond inviting the various parties to note the conclusions I have come to in my interim decisions.

23. It is reasonably clear, however, that whatever I decide will not result in the speedy completion of the South Downs Way National Trail for horse riders, whereas a decision now to confirm the Order to create a footpath will result in satisfaction of the undisputed need for a pedestrian link.

The Inspector then proceeded to confirm the order so as to create a 4m wide footpath from the end of the path created by the other order, and to incorporate a further large area of land which had been predicated on the requirements of a bridleway crossing.

In the High Court George Laurence QC, for the claimant, sought to argue that the creation of this footpath at a width of 4m and then a greater width further on was not within the powers set out in HA 1980 s 26 because the inclusion of that land was not necessary, or alternatively not expedient to the creation of a footpath. Those dimensions were promoted only to facilitate a bridleway, and no-one had suggested that they were either necessary or expedient for a footpath. Mr Laurence said that the assessment of the need for and expediency of the footpath in question needed to incorporate the detail of the position or alignment and of the length and width proposed.

On behalf of the Secretary of State, Mr Philip Coppel said that such a construction of s 26 was not appropriate and that all that was required was a general assessment of the need for, and expediency of, creating a path. The judge, however, supported Mr Laurence's construction. He took the view that when undertaking this assessment the section required those tests to be applied both in respect of the principle of the footpath but also the detail of its alignment, length and width.

The judge supported Mr Laurence's view for three main reasons. Firstly he was of the view that the most important thing was to read the Act 'as a whole and together'. He went on to say: 'Under s 26(1) it is the

proposal in the order which must sit the test. That means sitting the test must include examination of the land affected as set out on a map. ... To my mind regulation 2 of the 1993 regulation reinforces this point, and reading these provisions together, makes clear that the section is expecting the exercise of seeing whether the tests of s 26(1) have been passed and measured against the proposal in detail.'

Secondly he said that the progressing of an order had important consequences because it effectively conveyed the fee simple of the land concerned to the highway authority, and gave a right to compensation for the land which had been taken. It could also give rise to criminal proceedings if the way was obstructed. That being the case, the consideration of necessity and expediency should be considered in the context of the detail of the proposed path (alignment, length and width).

Thirdly, important and determinative consequences would flow from a consideration of the detail. For example, the width of a path would be highly relevant in the context of arguments about the impact of a path on a natural habitat.

He then considered whether the Inspector had indeed concluded that there was a need for path of the position, length and width which he was proposing. Only if there was such a need could it be concluded that the creation of the path was within the powers of the Act. His view was that the Inspector had not drawn that conclusion. No-one had suggested that the footpath had needed those dimensions and it was clear that he was proposing them as for the proposed bridleway. He did not appear to have posed the statutory test of whether such dimensions were needed for a footpath.

Mr Coppel sought to argue that the claimant could have made this point at an earlier point in the proceedings. The judge conceded that this was a strong point but did not feel he could exercise his discretion to decline the appeal for a number of reasons, the most compelling of which was that there had been a misapplication of the law.

The judge said that he had the power only to quash the order and that this would leave an inaccessible length of path and 'that might be thought to be an absurd outcome.' He was, however, reassured by the public

confirmation, by Mr Laurence, on behalf of his clients, that they would be willing to create a two metre wide footpath to fill the gap. It was in the hands of HCC to take up that offer to achieve what the Inspector correctly described as 'the undisputed need for a pedestrian link'.

TROs made by national park authority quashed by High Court

Geoffrey Wilson (1) and William Troughear (2) (on their own behalves and on behalf of the members of the Motoring Organisations' Land Access and Recreation Association v Yorkshire Dales National Park Authority [2009] EWCH 1425 (Admin)

In May 2008, the Yorkshire Dales National Park Authority (YDNPA) gave notice that under section 22B(2)(a) of the Road Traffic Regulation Act 1984 it had made TROs in respect of eight roads ('green lanes') within the park. The effect of the orders was to prohibit access to the routes by mechanically propelled vehicles (MPVs) for the stated purpose of 'preserving amenity and conserving the natural beauty of the area.' The Claimants were members of LARA, and the High Court application was a statutory appeal under Schedule 9 of Part VI of the Road Traffic Regulation Act (RTRA) 1984 against the making of the orders. By the time of the hearing, LARA was seeking that four of the TROs be quashed and did this by way of four grounds of complaint. The first of these was that in making the TROs, the park's Access Committee had failed to consider and/or take into the account the authority's duty under s 122 RTRA 1984. The s 122 duty requires an authority to exercise its functions under the Act 'as (...) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway (...).' This duty is however tempered by a need 'so far as practicable' to have regard to matters set out in subsection (2) which are (a) the desirability of securing and maintaining reasonable access to premises; (b) the effect on the amenities of any locality affected; ... (d) any other matters appearing to ... the local authority ... to be relevant. This was the primary allegation and affected both Grounds 1 and 2. The second ground

was that four of the routes in question were the subject of DMMO applications to record MPV rights. It was LARA's contention that the YDNPA had made full TROs on these routes because a partial or limited TRO might have given the impression that the authority was condoning vehicular rights where none existed. They said that this was an irrational reason and should not have influenced the decision. The authority did not accept that the decision was irrational. Thirdly, in respect of three of the routes, LARA complained that the authority had wrongly and irrationally excluded the possibility of time-limited TROs on the apparent basis that members of the public would not understand such restrictions. The authority accepted that this was part of their reasoning in respect of one of the routes but not that it was irrational. Fourthly, following a meeting of the park's access committee in January 2008, draft orders and statements of reason had been prepared for the purpose of consultation. LARA criticised the reasons given on a number of grounds. In particular, the reasons made no mention of s 122 RTRA 1984, no reference to whether it was appropriate to make anything other than full TROs on the routes which were subject to DMMO applications, and that partial TROs were too complicated for the public to understand. LARA further alleged that the reasons given were inadequate and that it had been prejudiced by the failure. The authority denied this.

The legal arguments centered on the effect of s 122 of the Act, and there was a large degree of agreement between Counsel to the parties on this. For the applicants, Mr Adrian Pay accepted that the duty imposed in s 122(1) was not absolute and that the effect of many TROs was to derogate from the 'expeditious' or 'convenient' movement of traffic. He recognised that the authority had to perform a balancing exercise between the duty in section 122(1) and the factors in s 122(2). However, in his view this was a balancing exercise of a particular sort. The primary duty was that in s 122(1), and only to the extent that the subsidiary considerations made compliance with the primary duty impractical could an authority properly derogate from the primary duty. To put it more loosely, he said '... foremost in the decision-maker's mind should be the purpose of securing the expeditious,

convenient and safe movement of vehicular traffic. Given the primary duty, it should also follow that a decision-maker should tend towards the least restrictive TROs necessary to achieve a particular purpose.'

For the YDNPA, Mr Alan Evans did not accept this analysis. In his view the s 122(1) duty was not primary, with the s 122(2) matters subsidiary. In fact, it was the reverse.

In the view of the judge, his Honour Judge Behrens, sitting as a Deputy High Court judge, the duty was that prescribed in section 122(1), but it took effect so far as practicable in the light of the matters to be taken into account under s 122(2). Whether these factors were described as primary or secondary did not seem to him to matter very much.

Mr Pay submitted that it was clear from the contemporaneous documents that the YDNPA had not considered the duty under s 122(1), nor carried out the balancing exercise required. He sought to show this by reference to these documents—(1) the statement of reasons prepared pursuant to the Regulation made no mention of s 122 or of the balancing exercise; (2) a letter of 21 May 2008 from the YDNPA solicitor to LARA (written when LARA had requested a copy of the minutes of the Access Committee of 17 April 2008—when it had been resolved to make the orders—or, alternatively, a note of the members' reasons) made no mention of s 122; the minutes of the meeting of the Access Committee on 17 January and 17 April 2008 made no mention of s 122; paragraph 30 of a report to the Access Committee for 30 March was positively misleading in that it failed to mention that the authority was required to consider the matters in s 122. From his analysis of the paperwork he submitted that it was not possible to infer that the necessary balancing exercise had been carried out. The core of Mr Evans' counter-submission was that once the YDNPA had decided that it was expedient on grounds of both amenity and conservation of natural beauty to prohibit the use of MPVs (save for those in excepted classes) from the particular TRO routes in question, it was impracticable thereafter for there to remain any duty to secure the movement of such vehicular traffic on those routes, whether expeditiously, conveniently, safely or otherwise. There was no doubt that

the decision which was made in the case of each TRO was that it was expedient on grounds of both amenity and conservation of natural beauty to prohibit the use of MPVs from the routes in question. The statements of reasons for each TRO record that the particular qualities associated with the amenity of the area through which the particular TRO routes ran (the feeling of wildness, remoteness, and associated tranquility) would be preserved by the TROs as the presence of recreational motor vehicles, or anticipation of their presence, and/or evidence of their passing detracted significantly from these qualities. The noise from the vehicles was also highlighted. In connection with the conservation of natural beauty each statement of reasons also explained that the presence of recreational motor vehicles on the particular TRO routes in question would detract from the features of such beauty.

The judge could not accept this submission, saying that the mere fact that there was a ground for making a TRO did not absolve an authority from carrying out the balancing act. Mr Evans recognised that the authority did not at any point direct itself to the effect that it was not practicable to observe the duty to secure the expeditious, convenient and safe movement of MPVs on

the routes in question, but he invited the court to consider that it was impractical to do so. The judge could not accept this either. It seemed to him to be clear that even if some form of TRO was inevitable on all of the routes it was not inevitable that a full 24/7 TRO was necessary. Having rejected these arguments, the judge considered Mr Evans' alternative submission that the authority had carried out a sufficient balancing exercise to satisfy the statute. He made this case by reference to various documents (minutes and reports, for example, and a late amendment to exempt invalid carriages from the orders). The judge did not however accept this submission. He agreed that the Access Committee had carried out 'a degree of balancing' but could not accept that it had been demonstrated that it had carried out the balancing exercise in respect to each of the TROs. He said that the necessity to carry out such an exercise was not brought sufficiently to the committee's attention and that there was no evidence that the exercise had been carried out. It followed that LARA's primary ground of complaint had succeeded and that the TROs in respect of the four routes specified would be quashed.

FROM PARLIAMENT

Hansard Written Answers

Rights of Way (column 572; 24 February 2009)

Gordon Prentice: To ask the Secretary of State for Environment, Food and Rural Affairs what steps he is taking to identify and restore lost rights of way.

Huw Irranca-Davies: In the wake of the Discovering Lost Ways project, Natural England has formed a Stakeholder Working Group to bring together key interests nationally to agree a package of strategic reforms relating to unrecorded and other rights of way. These include any reforms the group considers would improve the system for processing claims and reduce unnecessary delay and bureaucracy.

The group is expected to report by the end of the year. We have undertaken not to commence the provisions of the Countryside and Rights of Way Act 2000

relating to the extinguishment of unclaimed historic rights of way from 2026 at least until the group has reported.

BOATs (column 173; 11 May 2009)

Lord Bradshaw: To ask Her Majesty's Government whether regulation-making powers under the Road Traffic Regulation Act 1984 are adequate to protect Byways Open to All Traffic from damage by mechanically propelled vehicles.

The Minister of State, Department of Energy and Climate Change & Department for Environment, Food and Rural Affairs (Lord Hunt of Kings Heath): The Government believe the powers under the Road Traffic Regulation Act 1984 are adequate to protect byways open to all traffic from damage by mechanically propelled vehicles, and particularly when used as part of an overall management plan. Defra has published both *Making the best of byways* and *Regulating*

the use of motor vehicles on rights of way and off road, which provide guidance and advice to local authorities, the police and community safety partnerships on managing byways open to all traffic and on getting the most out of the existing legislation.

Under powers in the 1984 Act traffic regulation orders can restrict vehicular use to certain times or certain seasons, or even ban vehicular traffic altogether. Additional provisions introduced by the Natural Environment and Rural Communities Act 2006 and the Countryside and Rights of Way Act 2000, mean traffic regulation orders can now be introduced by national park authorities and be used for the purposes of conserving natural beauty.

The police also have powers under sections 59 and 60 of the Police Reform Act 2002 to seize vehicles that are being driven on byways open to all traffic in a careless or inconsiderate manner and in a way that causes alarm, distress or annoyance.

BOATs (col WA55; 1 June 2009)

Lord Bradshaw: To ask Her Majesty's Government further to the Written Answer by Lord Hunt of Kings Heath on 11 May (WA 173), what action they will take to compel highway authorities to make traffic regulation orders under the Road Traffic Regulation Act 1984 to ban mechanically propelled vehicles from badly damaged byways open to all traffic, or to make pre-emptive orders on byways which are vulnerable to damage by such vehicles.

The Minister of State, Department of Energy and Climate Change & Department for Environment, Food and Rural Affairs (Lord Hunt of Kings Heath): The management of all public rights of way is the responsibility of local highway authorities. It is for them to decide whether it is appropriate to introduce traffic control measures, such as a traffic regulation order on a byway open to all traffic, based on local needs and priorities and the circumstances of each case.

BOATs (col WA64; 1 July 2009)

Lord Bradshaw: To ask Her Majesty's Government further to the Written Answers by Lord Hunt of Kings Heath on 11 May (WA 173–74) and 1 June (WA 55), what action they will take to enable responsible organisations and individuals to appeal to the Secretary of State against refusals by

local highway authorities to make traffic regulation orders to ban mechanically propelled vehicles from damaged byways open to all vehicles, where the circumstances of the byways in question satisfy any of the criteria in Section 1(1) of the Road Traffic Regulation Act 1984.

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Davies of Oldham): There are no plans to amend the Road Traffic Regulation Act 1984 to provide for a right to appeal to the Secretary of State against a refusal by a local highway authority to make a traffic regulation order. To do so would risk imposing a significant new regulatory and financial burden upon those authorities. Local highway authorities are best placed to judge whether a traffic regulation order would be appropriate in any given circumstances. If an individual wishes to challenge the decision of a local highway authority not to make a traffic regulation order he or she can do so by way of an application for judicial review.

CRWA 2000 (Column WA315; 20 May 2009)

Lord Greaves: To ask Her Majesty's Government whether, where public access points to Countryside and Rights of Way Act 2000 access land are via gaps, gates or styles in fences and walls or other barriers along the boundary of such land, they will request the Ordnance Survey to include the location of such access points on the 1:25 000 series of Explorer and Outdoor Leisure maps.

The Minister of State, Department of Energy and Climate Change & Department for Environment, Food and Rural Affairs (Lord Hunt of Kings Heath): Detailed discussions were held with Ordnance Survey and other bodies, including the Countryside Agency (now Natural England), the Local Government Association and the National Park Authorities, in 2004 and 2005, about whether access points could be added to the OS Explorer Maps which show areas of access land mapped under the Countryside and Rights of Way Act 2000. The conclusion reached from these discussions was that access points to access land should not be shown on the maps because it was considered that most of the access points were sufficiently clear (roads, rights of way,

paths, tracks and at car parks) and that adding access points might also add some unnecessary clutter to these maps.

Open Moorland: Fencing (1 April 2009; Column WA 246–247)

Lord Greaves: To ask Her Majesty's Government whether they or Natural England encourage the fencing of open moorland for conservation, farming (including under cross-compliance requirements of single farm payments) or other land management; and what impact such fences have on the provisions of access to open country under the Countryside and Rights of Way Act 2000 and other legislation, and on the landscape objectives of National Parks.

Lord Hunt of Kings Heath: In some circumstances Natural England does support fencing of open moorland, where this is regarded as essential to meet nature conservation or land management objectives. Where this is the case, Natural England promotes prior consultation with stakeholders, and actively considers how impacts on the landscape and on access can be minimised.

The public access provisions in the Countryside and Rights of Way Act 2000 do not prevent the erection of fences on or around moorland or any other type of open country. Natural England would expect the access authority and the occupier to work together to ensure that suitable crossing points are included at appropriate locations along any new fences—and that where the requirement is temporary, arrangements are put in place for removal of the fencing once it has served its purpose.

In the case of open moorland which is registered common land, approval is normally required from the Secretary of State prior to the erection of any new fences.

Lord Greaves: To ask Her Majesty's Government whether they have monitored the number and extent of fences that have been erected in recent years on open moorland in the northern Peak District National Park and adjacent areas; and whether they have assessed the reasons for the erection of such fences.

The Minister of State, Department of Energy and Climate Change & Department for Environment, Food and Rural Affairs (Lord Hunt of Kings Heath): The Peak District

National Park moors have suffered very significant damage e.g. wildfires, overgrazing and pollution. To enable vegetation recovery it is necessary in places to exclude stock through fencing, funded through agri-environment agreements. Routes are agreed with the National Park Authority and chosen to minimise impacts on accessibility and landscape. From 1987 to the present, an estimated 127.7km* of fencing has been erected. Fences are being removed as soon as restoration allows e.g. 23km have recently been removed.

(**Peak District National Park—Northern moorland fencing extent and location.* Compiled by Richard Pollitt and Jon Stewart, Natural England, 2513/09.)

Lord Greaves: To ask Her Majesty's Government whether fencing of open moorland in the Peak District National Park and similar areas in England is supported by funding from the Common Agricultural Policy or other government or public sources.

Lord Hunt of Kings Heath: The costs of fencing of open moorland in the Peak District National Park are supported under agri-environment agreements such as environmental stewardship and the environmentally sensitive areas scheme. These are funded through Natural England by European common agricultural policy monies supported by matched funding from the UK Government.

CRWA 2000 (18 Mar 2009 : Column WA38)

Lord Greaves: To ask Her Majesty's Government what are the procedures and timetable for the review of the access maps in England under Section 10 of the Countryside and Rights of Way Act 2000.

The Minister of State, Department of Energy and Climate Change & Department for Environment, Food and Rural Affairs (Lord Hunt of Kings Heath): Section 10 of the Countryside and Rights of Way Act 2000 requires Natural England to review, at intervals of not more than 10 years, the conclusive maps of open country and registered common land issued under that Act. The current conclusive maps require review by 2014–15.

The Act does not set down specific procedures for this review. Natural England intends to consult publicly on how it should be conducted, beginning with a stakeholder workshop on 31 March 2009. Further details

will be published, once available, on Natural England's website.

NEWS FROM THE PLANNING INSPECTORATE AND DEFRA

The Planning Inspectorate (PINS) has issued a new Advice Note—AN 21, Procedural Irregularities in Respect of Definitive Map Modification Orders and Public Path Orders.

This can be viewed at:

http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/rights_way.htm#advice

It deals with those cases where, in respect of an order, it is claimed by a party to the order that the procedural requirements set out in the appropriate schedules to the legislation have not been adhered to.

PINS has been prompted to prepare the note because the suggestion has been made in a number of recent cases that the failure of the Order Making Authority to comply with the procedural requirements set out in the relevant schedules renders the order under consideration invalid and beyond the Inspector's powers of modification and confirmation. Given the frequency of such suggestions, PINS has considered which procedural irregularities would render an order invalid, and what solutions are available to address those irregularities which have occurred but which are not fatal to the validity of an order.

PINS Advice Note 15—AN 15, Breaks in User Caused by Foot and Mouth Disease has been amended and re-issued. This can be viewed at:

http://www.planning-inspectorate.gov.uk/pins/appeals/rights_of_way/rights_of_way_15_june09.pdf

We also learn from PINS that they have reviewed the operation of their Quality Assurance Unit (QAU) so that it now provides a complete 'one stop shop' facility for all complaints related to casework including pre-decision, rights of way, tree preservation orders and administration. This means that 'customers' have one point of contact for any complaint-based enquiry.

Prior to this a number of different areas of the business administered complaints depending on whether the appeal decision had been issued or whether it related to more specialised casework. This approach was often confusing and lead to inconsistencies in approach and style of

response. PINS hopes that this new service will be able to provide a complete overview of all complaints which can now be fed back to the business, both for Inspectors and administrators, to ensure that lessons can be learnt for future service delivery.

PINS has also announced its decision to discontinue the publication of the names and addresses of those who appear at inquiries or hearings.

Inspectors have always recorded the names and addresses of those who appear at an inquiry or hearing so that, for example, those who speak are sent a copy of the decision, or they can in exceptional cases be consulted on new evidence after the close of an inquiry.

It has been customary for these names and addresses to be included on an appearance list attached to the Inspector's report or decision. However, while there may be a clear business and legal requirement to record names and addresses there is no such requirement to publish these details. They have therefore decided to cease listing appearances within decisions or reports, as from 8 June 2009. Instead, a record of these details will be placed on the case file. A copy of the decision will still be sent to those attending the inquiry or hearing who ask for one.

In the last edition of FW (26/1), we reported that PINS would be publishing all statements of case, proofs of evidence and supporting documents on its website. PINS has now made a decision on the future of what was a pilot scheme, and on 30 April the following letter was issued by Annie Owen, the Rights of Way Section Manager:

'Since 3 November 2008, we have been running a pilot scheme where we have been publishing all statements of case, proofs of evidence and supporting documents on the Planning Inspectorate's website.

The pilot was for six months and we undertook to review it at the end of this time. Unfortunately it has become apparent in the last few weeks of the pilot that our website simply does not have the current capacity to cope with the increasing number, and size, of

documents being put onto our website and there is not scope at present to increase this. Regrettably therefore we have made the difficult decision to terminate the pilot. In the circumstances, from 4 May no further statements of case, proofs of evidence or supporting documents will be added to the website.

I know some of you will be disappointed with this decision as many of you have found the posting of documents on the webpage to be very useful. Unfortunately we simply do not have the capacity to carry on as we are. We are however exploring with Defra other potential ways of improving accessibility to evidence in Rights of Way cases and would welcome suggestions as to other possible ways of resolving this problem.

We will be posting on our website further guidance on the publication and availability of evidence after 4 May.'

On 2 June, the PINS website was updated to clarify exactly what information PINS itself will copy to parties engaged in inquiries, hearing or written representation procedures. This is as follows:

What we copy:

Statements of case (written representations procedure, inquiry and hearing): Where the OMA confirm they have nothing to add to their statement of grounds for making the order, we send a copy of the statement of grounds and comments on the objections/representations excluding copies of documents to all parties.

Where the OMA submit a statement of case, we send a copy of the OMA's statement of case excluding copies of documents themselves but including the list of documents to all parties. We also send a copy of their statement of grounds and comments on the objections/representations excluding copies of documents to all parties.

Where any other party submits a statement of case, we send copies of their statements of case including copies of documents to the OMA so they can make them available for public inspection. We then send copies of the statements of case excluding copies of documents themselves but including the list of documents to all parties.

Proof of evidence/summary (inquiry):

Where the OMA and/or parties submit a proof of evidence/summary, we send copies of their proofs of evidence/summaries including copies of documents to the OMA so they can be made available for public inspection. We then send copies of the proofs of evidence/summaries excluding copies of documents to all parties.

Defra Circular 1/09

Don't forget that the most recent edition of Defra's main advice on rights of way for local authorities, 'Rights of Way Circular 1/09, Guidance for Local authorities', which replaces Circular 1/08, came into effect on 1 March 2009. It is available on the Defra website and can be viewed or downloaded from <http://www.defra.gov.uk/wildlife-countryside/access/prow/index.htm>

In a covering letter to surveying authorities, Dave Waterman, Head of Recreation and Access Policy at Defra, pointed out the key changes in the new edition:

' ... there are two issues on which there has been a significant change to Government guidance, which has generated some controversy. On both these issues, the change to Government guidance came about through cases in which the existing interpretation of the legislation was challenged. Although neither case reached the High Court, in the course of considering both the issues raised and independent advice that we commissioned, we concluded that our interpretation of the legislation had, up until then, been incorrect and the guidance in circular 1/09 reflects our revised view of the legislation.

The first issue concerns the status of user evidence during a period when a right of way is found to be wrongly shown on the definitive map and statement (section 4.35 of the circular). The question that arises is whether a case for deemed dedication is established on a way that has been wrongly recorded on the definitive map when the qualifying period of use is between the date of the recording of the way on the definitive map and the date of its subsequent deletion. Defra's view is that use of the way in such circumstances cannot be deemed to be an intention by the landowner to dedicate it as a right of way, since the landowner cannot prevent such use and is therefore denied any

opportunity to show that he or she has no intention to dedicate it.

The second surrounds the interpretation of sections 119(1) and 119(6) of the Highways Act 1980 with particular regard to the expediency of diverting a right of way 'in the interests of the landowner ... or the public' (section 5.32 of the circular). There are two points at issue here; one is whether 'in the interests of the public' means solely in the interests of the public as regards the exercise of their right of way. In our view, the interests of the public as regards the exercise of their right of way are dealt with comprehensively in section 119(6). Therefore the public interest in section 119(1) must include the public interest in a wider sense, for example this could mean in the interests of protecting biodiversity or some other public asset.

The other point is whether, in the case of an opposed order, the Secretary of State's role is confined to auditing the

reasons for which the order making authority made the order. Defra's view is that, as with any other aspect of the order, the Inspector is entitled to take his or her own view, on the basis of the evidence submitted by all the interested parties, and may confirm an order, even where the reasons, under section 119(1), for doing so do not align with those of the order making authority, provided that the Inspector is satisfied that in the interests of the owner, lessee or occupier or the public, it is expedient to divert the way. Schedule 6 specifically gives the Secretary of State the powers to confirm the order with or without modifications. There appears no reason why this power, which of itself makes it clear that confirmation is not limited to approval or rejection of the order strictly as drafted by the order-making authority, should not extend to the grounds on which the order making authority considered it expedient to make the order.'

ARTICLES

Public rights of way and agricultural subsidies

(by Terry Norris, reproduced by kind permission of the Peak and Northern Footpath Society)

The EU common agricultural policy provides for subsidies to farmers to support their activities by means of the single payment scheme administered by the Rural Payments Agency. This results in annual payments of £2 billion a year to farmers in England. As a condition of receiving the full payment, farmers are obliged to meet a number of requirements to maintain their land in 'good agricultural and environmental condition'. This is known as cross compliance.

One of the requirements is of particular interest to footpath workers. This is GAEC 8, which provides that all visible public rights of way on the farmer's land are to be kept open and accessible. This includes any right of way which would be visible if the farmer had not breached the law. The obligation is to comply with highways legislation. This means not to disturb the surface so that it becomes inconvenient to pass over it or to wilfully obstruct free passage along it. Stiles and gates must be

maintained in a condition that makes them safe and reasonably easy to use, where maintenance is the farmer's responsibility—which is normally the case. The surface of a cross-field path must be made good within 14 days of the first disturbance if sowing a crop or within 24 hours in all other circumstances. The minimum width of the reinstated path should be 1 metre in the case of a footpath and 3 metres in the case of a bridleway. The route of the reinstated cross-field path should be indicated to members of the public. Field-edge rights of way should never be cultivated and should be maintained to similar minimum widths as cross-field paths.

These requirements are monitored by the Rural Payments Agency (RPA) who operate an inspection regime. The Agency aims to inspect 1% of farms in receipt of agricultural subsidy each year. This amounts to some 11,000 visits. The inspector is given a dossier about the farm which includes information derived from the OS map about all public rights of way on the land. This enables the condition of all footpaths and bridleways to be checked to see if there is compliance with GAEC 8. Breaches will be reported to the highway authority for

enforcement action and if the breaches are serious there may be a reduction in amount of subsidy paid. Some 25% of farms inspected are selected at random, the remainder on the basis of a risk score which is derived in part from information available from other agencies such as English Heritage (if there are ancient monuments) or Natural England (if there is a site of special scientific importance) or local authorities. The last-mentioned means that the Agency can act on referrals from public rights of way staff who encounter serious and persistent breaches of GAEC 8.

You can find out whether a farmer is receiving a subsidy by searching the DEFRA website—<http://cap-payments.defra.gov.uk>. This can be searched by post code or the name of the farm. You may well be surprised

by the amounts being paid out. If you know of a farmer who is in receipt of a payment and seriously breaching his obligations under GAEC 8 then this should be reported to the appropriate highway authority. The public rights of way staff can then take the matter up with the RPA.

It would be wildly optimistic to expect quick results from using this avenue of complaint. However, I am sure that few farmers would welcome an inspection from the RPA, which will involve a detailed examination of their practices with regard to stock movement, use of fertilizers and pesticides and many other aspects of farm management. The threat of a referral may just be the factor that turns belligerent resistance into reluctant co-operation with the local authority.

TRAINING COURSES

As usual there are a number of new training courses and repeat sessions available from IPROW. For further details of any course or to make a provisional booking, email training@iprow.co.uk

One day courses cost £220 for IPROW members and £295 for non-members, two day courses are for £410 members and £485 non-members.

IPROW Conference

Collingwood College, Durham; 22–23 September 2009. (Special fees apply.)

Law and Practice II—Maintenance and Enforcement

Knuston Hall, Northants; 7–8 October 2009

Law and Practice I—Definitive Map and Public Path Orders

Knuston Hall, Northants; 14–15 October 2009

Compass Confidence

Teggs Nose Country Park, Macclesfield; 13 October 2009

The following Rights of Way Law Review courses are being organised at Wolfson College, Oxford:

The Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006: successes and failures affecting public rights of way

(16 September 2009)

This course will explore the effects to date and in the future and will include the ‘right to

apply’. Recent cases will be examined including *Winchester* and guidance given as to how surveying authorities should examine applications for DMMOs. Byway claims will be discussed including the type and sources of evidence that could enable such claims still to succeed. The progress of the Stakeholders’ Working Group. The legislative process in action, the formulation and status of non-statutory guidance.

Rights of Way in Urban Areas (18 November 2009)

Many minor highways in built up areas of towns and villages have escaped the recording processes. They may fall to be extinguished in 2026, or have had vehicular rights already removed by NERC. The speakers will discuss the difficulty of obtaining evidence as to private v public rights; conflicting and overlapping highway records; the difficulties of householders on private streets; getting urban ways onto the definitive map; gating orders.

Details available from:

Rights of Way Law Review

The Granary, Charlcott, Calne, Wiltshire SN11 9HL

Tel: 01249 740273 Fax: 01249 740404

E-Mail: rwlr@rwlr.co.uk; website: rwlr.co.uk

NEWS

Changes to public services at The National Archives

A number of changes to operations and public services at the National Archives have been proposed. The proposals include closure of the Kew reading room to the public on Mondays, and a new daily charge for car parking on the Kew site. It is anticipated that the changes will be implemented from early 2010.

The changes in the Kew service reflect the growth in demand from online customers, who account for over 90 per cent of usage, and who will be unaffected by the changes.

The National Archives management say that more and more customers expect to access services online and that they need to evolve to meet their customers' changing needs. They say that over 170 documents are now downloaded for every one original document seen by a visitor to the reading rooms and that investment in the website will continue as they constantly improve access to their records and expertise online: for example, developing the catalogue and digitising popular records such as the 1911 census.

GLEAM website re-launched

GLEAM (the Green Lanes Environmental Action Movement) has recently re-launched its website. Visit www.gleam-uk.org to read about the organisation's work protecting green lanes, particularly in the context of the operation of Part 6 of the Natural Environment and Rural Communities Act.

Blue book cumulative supplement

The cumulative supplement to the blue book for the period ending 13 May 2009 is now available on the blue book extra website at: <http://www.ramblers.co.uk/files/BB4%20cumulative%20supplement%20at%202009.05.13.pdf>

Natural England Stakeholder Working Group

Don't forget that the minutes of the SWG can be viewed on the Natural England website at <http://www.naturalengland.org.uk/ourwork/enjoying/places/rightsofway/swgrow/default.aspx>

The group, which is looking at the problems associated with recording historic rights of way on the definitive map and the 2026 'cut-off' date, has now met a total of seven times. It is due to report to the Secretary of State by the end of the year.

LETTERS TO THE EDITOR

Madam,
David Bradnack has raised some interesting points in the February issue of FW.

I have long been critical of the Ramblers' insistence on the absolutely sanctity of the line of PRowS. Years ago, when the PRow network was in a truly parlous state, there was a case for maintaining the exact line shown on the DM but, following the highly successful Milestones Initiative, after which the Countryside Commission (now Natural England) estimated that, for walkers, no more than four per cent of PRowS were impossible to use, the great majority of public paths in England are now available to those who want to explore the countryside on foot.

Many PRowS 'fail' the BVPI tests because they don't follow the strict line of the DM but are, nevertheless, readily available and most walkers will be blissfully unaware that there is 'problem' on the path. For example, in 1993, the Isle of Wight surveyed its 837 km PRow network and identified 232 routes where the line on the ground differed from that shown on the DM. It is very difficult to restore the exact line of a cross-field PRow if it curves across a field, or the line of sight is obscured by a hillock.

The situation is similar in upland areas. Anyone familiar with the paths on the Scafell massif in the Lake District knows that some of the PRowS shown on the OS map have never been used by walkers. The routes actually used are shown by non-definitive black pecked lines. The old Outdoor Leisure

map showed a PRow running through Dock Tarn near Watendlath in Borrowdale (this has been corrected on the latest edition of the Explorer map). There is at least one PRow on Dartmoor that looks as though it was drawn with a ruler. It starts and finishes at the correct location but it runs through an extensive bog on a line that no walker has ever used.

The pedantic instructions laid down for those who inspect PRows for compiling the BVPI 178 statistics that deviations from the exact line shown on the DM will not be tolerated accounts for a significant proportion of so-called path failures whereas, in fact, most of them are available to walkers.

Let's hope that when the RA comes up with its own inspection system to replace the unlamented BVPI tests that a sensible, pragmatic approach will prevail. Does it really matter that a PRow deviates by a few metres from the line shown on the DM if the path is clear on the ground?

Hugh Westacott

Director of guided walks & walking tours,
author & journalist

Madam,

With reference to the item from David Bradnack on paths that go nowhere in the last issue of FW, my thoughts are as follows.

We have paths that seem to go nowhere, but that's because they've been wrongly shown on the definitive map. There was a recent diversion order that couldn't be confirmed until the anomaly was corrected, probably by dedication of a section of path that should have been shown on the definitive map anyway (it's shown on the

wrong side of a wall). In another instance, discovered during a diversion case, the path is on two separate adjoining map sheets, and when put together they don't join up. For that reason the diversion was not confirmed. The same path is shown in one field not going directly to a stile, but some yards away from it, then making a turn in the field to get to the stile, with no reason on the ground for this, ie no rock, bog or other feature.

Another path, just down the road from my home, runs from a gate to a fence, instead of to a stile, but is described in the statement as going to the stile. A retired farmer from Upper Teesdale told me lots of paths up there are wrongly shown on the definitive map, going to walls where there is no stile, while in other places there are stiles on the ground but with no paths leading to them on the map.

One explanation suggested is that when the DM was drawn up, most people had no idea of the importance of the accuracy, and this seems most likely. So probably those who drew them were careless, and people didn't bother to check them, or if they noticed small anomalies didn't bother to draw attention to them.

I would hesitate to extinguish paths on the map that seem to go nowhere, as it would make more sense to create a useful connection so that they do go somewhere, and to correct the definitive map where there have clearly been errors. It's more likely that a path will have been left off, than one being put on by mistake, but possibly some were put on in the wrong place.

Jo Bird

NorthYorks and South Durham Area

OBITUARY

Harry Comber

Malcom McDonnell writes, Harry Comber, who has died at his home in Eastbourne, was a pioneer of footpath work in Sussex and a lifelong campaigner for the rights of walkers on the South Downs. He was a founder member of the Ramblers Beachy Head Group and served on their committee for 26 years until 2005. He helped create both the South Downs Way and later the Wealdway, and wrote and published a guide booklet for the former that is still in use today.

More recently it is down to Harry's tenacity that we have a definitive map for Eastbourne, and one of his last achievements was the easy-access route along the Downs from Beachy Head to Butts Brow.

Harry had a formidable eye for the important details in footpath work, and a reputation for not suffering fools gladly. Everyone who had dealings with him held him in great respect, including East Sussex County Council. Harry's sort of tenacity and sheer hard work for the cause we all love is very rare now and will be sorely missed.