

BBR02

Rights of way : a guide to law and practice - fourth edition

Cumulative supplement at 30 June 2021

A list of corrections, previously included with this collection of supplements, is now available as a separate file (BBR01).

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NOTE : The Planning Inspectorate's Advice Notes, Consistency Guidelines and other documents can

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391	Department for Communities and Local Government Circular 03/2007 : Town and Country Planning (Control of Advertisements) (England) Regulations 2007 – link
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221	Guidance for National Park Authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984 (Defra, 2007) – download
304	Guidance for Public Authorities on Implementing the Biodiversity Duty (Defra, 2007) – download
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56	Guidance to Commons Registration Authorities in England on Sections 15A to 15C of the Commons Act 2006 (Defra, 2013) - link
206	Marine licensing guide 4 Harbours Act 1964 guidelines (Marine Management Organisation, 2011) – download
261, 282	Making stiles and gates easier for those with mobility problems (Defra, 2007) – download
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196	The Validation of Planning Applications : guidance for local planning authorities (Department for Communities and Local Government, 2007) – link

Chapter 1

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3	1.1 Natural England has published <i>England Leisure Visits – report of the 2005 survey</i> (NE13). This found that walking had been the main reason for 18% of trips, and that 21.2 million visits to land to which access had been granted under the 2000 Act had been undertaken by people living in England over a 12-month survey period.
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- 4 Performance indicators for the 2006-07 financial year have been included in a revised set of tables for both England and Wales available for downloading from the website.
- 8 1.2.1 By 'road' in the phrase 'any other road', is meant that which has the characteristics of what is in common parlance termed a road, namely, a route with a tarmacadamed surface and defined lateral boundaries. For example, in *Barrett v Director of Public Prosecutions* (2009) a way through a private caravan site to give access to the public to a beach on the far side of the site was held to be a 'road' within the phrase 'any other road to which the public has access' in the definition of 'road' in RTA 1988 s 192.
- 9 Further Reading A new edition of *Out in the Country* was published in 2007 by Natural England.

Chapter 2

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- 11 2.1 For a discussion of the approach to be taken when a public right of way is alleged to exist over a way subject to private rights of way, see *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010).
- 11 2.2 In *R (Smith) v Land Registry (Peterborough Office)* (2009), the owner of a caravan claimed possession of land on which the caravan had stood for more than 12 years. The Registry rejected the application on the ground that the land on which the caravan stood was public highway, and public highway could not (*Harvey v Truro District Council* (1903)) be extinguished by adverse possession. The court upheld the Registry's decision and an appeal to the Court of Appeal [*R (Smith) v Land Registry (Peterborough Office)* (2010)] was dismissed (meaning and effect of dictum 'once a highway, always a highway' considered).
- 12 2.3.1 Purposes reasonably incidental to passing and repassing include, with regard to a vehicle, stopping and parking (i.e, in the absence of restrictions on stopping and parking imposed with legal authority by the highway authority). *Rogers v Ministry of Transport* (1952), cited in *Pusey and Anor v Somerset CC*(2012).
- 12 In *Jeffries v Robb* (2012) A applied for the striking out, in an injunction restraining her use of a way across B's land, of a provision that excluded use 'other than at a reasonable speed', arguing that the speed with which a person was entitled to pass along a right of way depended on the circumstances.
- The Court of Appeal held that, having regard to the fact that A's use of the way had included use with a tractor fitted with a CCTV camera for the purpose of 'intrusive snooping' on B's land, 'adjusting her speed to enable her to carry out that exercise', the inclusion of the words objected to was warranted. The application was accordingly dismissed.
- 13 2.3.1 *Mayor, Commonality and Citizens of the City of London v Samede, Barda, Ashman and persons unknown* (2012). Protestors set up a camp consisting of about 175 tents on highway land outside St Paul's Church in London. The claimant authority sought an order for possession of the land, a declaration that under common law or under HA 1980 s 143 it was lawfully entitled to remove tents, and an injunction preventing the defendants from interfering with the removal. The protestors claimed that the granting of the relief sought would constitute and infringement of their rights under Article 10 (Freedom of expression) and Article 11 (Freedom of assembly) of the European Convention of Human Rights. The court held that that in the light of the fact that the presence of the camp was incompatible with the lawful function and character of the land as a highway; the interference with the rights (under Article 9) of worshipers attending the church, the nuisance caused by noise and smell and the damage to local trade, the interference with the claimants' rights under Articles 10 and 11 was proportionate, lawful, and justified. The relief sought was granted.
- 13 2.3.1 In *Sheffield City Council v Fairhall & Ors* (2017) it was held that as the removal of trees in the highway came within the highway authority's duty of maintenance, those taking direct action to prevent such removal were trespassing and committing an offence under HA 1980

- s 303 [wilfully obstructing a person acting in the execution of the 1980 Act] and accordingly an injunction would be granted to restrain their activities.
- 15 2.3.2 The power in the Clean Neighbourhoods and Environment Act 2005 to make dog control orders was replaced on 20 October 2014 by a power under the Anti-Social Behaviour, Crime and Policing Act 2014 for unitary authorities, London borough councils and non-metropolitan district councils to make public space protection orders. See Chapter 7 below for more details of the power.
- 17 2.4.1 Localism Act 2011 s 88 permits 'assets of community value' to be listed by a local authority. Actual use either currently or in the recent past is required before a building or other land can, in the opinion of the local authority, be an asset of community value. In *Banner Homes Ltd v St Albans City And District Council & Anor* [2018] the land was a field crossed by two public footpaths, but the whole of which had been used for informal recreation. The request to list the field came after the owner fenced off the paths from the remainder of the field. The argument before the court was whether the 'actual' use of the field away from the public footpaths qualified under the Act, given that the use had been trespassory. The court held that "actual use", in this statutory context, should mean what it says and that the listing of the field by the Council should be upheld.
- 19 2.6.4 The Use of Invalid Carriages on Highways (Amendment) (England and Scotland) Regulations 2015 substitute regulation 7 of the 1988 Regulations to introduce a new requirement which relates to invalid carriages which include necessary user equipment. The Use of Invalid Carriages on Highways (Amendment) (Wales) Regulations 2015 made similar provision in Wales from 9 April 2015.
- 19 2.4.3 fn 30 In *Ramblers' Association v Secretary of State for Environment, Food and Rural Affairs* (2017) it was held that an Inspector had been correct to accept evidence of the adequacy of notices posted under s 55 of the British Transport Commission Act 1949.
- 20 2.4.3, footnote 38, additional sites have been designated by the Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) Order 2007, as amended by the Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) (Amendment) Order 2007.
- 21 2.5.2 A transfer order made under the Greater London Authority Act 1999 transferred responsibility for a road from Southwark LBC to Transport for London. The order transferred "the highway, in so far as it vested in the former highway authority". What was the extent of that transfer? In *London Borough of Southwark v Transport for London* (2018) the Supreme Court held that it was limited to the extent of the former authority's property rights as highway authority. If that authority had other rights in relation to the land they had not been transferred.
- 25 2.5.3, final paragraph. The requirement to prepare Home Information Packs was suspended from 21 May 2010 by the Home Information Pack (Suspension) Order 2010, and Part V of the Housing Act was subsequently repealed on 15th January 2012: Localism Act 2011 ss 183 and 240.
- 26 2.6.2, third paragraph. Police community support officers now have powers to issue fixed penalty notices to people cycling on footways: the Police Reform Act 2002 (Standard Powers and Duties of Community Support Officers) Order 2007.
- 26 2.6.2 footnote 67 Byelaws under LGA 1972 s 235 may, from 3 March 2016, be made under the alternative procedure set out in the Byelaws (Alternative Procedure) (England) Regulations 2016.
- 27 2.6.3 Byelaws under LGA 1972 s 235 may, from 3 March 2016, be made under the alternative procedure set out in the Byelaws (Alternative Procedure) (England) Regulations 2016.
- 27 2.6.4 *Coates v Crown Prosecution Service* (2011) was an appeal against conviction for riding a SEGWAY on a pavement contrary to section 72 of the Highways Act 1835. Munby LJ described a SEGWAY as "a technologically advanced form of personal transportation

consisting of a small gyroscopically stabilised platform mounted on two wheels, on which the traveller stands, powered by a battery driven electric motor. A vertical joy-stick is used to steer. Speed is controlled by leaning forward (to go faster) or standing up straight (to slow down). Its maximum speed is 12½ miles per hour”.

The court considered the provisions in section 72 in two parts. The first was the provision that it should be an offence ‘ ... if any person shall ride upon any footpath or causeway by the side of a road or set apart for the accommodation of foot passengers’.

The court held that :

- (a) ‘ride’ was not confined to riding a horse;
- (b) ‘ride’ connoted being on or in the thing being ridden;
- (c) “To be carried along on a wheeled contraption or machine, whether powered or not, can be, within the meaning of section 72, to ride”;
- (d) “You do not have to be seated to be riding”.

The court concluded that the accused was, within the meaning of section 72, riding the SEGWAY, and so was guilty of an offence under this first part.

The second part was the provision that it should be an offence to ‘drive any ... carriage of any description ... upon any such footpath’.

The court held that :

- (a) section 85(1) of the Local Government Act 1888 enacted that ‘ ... Bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highways Acts’. Since a SEGWAY came within the term ‘and other similar machines’, and the 1835 Act ‘is an “always speaking” statute’ (its provisions apply notwithstanding that the meaning attached to terms might change over time), a SEGWAY was a carriage within the second limb of section 72; and,
- (b) the accused had ‘driven’ the SEGWAY, (“drive’ for the purposes of section 72 has quite a wide meaning. The ‘driver’ may be in or on the thing being driven but need not be, as the example of the drover shows. One drives a motor cycle by sitting on it, just as one drives a car by sitting in it, but the coachman of a stage coach, like the Victorian cabbie on his Hansom, is driving the horses although seated on the coach rather than the horses.” Per Munby LJ)

The court concluded that the accused was guilty of an offence under the second part of the section. The appeal against conviction was therefore dismissed.

The court also held that in the charge before the District Judge, that the accused ‘willfully rode a motor vehicle, namely a SEGWAY, upon a footpath ... contrary to section 72 of the Highways Act 1835’, the words ‘motor vehicle’ were surplusage, since neither limb of the section required that the vehicle ridden/driven should be a motor vehicle.

In *Chief Constable of North Yorkshire v Saddington* (2000), it was held that since a Goped was a vehicle ‘intended or adapted for use on roads’ within RTA 1988 s 185(1), and so a ‘motor vehicle’ within that sub-section, a user was required (under s 87(1)) to hold a driving licence; and (under s 143(1)) a policy of insurance in respect of third party risks.

30

2.6.6, footnote 87, the decision of the High Court in *Kay* has been overturned by the Court of Appeal in *Commissioner of the Police for the Metropolis v Kay* (2007). The case concerned a recurrent event (named Critical Mass) in which pedal cyclists met at the same place in London at 6pm on the last Friday of each month and, having no fixed, settled or predetermined route, end time or destination, followed the route taken by whichever cyclist happened from time to time to be in the lead. The police notified participants that the event was illegal in that no notification had been given as required by section 11(1). A participant sought a declaration that the rides were not public processions of which notice was required to be given to the police. In *Kay v Commissioner of Police of the Metropolis* (2008) the House of Lords held (per Lord Phillips) that the event was a ‘procession’ within the meaning of section 11 but that, being

one ‘commonly or customarily held’, by virtue of section 11(2) the requirement to give notice did not apply; (per Lord Brown) there being no organizers, the requirement to give notice did not apply. Consequently, the exception under section 11 (2) did not arise. The event was therefore not illegal.

- 31 2.7.2 The Office of Rail Regulation published in August 2011 *Level crossings : A guide for managers, designers and operators*, which includes guidance on footpath and bridleway crossings.
- 32 2.7.2. In *Ramblers’ Association v Secretary of State for Environment, Food and Rural Affairs* (2017) it was held that the date when alleged incompatibility with statutory purposes was to be assessed was the date when the matter was before a tribunal, in this case an Inspector considering an opposed definitive map modification order.
- 33 2.7.4 For a discussion of public rights over the seashore by the Supreme Court see *R (Newhaven Port & Properties Ltd) v East Sussex CC* (2015).
- 36 2.7.7 A way cannot be a public right of way unless one terminus joins a public right of way. Thus where the public right is extinguished over a length at each end of a public path, the right over the middle section is extinguished also (neither end then joining a public right of way). In *Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs and Bury Metropolitan Borough Council* (2012) a claim based on twenty years use under HA 1980 s 31 over a way that linked two areas of land to which the public had access by virtue of licence failed since neither end terminated on a right of way.
- 37 2.8.2 Where a landowner who owns land adjoining a highway that for part of its width has a made up or metalled surface ‘fences against the highway’ (i.e., erects a fence or wall to, e.g., retain livestock from straying onto the highway, or to prevent people entering his land from the highway, or both), ‘there is a rebuttable presumption that the land between the fence and the made up or metalled surface of the highway has been dedicated to public use as a highway and accepted by the public as such.’ Per Laws, LJ, *Sinclair v Kearsley and Salford City Council* (2010). (I.e. the land is highway verge.)
- 38 Further Reading The Department for Transport has published new and revised guidance on self-balancing scooters, motorised scooters and miniature motorcycles
- 38 Further Reading The Department for Transport published in July 2009 details of the regulations applying to electrically-assisted pedal cycles.
- 38 The Planning Inspectorate published a new version of Advice Note 16 in September 2009.
- 38 Further Reading A new edition of *Out in the Country* was published in 2007 by Natural England.

Chapter 3

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- 40 3.2 In *Wild v Secretary of State for Environment, Food and Rural Affairs and Dorset CC* (2009), the Court of Appeal (Scott Baker LJ, Moses LJ) held that the airing, in 1978, at an inquiry on the occasion of a special review of the definitive map, of objections, lodged in 1975, by ‘persons who could very well have been owners’ (per Scott Baker, L J) of land crossed by a way, to the showing of the way as a bridleway, constituted not only:
- (a) something that brought the right to use the way into question (in the context of a claim, in the event unsuccessful, that use of the way prior to 1978 had resulted in the way being dedicated as public); but also
- (b) sufficient indication that the owners of the land (‘...whoever they may be,’ per Scott Baker, LJ) had not acquiesced in public use of the route to preclude an inference, from use of the way as of right for a period short of twenty years prior to the locking in 1998 of a gate across the way, of dedication at common law of the way as a public right of way on foot [i.e., notwithstanding that the expression of contrary intention had occurred, not during the period of user relied upon, but prior to its commencement.] (‘The state of mind of the users seems to me to be relevant to the status of the track.’ Per Scott Baker, LJ.)

Decision of the High Court (Keith J) upholding the inspector's confirmation of the order adding the way to the definitive map as a footpath, set aside.

44 In *Smith v Muller* (2008), landowner A made a claim, based on long usage, to an easement (a private right of way) over B's land to a road on the far side. An enclosure award of 1798 required the boundary between A's and B's land to be fenced. B argued that the construction of an access through the fence would constitute an unlawful breach of the fencing requirement in the award, with the result that no presumption of dedication either under statute or at common law could have arisen. The court rejected the argument. The purpose of the requirement was to mark the ownership boundary and to retain cattle, purposes that would not be impeded by the existence of a gate in the fence. The enclosure award requirement of fencing was therefore no bar to the presumption of the dedication of the easement. A's claim succeeded.

44 3.3.5 '...other than a way of such a character that its use could not give rise at common law to any presumption of dedication..' A way cannot be a public right of way unless one terminus joins a public right of way. Thus where the public right is extinguished over a length at each end of a public path, the right over the middle section is extinguished also (neither end then joining a public right of way). In *Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs and Bury Metropolitan Borough Council* (2012) a claim based on twenty years use under HA 1980 s 31 over a way that linked two areas of land to which the public had access by virtue of licence failed since neither end terminated on a right of way.

44 3.3.5 In *Forbes v Wokingham BC* (2018) the claimant challenged the refusal by the BC, as commons registration authority, of an application for registration of land as a village green. The refusal followed a public inquiry the Inspector at which concluded that use of land had been attributable to assertion of a right of way. The judge rejected a claim that the Inspector had wrongly taken into account evidence of uses such as blackberry picking.

44 3.3.5 *Network Rail Infrastructure Ltd v Welsh Ministers* (2020) was a challenge to the confirmation by an Inspector of a definitive map modification order across a railway line. The Inspector had concluded that there was sufficient documentary evidence to conclude that the right of way existed prior to the construction of the railway. The court decided that the Inspector had had sufficient grounds for so concluding.

44 3.3.5 *TW Logistics Ltd v Essex CC* (2021) was a challenge to the registration by the CC of land at Mistley Port in Essex as a village green. The claimants argued that land should not be so registered if the effect would be to criminalise the landowner's continuing use of the land for the same commercial purposes as took place during the 20-year qualifying period. The Supreme Court held, dismissing the appeal, that the exercise by the public of any rights arising from registration were subject to the 'give and take' principle. This meant that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner as recognised in the practical arrangements which develop to allow for coexisting use during the qualifying period. The landowner had the right to undertake new and different activities provided that they did not interfere with the rights of the public to use the land for lawful sports and pastimes.

46 3.3.6 '...as of right...' R (*Lewis*) v *Redcar and Cleveland Borough Council* (2010). Area of land consisting of coastal sand dunes occupied for at least 80 years until 2002 in part by the greens and fairway of a golf course; application under Commons Act 2006, section 15 for the land to be registered as village green; open parts of land used for informal recreation; route used by walkers crossed fairway; walkers in practice of stopping before crossing fairway until a game in progress had gone through; golfers on occasions called warning to walkers that a game was going through; registration opposed on ground that since walkers had (it was claimed) 'deferred' to the landowner's use of the land, the use could not be as of right.

Held, the fact that, in a claim based on long usage, users temporarily refrained from the use in order to accommodate the interests of the landowner does not preclude the use from

being as of right. (Per Lord Walker, ‘I have great difficulty in seeing how ... [the use by residents for recreation was not exercised as of right] simply because they normally showed civility towards members of the golf club who were out playing golf.’) Council ordered to register the land as village green. Nature of rights exercisable on land becoming registered as village green vis a vis rights the exercise of which gave rise to the registration, considered. ‘I see little danger, in normal circumstances, of registration of a green leading to a sudden diversification or intensification of use by local residents. The alleged asymmetry between use before and after registration will in most cases prove to be exaggerated.’ (Per Lord Walker, para 47.)

46 3.3.6 ‘...without interruption...’ The Planning Inspectorate amended Advice Note 15 in April 2010, and again in November 2012. In *R (Roxlena) v Cumbria CC & Anor* (2017) the judge disagreed with the view in the Advice Note, commenting (at para 73): ‘I do not agree with the proposition in the Advice Note ... that an interruption which is more than de minimis but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way. I see no basis for that proposition. Use or non-use is a question of fact; the cause of any non-use is not the issue.’

47 3.3.6 Without force “User by force is not confined to physical force. It includes use which is ‘contentious’. A landowner may render use contentious by, among other things, erecting prohibitory signs or notices in relation to the use in question.” Per His Honour Judge Waksman, *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire CC* [2010].

Although force is the clearest indication that use of a way was *vi* (and thus not as of right), force is not a necessary requirement. What is required is that the use should be shown to have been contentious, for example by the landowner showing that he had done all he reasonably could to prevent the use. For the meaning of *vi*, and of contentious, (in the context of the phrase ‘as of right’ in the Commons Act 1965, s 22(1)), see *Betterment Properties (Weymouth) Ltd v Dorset CC and Taylor* (2010).

47 ‘without permission’. In *Barkas v North Yorkshire CC and Scarborough Council* (2012), B had applied for land to be registered under the Commons Act 2006 as village green on the ground that it had, under section 15(3)(a), been used as of right by a significant number of inhabitants of a locality for sports or pastimes for a period of at least twenty years. The land had been provided by a predecessor to Scarborough Borough Council, the landowner, as a recreation ground under section 80 of the Housing Act 1936, and maintained as such during the relevant period of use. North Yorkshire CC, the registration authority, refused the application, holding that, since the public had been entitled to use the land for recreation under the 1936 Act, use of the land had been by virtue of this entitlement and therefore, the use not being *nec precario*, had not been use as of right. (The use had been by right, not as of right.) The Court of Appeal held, dismissing an appeal from the High Court (*R (Barkas) v North Yorkshire CC and Scarborough Council* (2011)), that the authority had acted correctly. The Supreme Court dismissed an appeal from the Court of Appeal (*R (Barkas) v North Yorkshire CC and Scarborough Council* (2014)), also holding that the House of Lords had been wrong in the case of *R (Beresford) v City of Sunderland* (2003) (see p 48)

50 3.3.7 Where the right to use a way is brought into question on more than one occasion, use during the 20-year period ‘next before’ either bringing into question may suffice for the purposes of HA 1980 s 31. However where the two dates are more than 20 years apart, a contrary intention shown prior to the commencement of the second period does not operate to oust the statutory presumption that arises from the use during that period. *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010).

51 3.3.8 ‘..brought into question.’ How? In *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* (2007) Lord Scott said, ‘ ... the bringing into question could, in my opinion, be done not only by the landowner but also by a member of the public or by the local authority. A member of the public might apply to the court for relief of some

sort that would bring the right into question, or a prosecution brought by a local authority against a landowner e.g., allowing a stile to fall into disrepair, might, if the landowner disputed that there was any right of way, be similarly regarded’.

52 3.3.9 In *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010), Sales J held that an intention not to dedicate shown before the start of a 20-year period does not operate to oust the statutory presumption that arises from the use during that period. Sales J also said (para 33): “It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires ‘sufficient evidence’ that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of state of mind. And once one introduces that element of objectivity ... it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.”

52 3.3.9 In *Ali v Secretary of State for Environment, Food and Rural Affairs* (2015) an Inspector’s decision to confirm a definitive map modification order was challenged for, among other reasons, failing to conclude that the locking of a door at Christmas had constituted sufficient evidence of the landowner’s intention not to dedicate. The challenge failed, the judge holding that it had been reasonable for the Inspector to conclude that the use of the path had been for the purpose of getting to the local shops and businesses and so a locking of the door at Christmas when those shops and business were closed had not been effective to provide “sufficient evidence” that there was no intention to dedicate.

52 3.3.9 In *Powell and Irani v Secretary of State for Environment, Food and Rural Affairs* (2014) a definitive footpath had been diverted by order in 1967. No ‘legal event’ modification order had ever been made to modify the definitive map and statement to give effect to that diversion. There had been continued public use of the former route of the footpath until it was brought into question in 2006. A modification order had subsequently been made to add the former route to the definitive map. The case was a challenge to the confirmation of that order by an Inspector. The court held that the fact that the definitive map had not been amended was no reason to impose an additional test of asking whether the quality of the use was such that a reasonable landowner could have been expected to intervene to resist it.

53 3.3.9 The House of Lords, in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* (2007) reversed the decision of the Court of Appeal, thus overturning the decision of Dyson J in *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset CC* (1999) and rendering unsound the decision of Collins J in *Norman and Bird v Secretary of State for Environment, Food and Rural Affairs* (2006) and of the Court of Appeal (2007) in upholding Collins J’s decision: dictum of Lord Justice Denning in *Fairey v Southampton CC* (1956), (“In my opinion a landowner cannot escape the effect of 20 years’ prescription by saying that, locked in his own mind, he had no intention to dedicate. ... In order for there to be “sufficient evidence that there was no intention” to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – in this case the villagers – that he had no intention to dedicate’), approved. In *R (Drain) v Secretary of State for the Environment, Food and Rural Affairs* (heard and reported with Godmanchester above), the House of Lords rejected the contention of the appellant that the contrary intention under section 31 must, to rebut the presumption of dedication, be shown to have existed throughout the twenty year period of use.

55 3.3.9 Notices In *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010), the court held that an inspector was entitled to find that signs in such terms as ‘Private’ or ‘Private, No tipping’ did not unambiguously provide sufficient evidence or notice that there was no intention that a path be dedicated to public use. “A sign saying only ‘Private’ could simply have been indicating that the land a short way further down the footpath (which was

open fields) was private so that people should stick to the footpath. In that regard, the inspector was entitled to accept the submission ...that virtually all rights of way are over private land so that a simple sign saying 'Private' does not clearly indicate that there is no public right of way along a marked footpath. Similarly, the inspector was entitled to conclude that a sign saying "Private, No Tipping" did not clearly indicate that there was no public right of way over the footpath (it might more naturally be taken to refer to what should not be done on the fields at the end of the path)." Per Sales J.

56 3.3.9 and footnote 67. HA 1980 s 31A(1), which requires highway authorities to keep a register containing information relating to maps and statements deposited and declarations lodged with the authority under section 31(6), was brought into operation in England from 1 October 2007 : Countryside and Rights of Way Act 2000 (Commencement No. 13) Order 2007.

The Dedicated Highways (Registers under Section 31A of the Highways Act 1980) (England) Regulations 2007, make provision for the information that is to be included in a register (regulation 3), the manner in which the register is to be kept (regulation 4), and the circumstances in which an entry may be removed (regulation 5).

Defra has issued guidance to authorities in England on the regulations.

Further changes were made in England by section 13 of the Growth and Infrastructure Act 2013, brought into effect from 1 October 2013 by the Growth and Infrastructure Act 2013 (Commencement No. 3 and Savings) Order 2013. The amendments extend the period from ten years to 20, provide that declarations must be in a prescribed form, require surveying authorities to publicise declarations on site and permit those authorities to charge a reasonable fee. Declarations may be joint ones covering also declarations intended to prevent claims for village green status. The regulations prescribing forms are the Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013. Defra has issued guidance "Guidance to Commons Registration Authorities in England on Sections 15A to 15C of the Commons Act 2006" (revised in March 2014) and guidance to those wishing to make a declaration using the prescribed form CA16.

56 3.3.10 An Inspector has held that section 56 of the Pastoral Measure 1985, under which no church or consecrated land can be sold, leased or otherwise disposed of otherwise than under powers conferred by the Measure did not preclude the presumption of the dedication of a right of way under HA 1980 s 31 over consecrated land. The reason was that presumed dedication under the section did not constitute the sale, lease or other disposition of the land. Since twenty years' use of the way as of right over the consecrated land concerned had been shown, the order modifying the definitive map to add a footpath was confirmed. (A Pastoral Measure is a Measure of the General Synod of the Church of England confirmed by both Houses of Parliament...) Worcestershire County Council Order (Footpath 709, Alfrick) Definitive Map Modification Order 2006. PINS ref:FPS/E1855/715, order decision issued 14.12.2007.

56 3.3.10 In *Housden v Conservators of Wimbledon and Putney Commons* (2008), the Court of Appeal held that that section 35 of the Wimbledon and Putney Commons Act 1871, which prevented the Conservators from selling, leasing or in any manner disposing of any part of the common, did not prevent them lawfully granting an easement over the land [in exercise of the power conferred by section 8 to 'hold and to dispose of (by grant, demise or otherwise) land']. The Court (Mummery LJ) indicated, obiter, that if it had – if the Conservators had had no power to grant an easement - this lack of capacity would prevent the acquisition, from long usage, of an easement under section 2 of the Prescription act 1832, notwithstanding that, under the section, where 40 years use had been shown, the claim was to be 'deemed absolute and indefeasible' unless the use had been by consent in writing.

58 3.3.12 In *Whitworth v Secretary of State for Environment, Food and Rural Affairs* (2010, CA) the Court of Appeal considered an appeal against a decision of the High Court (2010, HC) to

uphold a decision by an Inspector to confirm, with modifications, a modification order. As confirmed, the order added the disputed way to the definitive map as a restricted byway. The Inspector had found that at some time in the past the way had acquired the status of bridleway but considered that in the relevant 20-year period between 1973 and 1993 use of the way by pedal cyclists meant that dedication as restricted byway could be presumed.

Carnwath LJ disagreed, agreeing with counsel for the applicant that use by pedal cyclists after 1968 would have been by virtue of the right conferred by CA 1968 s 30, and therefore that such use should be disregarded for the purposes of HA 1980 s 31. He further expressed the view that he would have reached the same conclusion even if there had not been the evidence of pre-existing bridleway rights, commenting: “One would then be considering the inference to be drawn from the actual use between 1973 and 1993. It is true that regular use by both horse-riders and cyclists over that period would be consistent with an assumed dedication as a restricted byway at the beginning of the period (had that concept then existed). But it is no less consistent with an assumed dedication as a bridleway, of which cyclists have been able to take advantage under the 1968 Act. Since section 30 [sic, but should it be section 31?] involves a statutory interference with private property rights, it is appropriate in my view, other things being equal, to infer the form of dedication by the owner which is least burdensome to him.” LLJ Tomlinson and Maurice Kay agreed.

The part of the order relating to the disputed way was quashed.

58 3.3.12 In *Slough Borough Council v Secretary of State for Environment Food And Rural Affairs* (2018) there had been evidence of use of the way by pedal cycles prior to an interruption in 1961. The Inspector had concluded that this gave rise to the existence of public vehicular rights. However the judge concluded that he had failed to consider the alternative explanation of such use being tolerated use over a public bridleway (prior to the public rights created under CA 1968).

65 3.4.5 In *Barlow v Wigan MBC* (2020), citing *Turner v Walsh* (1881), the Court of Appeal held that a path laid out in the 1930s had become a highway through common law dedication, and as *Turner v Walsh* was authority that dedication was retrospective, the way had been a highway in 1949 and was thus maintainable at public expense.

65 3.4.6 In *Garland & Anor v Secretary of State for Environment, Food and Rural Affairs* (2020) the High Court rejected a challenge to a decision by an Inspector to confirm a modification order changing the status of a way which passed through a low underpass under a motorway from footpath to bridleway. The challenge was on the basis that dedication of the way as a bridleway could not have taken place because it would have constituted a public nuisance.

65 3.4.7 In *Campbell v Banks* (2009) it was held that while the Wildlife and Countryside Act 1981 provides a statutory procedure by which the existence or non-existence of a public right of way may be established, the fact that this statutory procedure exists does not oust the inherent jurisdiction of the court to make a declaration as to whether a way is or is not public. For the court to exercise this jurisdiction, however, it is necessary for all parties affected (including, in particular, the owners of land crossed by the way) to be joined as parties to the action, so the parties may be before the court.

66 3.4.7 In *R (Roxlena) v Cumbria CC & Anor* [2017] the judge declined to quash a decision by a surveying authority to make a modification order, commenting (at para 63): ‘I think it would be a rare case in which the court were prepared to second-guess the outcome of a local public inquiry to determine the force of the objectors' case, where the nature of the objection was an attack on the exercise of the surveying authority's judgment.’ His view was endorsed by the Court of Appeal in *R (Roxlena) v Cumbria CC* [2019].

69 Further Reading The Planning Inspectorate amended Advice Note 15 in April 2010 and again in November 2012, and Advice Notes 6 and 12 in May 2013.

69 Further Reading Defra issued version 5 of its guidance to the NERC Act in May 2008.

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- 77 4.2.5 Circular 2/1993 has been replaced, for authorities in England, by Defra circular 1/09, paragraph 6.17 of which restates the advice about obstructions apparently recorded in the definitive statement.
- 87 4.6.1 Annex B to circular 2/1993 has been replaced, for authorities in England, by chapter 4 of Defra circular 1/09.

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- 98 5.1.3 footnote 4 The guidance previously in circular 2/1993 is now, for authorities in England, in Defra circular 1/09, paragraph 4.09.
- 99 5.2.1 The level of accuracy of the map and statement should be of the highest level in practice attainable. The level of the degree of accuracy attainable will depend on the circumstances, in particular the nature of the evidence as to the line and other particulars of the route. In *Perkins v Secretary of State for the Environment, Food and Rural Affairs* (2009), Sir George Newman said, ‘...if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question. Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes, in my judgment, there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence.’
- 102 5.2.5 In *Kotarski v Secretary of State for Environment, Food and Rural Affairs* (2010) a footpath was included in the definitive statement but not on the definitive map. The court accepted (rejecting an argument of the appellant to the contrary) that the discovery by the authority of evidence that this conflict existed constituted the ‘discovery of evidence’ for the purpose of section 53(3)(c). The court dismissed the appeal against the decision of the inspector at a public inquiry to uphold the order made by the surveying authority that added the footpath in the statement to the map.
- 102 5.2.5 Because CRWA 2000 s 48 provides conclusive evidence of the existence of restricted byway rights, it is not now possible to ‘downgrade’ a restricted byway reclassified from a RUPP by the 2000 Act to bridleway or footpath status.
- 104 5.2.6 DOE Circular 18/1990 has been replaced, for authorities in England, by Defra Circular 1/09, see paragraph 4.30 onwards. Paragraph 4.35 of the new circular expresses an amended view that, in the context of deletions from the definitive map, it is not possible for a right of way to be dedicated when use is by virtue of its already being shown on a definitive map. Defra’s view is now that use of the way in such circumstances can no longer be seen to be as of right. . In circular 1/09 the view is expressed that this applies from the date of first recording on the definitive map, this term being defined as ‘either the date of the original publication of the first definitive map, the date of publication of a review, or the relevant date of an order adding the path to the definitive map, whichever was appropriate’.
- 105 5.2.7 As subsection (7B) refers to “the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act”, and as this phrase was interpreted in the *Winchester College* case (see p 107 below) as requiring strict adherence to the requirements of Sch 14, it is submitted that for an application to bring into question the right of the public to use the way, it too must have complied with the requirements of paragraph 1, e.g in respect of submission of copies of documents. See, for example, paragraph 49 of the *Winchester College* judgment: “Parliament stipulated that an application is made when it is made in accordance with all the requirements of the paragraph”. This view is in accordance with paragraph 66 of the Defra guidance on the NERC Act (version 5, May 2008). However the opposite view

was taken by Defra in a letter to the Planning Inspectorate in May 2012. In that letter, which makes no mention of amending the NERC Act guidance, Defra argued that the *Winchester College* case conclusion of strict compliance was reached after considering the phrase in the context of the NERC Act, and that as NERCA 2006 s 69 amended HA 1980 s 31, the same phrase as used in that section should be interpreted in the context of HA 1980. Its consideration of that Act led it to conclude that it was “entirely reasonable to construe section 31(7B) differently from section 67(6)”.

It would seem that the position with regards to a non-compliant application is the same as it was before the NERC Act amendment, namely that it is likely that in practice the application will have had the effect of bringing into question the right to use the way, but it is for a surveying authority (or Inspector) to satisfy it/himself on the matter.

106 5.3 The Rights of Way (Hearing and Inquiry Procedure) (England) Rules 2007 gives rights to applicants for modification orders which are opposed. See 5.7.8 below.

107 5.3.1 Defra wrote to surveying authorities in England in April 2007 to express the view that “where an application under section 53(5) of the Wildlife & Countryside Act 1981 is accompanied by a list or summary analysis of documentary evidence sufficient to make a credible case for an Order under section 53(2) of the '81 Act, then this constitutes an application that is compliant with schedule 14, paragraph 1..” Note that this advice was superseded by the *Winchester College* case below, and see Defra circular 1/09, paragraph 4.7.

R (Warden and Fellows of Winchester College) v Hampshire CC (2008) concerned an application to re-classify as a byway open to all traffic a route shown on the definitive map in a part as bridleway and the remainder as a restricted byway. The landowner contended that vehicular rights over the way had been extinguished by NERCA 2006 s 67(1). The applicant contended that section 67(1) did not operate to extinguish vehicular rights because the exception to section 67(1) in section 67(3)(a) (application for modification order adding a way as a BOAT made before 20 January 2005) applied. The landowner contended that since WCA 1981 Sch 14 para 1(b) required that an application for a definitive map modification order should be accompanied by 'copies of any documentary evidence ... which the applicant wishes to adduce in support of the application' and since the requirement had not been complied with (in that the application had been accompanied, not by copies of the evidence, but by a list of the documents), the exception in section 67(3)(a) did not apply, with the result that vehicular rights had been extinguished by section 67(1).

The authority, rejecting the landowner's contention, made the order. The landowner called on the authority to reconsider its decision. The authority refused. The landowner applied for judicial review of the authority's refusal. The High Court, rejecting the application for judicial review, held that the exception in section 67(3)(a) applied and that the modification order showing the way as a BOAT should therefore stand.

The Court of Appeal, reversing the decision of the High Court (*R (Warden and Fellows of Winchester College) v Hampshire CC* (2007)), held that the words of WCA 1981 Sch 14 para 1(b) were to be given their clear and ordinary meaning. The requirements of the paragraph were therefore to be adhered to strictly. Thus the application for the way to be shown as a BOAT had not been validly made. Therefore the exception in section 67(3)(a) did not apply, with the result that, since a valid application to have the way shown as a BOAT had not been made by 20 January 2005, vehicular rights over the way had been extinguished.

107 5.3.1 In *R (Trail Riders' Fellowship) v Dorset CC* (2012) it was held that the requirement of Regulations 2 and 8(2) of the Wildlife and Countryside (Definitive Map and Statement) Regulations 1993 that the map accompanying an application for an order that modified the definitive map should be ‘on a scale of not less than 1/25,000’ required a map derived from a map originally drawn to that scale.

Thus where the maps accompanying applications for orders that would show ways as BOATs consisted of a map drawn to the scale of 1:50,000 that had been digitally enlarged so

as to show the map as at the scale of 1:25,000, the requirement that the map should be drawn at the scale of 1:25,000 was not satisfied, with the result that since in the Natural Environment and Rural Communities Act 2006 the exception to section 67(1) in section 67(3)(a) did not apply, rights for mechanically-propelled vehicles had by section 67(1) been extinguished. A challenge to the CC's decision to refuse the applications therefore failed.

However, the Court of Appeal took a different view (*R (Trail Riders' Fellowship) v Dorset CC* (2013)), holding that a map which was produced to a scale of 1:25,000, even if it was digitally derived from an original map with a scale of 1:50,000, satisfied the requirements of paragraph 1(a) of Schedule 14 to the 1981 Act provided that it was indeed “a map” and that it showed the way or ways to which the application related.

108 5.3.2 In *R (Warden and Fellows of Winchester College) v Hampshire CC* (2008), the Court of Appeal held (upholding the decision of the High Court in *R (Warden and Fellows of Winchester College) v Hampshire CC* (2007)) that where a landowner had received notification from the authority that an application for a modification order had been made, this was sufficient for the authority validly to determine the application and make the order, notwithstanding that the notification to the landowner had been by the authority and not, as required by Sch 14 para 2(1), by the applicant.

109 5.3.4 In *Maroudas v Secretary of State for Environment, Food and Rural Affairs and Oxfordshire CC* (2009), the High Court (Mackie J) considered whether an application had been validly made by compliance with WCA 81 Sch 14 and regulation 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. The Court concluded that it was necessary for the application and the circumstances attending its submission to be looked at as a whole. Notwithstanding defects in the application, including a failure to sign and date the form in the relevant boxes, the circumstances, taken as a whole and including subsequent correspondence between the applicant and the authority that established the essentials of the application, warranted an inspector in finding that the application had been validly made.

On appeal to the Court of Appeal (*Maroudas v Secretary of State for Environment, Food and Rural Affairs* (2010)), Dyson LJ expressed the view that if an error or omission in an application was recognised by the applicant and corrected shortly after submission of the application, that would be sufficient to ensure compliance with the requirements. But in the present case the defects had been so substantial, consisting of a delay of some weeks and a change to the length of route applied for, that there had been non-compliance with the requirements. Accordingly the appeal was allowed and the Inspector's decision quashed. The consequence was that NERCA 2006 s 67 had operated to extinguish vehicular rights over the way in respect of which the application had been lodged.

110 5.3.5 and 5.3.6 From February 2011 the Planning Inspectorate administered in England, on behalf of the Secretary of State, applications for directions and appeals against refusals to make modification orders.

110 5.3.6 The Planning Inspectorate announced in February 2014 revised procedure for appeals against refusals to make modification orders. Inspectors will now take into account evidence not considered by the surveying authority when it decided not to make the order. An inquiry may also be heard into an appeal. Full details of the new policy, revised in February 2015, are on the PINS website

113 5.5.1 Advice to surveying authorities in England on the action to be taken where, with respect to former RUPPs, there is any ambiguity between the definitive map and statement is contained in Defra circular 1/09, paragraph 4.41.

114 5.5.1 Paragraph beginning “subsection (2)” Although deletion is still possible, ‘downgrading’ a restricted byway reclassified from a RUPP by the 2000 Act to bridleway or footpath status by modification order is no longer possible because CRWA 2000 s 48 provides conclusive evidence of the existence of restricted byway rights over the way.

118 5.6.4 Defra wrote to surveying authorities in England in April 2007 to express the view that

“where an application under section 53(5) of the Wildlife & Countryside Act 1981 is accompanied by a list or summary analysis of documentary evidence sufficient to make a credible case for an Order under section 53(2) of the '81 Act, then this constitutes an application that is compliant with schedule 14, paragraph 1, and hence with sections 67(3)(a) and (6) of the NERC Act.” Note that this advice was superseded by the *Winchester College* case above (see page 107, 5.3.1), and see Defra circular 1/09, paragraph 4.7.

118 5.6.4 In October 2007 Defra wrote to the Planning Inspectorate to express a view on whether the exemption in section 67(3)(a) applied where an application had been made, but also determined, before the 20th January 2005 date. Defra’s view is that the exemption does not apply in such a case: for an application to qualify it must not have been determined at the date specified in the Act.

120 5.7.4 In September 2011 the Planning Inspectorate wrote to order-making authorities about the correct use of notation on order maps. In December 2011 the Inspectorate issued a new Advice Note 22 on the subject, revised in May 2013.

121 5.7.4 Non Statutory Guidance on the recording of widths on public path, rail crossing and definitive map modification orders was issued by Defra in February 2007 alongside a revision of the Planning Inspectorate’s Advice Note 16.

122 5.7.5 footnote 54 The previous advice in Circular 2/1993 about ‘appropriate bodies’ for the receipt of orders has been replaced, for authorities in England, by advice in paragraph 4.20 of Defra circular 1/09 to authorities to consider wider publicity for orders through ‘local organisations which are recognised as being representative of user interests’.

122 5.7.8 footnote 60 The previous advice in Circular 2/1993 about what to send with orders has been replaced, for authorities in England, by advice in paragraph 4.26 of Defra circular 1/09 to authorities to use the Inspectorate’s checklist.

122 5.7.8 The Rights of Way (Hearing and Inquiry Procedure) (England) Rules 2007 apply to modification orders in England submitted to the Secretary of State on or after 1st October 2007. For general details of the rules see the supplement to chapter 8. Under the Rules the applicant for an order [defined in rule 4(4)(b)] has the following rights:

(a) to receive preliminary notice indicating whether an inquiry or hearing will be held and its date, time and place [Rule 4(4)(b)]

(b) to receive from the Secretary of State a copy of the order-making authority’s statement of case or proof of evidence [Rules 6(2), 17(2) and 20(3)(a)]

(c) to receive from the Secretary of State a copy of any other statement of case [Rules 6(6)(b) and 17(6)(b)]

(d) if the applicant has submitted a statement of case or notice of reliance on the order-making authority’s case, to receive from the Secretary of State a copy of any further information he required any person to supply [Rules 7(3) and 18(3)]

(e) to appear at a hearing and give oral evidence or call someone else to do so [Rules 8(1)(b) and 9(6)(b)]

(f) to receive notice of any pre-inquiry meeting [Rule 15(2)]

(g) to appear at an inquiry [Rule 19(1)(b)]

(h) if appearing at an inquiry, to give or call another person to give, oral evidence and to present, or call another person to present, any matter; and to cross-examine any person giving evidence or presenting any matter to the inquiry [Rules 21(5) and 21(6)]

(i) to receive notice of the intention of the Secretary of State to disagree with the inspector and to be given an opportunity to make representations; and to receive notice of any re-opened hearing or inquiry [Rules 11(6), 11(9), 23(6) and 23(9)]

(j) to receive notice of a decision by an Inspector to take into account any subsequent material and to be given an opportunity to make representations, and to receive notice of any re-opened hearing or inquiry [Rules 12(3), 12(6)(a), 24(3) and 24(6)(a)]

(k) to receive notice of the decision [Rules 13(2), 14(2), 25(2) and 26(2)]

An applicant is given similar rights by the procedure for written representations adopted by the Planning Inspectorate for opposed orders determined by that method – see publication for details.

The applicant also has the following duties:

(a) to ensure that, within 14 weeks of the start date, the Secretary of State has received either their statement of case or notification that they intend to rely on the order-making authority's statement of case [Rules 6(3) and 17(3)]

(b) to ensure that the Secretary of State receives any proofs of evidence (and summary if necessary) not less than four weeks before the start of the inquiry [Rule 20]

122 The Planning Inspectorate's checklist for order-making authorities was revised in March 2007 and again in October 2007.

123 5.7.8 The Planning Inspectorate is now making decisions on definitive map modification orders for England and for Wales available on its website.

123 5.7.8 In a revised version of circular 1/09 in October 2009 Defra revised paragraph 4.27 to make it clear that if orders are severed, each part must be separately capable of confirmation.

123 5.7.9 In *R (Elveden Farms Ltd) v Secretary of State for Environment, Food and Rural Affairs* (2012) Charles J took the view that "that the process under paragraph 8 (of Sch 15) did not limit objections that could be made, and does not limit them to the modifications proposed by the inspector".

124 5.7.9 The Planning Inspectorate issued revised versions of Advice Note 20 in September 2009 and again in May 2013.

124 5.7.11 An appeal under Schedule 15 is in the nature of a statutory judicial review and is limited to ordinary public law grounds: *Powell v Secretary of State for Environment, Food and Rural Affairs and Anor* (2009), para 9; *Norman and Anor v Secretary of State for Environment, Food & Rural Affairs* (2007), para 3. For the grounds, see 13.1.3, p 332.

124 5.7.11 In determining an appeal under paragraph 12 (1) of Schedule 15, the court should apply the "usual public law principles equivalent to those applicable in judicial review". *Paterson v Secretary of State for the Environment, Food and Rural Affairs* (2010).

124 5.7.11 The effect of an order of the court under WCA 1981 Sch 15 para 12 (2) quashing an inspector's decision to confirm an order is to quash not merely the decision of the inspector, but the order itself (thus requiring the order, if the authority so decides, to be re-made): *Jones v Welsh Assembly Government* (2008). However in *R (Elveden Farms Ltd) v Secretary of State for Environment, Food and Rural Affairs* (2012) Charles J quashed the decision of the Inspector rather than the orders that he had determined (which had been made following a successful appeal under Sch 14).

124 5.7.11 In *Nottingham City Council v Calverton Parish Council* (2015) Mr Justice Lewis held that, where a six-week period for challenging the adoption of a development plan ended on a day when the court office was closed, the period was extended until the next day on which the office was open.

124 5.7.11 The Planning Inspectorate has amended its leaflet about applying to the High Court to include more information on how to challenge a decision.

127 5.8.3 The OS and IDEA have published guidance to local authorities on making OS-based definitive map information available to the public

127 5.8.3 The advice previously in circular 2/1993 has been replaced, for authorities in England, by paragraph 2.3 of Defra circular 1/09, which no longer recommends that maps be sold to the public.

130 5.9.3 Where a path is included in the definitive and statement for a particular area, and a dispute arises as to the line that these are intended to represent, the court has jurisdiction to determine, on the evidence, the true line of the right of way. In *Ernstbrunner v Manchester City*

Council and Males (2009) a farmer put a gate across a used path which was included on the definitive map and which, as used, followed a private road through the farmyard. An application was made to the highway authority for an order under HA 1980 s 130B(2) requiring the authority to take action to secure the removal of the gate, followed later by an application under section 130B to the magistrates' court for an order requiring the authority to act. latter application was dismissed. On appeal, the Crown Court accepted evidence by the landowner that the line of the public right of way followed a line indicated on the ground by stone sets, to the north of the private road through the farmyard [with the result that since the gate was not on the route found by the court to be the correct line of the public right of way, no obstruction had occurred]. An appeal to the High Court was dismissed.

130 5.9.3 In *Kotarski v Secretary of State for Environment, Food and Rural Affairs* (2010) a footpath was included in the definitive statement but not on the definitive map. The court accepted (rejecting an argument of the appellant to the contrary) that the discovery by the authority of evidence that this conflict existed constituted the 'discovery of evidence' for the purpose of section 53(3)(c). The court dismissed the appeal against the decision of the inspector at a public inquiry to uphold the order made by the surveying authority that added the footpath in the statement to the map.

131 5.9.4 footnote 87 Circular 2/1993 has been replaced, for authorities in England, by Defra circular 1/09, paragraph 6.17 of which restates the advice about obstructions apparently recorded in the definitive statement. Paragraph 4.16 of circular 1/09 advises surveying authorities on the inclusion of limitations in modification orders.

132 5.11.1 Natural England from further archive research in the Discovering Lost Ways project, and initiated a review of legislation by a body it established and called the Stakeholder Working Group. Defra announced in March 2008 that the implementation of sections 53 to 56 of the 2000 Act would be deferred at least until that review has reported.

Natural England published "Stepping Forward" report of the Stakeholder Working Group in March 2010 (ref Natural England Commissioned Report NECR035).

134 Further Reading Natural England published a new edition of A guide to definitive maps and changes to rights of way (NE 112) in 2008

135 Further Reading Defra issued version 5 of its guidance to the NERC Act in May 2008.

135 Further Reading The Planning Inspectorate issued revised versions of Advice Notes 5, 7, 9, 10, 15, 16 and 20 between June and October 2009, Note 15 in April 2010 and November 2012, Notes 5, 8 and 20 in May 2013, Note 19 in June 2014 and Notes 9 and 10 in November 2014. In November 2014 the Inspectorate withdrew Advice Note 7 and replaced it by new Advice Note 23.

135 Further Reading The Planning Inspectorate's Definitive Map Orders guide has been revised. It has been superseded for English orders submitted to the Inspectorate from 1 October 2007 by new guidance (itself revised, most recently in June 2017).

Chapter 6

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141 6.1 Totality of evidence. In *R (Ridley) v Secretary of State for Environment, Food and Rural Affairs* (2009) Walker J said 'As a matter of logic and common sense, it is perfectly plausible that an accumulation of material pieces of evidence may lead to a conclusion that while none of them, of itself, actually points to a particular result, taken as whole they do.'

141 6.1 Circumstances may arise in which an inspector or the court has to determine which of two conflicting, or apparently conflicting, items of evidence should prevail. For example, in *Parker v Nottinghamshire CC and Department for Environment, Food and Rural Affairs* (2009) an order was made adding a restricted byway to the definitive map on the ground of the depiction of the way in an enclosure award [see 6.3.2] made under the Inclosure Act 1771. In 1783 the Trent Navigation Act [see 6.3.3] conferred powers on a navigation [i.e., canal]

company to 'set out ...use...and maintain Paths and Ways for haling, towing by men or horses any Boats, Barges or Vessels using the said Navigation'. The Act provided that owners though whose land the path was to pass should have a right to use the path as a 'footpath, bridleway or driftway for their cattle and that no other person may use the same.' Adjacent landowners objected to the modification order on the ground that this provision, and in particular the words 'and no other', restricting those entitled to use the way precluded the existence of public rights over the route. The court held that the Act created private rights of way over the path (for the benefit of canal users and adjoining landowners.) The existence of private rights did not preclude the existence of public rights (in the instant case, rights of a different nature) over the same route. The order was therefore confirmed. [Semble, if the public rights were extinguished, the private rights created by the Act would not be affected.]

145 6.3.1 The Consistency Guidelines have been revised by the Planning Inspectorate, most recently in March 2015.

147 6.3.2 footnote 7 In R (*Andrews*) v *Secretary of State for Environment, Food and Rural Affairs* (2014) Mr Justice Foskett rejected an attempt by Mr Andrews to overturn the 1993 judgment. However this was overturned by the Court of Appeal in R (*Andrews*) v *Secretary of State for Environment, Food and Rural Affairs* (2015), the court concluding that section 10 of the 1801 Act did authorise a commissioner to set out and appoint public bridleways and footpaths in an award.

147 6.3.2 In *Craggs v Secretary of State for Environment, Food and Rural Affairs* (2020) the High Court concluded that an Inclosure Award could be interpreted as having validly created bridleways notwithstanding an earlier judgment that the purported creation of carriageways under the same Award had been *ultra vires* [*Buckland v SSETR* (2000)].

150 6.3.6 The Consistency Guidelines have been revised by the Planning Inspectorate, most recently in January 2015.

156 6.3.11 Advice Note 4 was withdrawn in July 2013 as the subject is now covered by the Consistency Guidelines.

157 In *Fortune & Ors v Wiltshire Council & Anor* (2010), claimants with properties on a lane objected to a proposal for the construction of a housing estate adjacent to the lane. In 2002 and 2006 obstacles were placed on the verges of the lane. The Council, as highway authority, claimed that the lane was a public highway and that by virtue of HA 1980 s 130 it had acted lawfully in removing the obstacles.

The residents claimed that either that no vehicular rights existed over the lane; or that, if such rights had existed, they had been extinguished by NERCA 2006 s 67(1). The Council argued that highway rights had not been extinguished by section 67(1) by virtue of the exception to section 67(1) in section 67(2)(b), namely the existence of 'a list required to be kept under section 36(6) of the Highways Act 1980', which sub-section required every county council to make, and keep corrected up to date, 'a list of the streets ... which are highways maintainable at the public expense', the list being required (by section 36(7)) to be open to inspection by the public at the offices of the county council and that for each district of the council, at the offices of the district.

The claimants contended that the list maintained by the Council was not compliant with NERCA 2006 s 67(2)(b) and HA 1980 s 36(6) with the result that the exception did not apply.

The court held that, on the evidence, both at common law and under HA 1980, vehicular rights existed over the lane. The exceptions in NERCA 2006 s 67(2) were not to be given a narrow, restrictive interpretation but were to be interpreted in the context of the section's purpose. With regard to the arguments advanced by the claimants as to why the list of streets maintained by the Council was not a list of streets for the purpose of section 67 (2)(b), the arguments and the court's finding were as follows.

1. The list was not (being in digital form as an Exor database) in writing on paper. The court

held that a list that could be 'rendered visible to the public either by printing off a copy of it or displaying it on a computer screen', constituted a list within section 36(6).

2. The list did not contain minor highways (i.e. footpaths, etc) which, being highways maintainable by the public, should have been included. The court held that whilst a list should properly contain minor highways, the omission of minor highways did not of itself prevent the list from coming within section 36(6), since the under the section the list was open to correction.

3. The list did not contain words that identified the list as one kept for the purpose of section 36(6). The court held that the list kept by the council for the purpose of section 36(6) did not require a label identifying it as such.

4. A section 36(6) list was a list of streets maintainable by the public. The list relied upon by the council was a list of streets maintained by the council, and so contained both streets that were in law maintainable and streets that were not in law maintainable but which were in practice maintained.. The list therefore did not comply with section 36(6). The court held that the fact that the list contained, out of a total of 11,000 roads, 19 that were not maintainable (because they were under construction or had not yet been adopted), was de minimis and irrelevant. "...having regard to the mischief at which section 67 NERC is directed, on the facts of the case, the difference between 'maintainable' and 'maintained' is an insignificant one."

Thus the list maintained by the council was compliant with section 36 with the result that since the exception in NERCA 2006 s 67(2)(b) therefore applied, vehicular rights had not been extinguished. The Council had thus acted lawfully in removing the obstacles.

In dismissing an appeal, (*Fortune & Ors v Wiltshire Council & Anor* (2012)), the Court of Appeal held, confirming what had been held in the court below, that the *Winchester College* principle of strict compliance should not be applied to the section 67(2)(b) exception, and also endorsed the other conclusions reached by the High Court.

157 6.3.12 In *Slough Borough Council v Secretary of State for Environment Food And Rural Affairs* (2018) the Inspector had concluded that the exemption applied to a way shown in a s 36 list as a "Private Street". The judge held that he had been wrong to do so, saying that the law did not prevent an authority including in a list both ways which were highways maintainable at public expense and ways which were not.

158 6.3.12 footnote 15 The advice to authorities is now, for authorities in England, in Defra circular 1/09, paragraph 4.42.

158 6.3.12 footnote 16, the 1992 regulations have been replaced by the Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007 and the Street Works (Registers, Notices, Directions and Designations) (Wales) Regulations 2008. These require registers to be indexed, to comply with BS 766 Part 1 and, by no later than 1st April 2009, to be based on a geographical information system. The Department for Transport has published new and revised guidance on street works, which includes guidance on the registers.

160 Further Reading The Consistency Guidelines have been revised by the Planning Inspectorate, most recently in January 2015. The Guidelines now cover the subject-matter of Advice Note 4, which was withdrawn in July 2013. Advice Notes 11 and 14 were revised in May 2013.

Chapter 7

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168 7.2.1 Annex C of Circular 2/1993 has been replaced, for authorities in England, by Chapters 3 and 5 of Defra circular 1/09.

169 7.2.2 The Secretary of State's advice that he will exercise his powers to make orders under the Highways Act only exceptionally is now, for authorities in England, in paragraph 10.2 of

Defra circular 1/09.

- 169 7.2.3 Non Statutory Guidance on the recording of widths on public path, rail crossing and definitive map modification orders was issued by Defra in February 2007 alongside a revision of the Planning Inspectorate's Advice Note 16. The Advice Note was further revised in September 2009.
- 169 7.2.3 In September 2011 the Planning Inspectorate wrote to order-making authorities about the correct use of notation on order maps. In December 2011 the Inspectorate issued a new Advice Note 22 on the subject, revised in May 2013.
- 171 7.2.4 footnote 27 The view that an authority may decide not to proceed with an order under the Highways Act is now, for authorities in England, in paragraph 5.29 of Defra circular 1/09.
- 173 7.2.5 A table listing when order-making authorities should send copies of orders to the Ordnance Survey is, for authorities in England, in Defra circular 1/09, paragraph 5.59.
- 173 7.2.5 The Planning Inspectorate is now making decisions on public path orders in England and Wales available on its website.
- 173 7.2.6 The Secretary of State's advice on his powers to modify orders is now, for authorities in England, contained in chapter 10 of Defra circular 1/09.
- 175 7.2.7 Guidance on the use of the certification procedure for s 119 orders is contained, for authorities in England, in Defra circular 1/09, paragraph 5.28
- 176 7.2.8 The provision for combined orders, whereby certain public path orders made by surveying authorities may include modification of the definitive map, was brought into force in England from 6th April 2008: Public Rights of Way (Combined Orders) (England) Regulations 2008. Defra has published guidance. Amendment regulations came into force, and revised guidance was published, in October 2010. In a letter to the Planning Inspectorate in May 2012 Defra took the view that, where there was a defect in the definitive map modification order element of a combined order, the Secretary of State should not deal with it, and indeed arguably had no power to do so. Instead the correct course of action would be for the order-making authority to withdraw the order, remake it without the modification order element, and subsequently make a separate legal event modification order.
- 176 7.2.9 In *Nottingham City Council v Calverton Parish Council* (2015) Mr Justice Lewis held that, where a six-week period for challenging the adoption of a development plan ended on a day when the court office was closed, the period was extended until the next day on which the office was open.
- 176 7.2.9 The Planning Inspectorate has amended its leaflet about applying to the High Court to include more information on how to challenge a decision.
- 177 7.2.12 Advice on charging applicants is now, for authorities in England, in Defra circular 1/09, paragraphs 5.34 to 5.41.
- 178 7.3.1 The advice previously in circular 2/1993 is now, for authorities in England, in Defra Circular 1/09, chapter 5.
- 181 7.3.2 The advice previously in circular 2/1993 is now, for authorities in England, in Defra Circular 1/09, chapter 5. Paragraph 5.32 expresses the view that the Inspector's role is not 'confined to auditing the reasons for which the order making authority made the order. The Inspector is entitled to his or her own view, on the basis of the evidence submitted by interested parties, and may confirm an order, even where the reasons, under section 119(1), for doing so may 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'.
- 181 7.3.2 In *Ramblers' Association v Secretary of State for Environment, Food and Rural Affairs & Ors*

(2012) Ouseley J held that the purpose of the discretionary power in subsection (1) of section 119 was to enable the local authority to consider factors other than the interests of the owner, occupier or the public. In his judgment those other factors included those set out more specifically in sub-section (6) and any other relevant matters. However, at confirmation stage those other factors were not to be considered under the provision requiring the confirming authority to be satisfied as to the expediency of the diversion 'as mentioned in subsection (1) above', but rather under the other provisions in subsection (6). The judge agreed with the parties that the Inspector had been wrong to treat as irrelevant the possibility that this diversion (of a path away from a historic building) might set a precedent. However, he did not consider that there had been sufficient evidence of the likelihood of such a precedent being set to justify quashing the decision of the Inspector to confirm the order. The judge also doubted the lawfulness of a further concession made by the Secretary of State that the Inspector had been wrong to treat as irrelevant an argument that because the applicants knew of the existence of the footpath when they bought the Mill it was not legitimate for them to expect that it might be diverted.

181 In *Open Spaces Society v Secretary of State for Environment, Food And Rural Affairs* (2020) the Society argued that an Inspector had erred in law in considering factors other than those in subsections (a) to (c) of s 119(6) when deciding whether to confirm a diversion order. The court held that those were not exclusive factors and that the Inspector had not erred, a view upheld by the Court of Appeal in *Open Spaces Society v Secretary of State for Environment, Food And Rural Affairs* (2021), Lewis LJ concluding: "In deciding whether it is expedient to confirm a public path diversion order in the exercise of the power conferred by section 119(6) of the 1980 Act, the decision-maker must have regard to the effect of the matters specified in paragraphs (a) to (c) (and any material provision of a rights of way improvement plan) and may have regard to any other relevant matter, including if appropriate the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest."

184 7.3.2 What if the existing path is obstructed?, third paragraph. In a revised Advice Note 9 the Planning Inspectorate has given the following guidance:

"Whereas section 118(6) provides that, for the purposes of deciding whether a right of way should be stopped up, any temporary circumstances preventing or diminishing its use by the public shall be disregarded, section 119 contains no equivalent provision. However, [it is the Inspectorate's view that, when considering orders made under section 119(6), whether the right of way will be/ will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. Therefore, in all cases where this test is to be applied, the convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it."

See also Defra circular 1/09, paragraph 5.25.

185 7.3.3 The advice previously in circular 2/1993 is now, for authorities in England, in Defra Circular 1/09, chapter 5.

185 7.3.3 Where, to exercise the power conferred by HA 80, section 26 to make an order that creates a public footpath, the authority is required to show that there is a need for the path, and that it is expedient that the order should be made, the need that must be shown relates to both the need for the path to exist [i.e. on the route proposed], and the need for the created path to be of the dimensions proposed [e.g. with regard to its width]. *R (MJI Farming Limited) v Secretary of State for Environment, Food and Rural Affairs* (2009): order creating a public footpath quashed since no need had been shown for the order path to be of the width proposed (4 metres), the width being that needed to accommodate a bridleway should one later be created.

186 7.3.4 The advice previously in circular 2/1993 is now, for authorities in England, in Defra
Circular 1/09, paragraph 5.54.

189 7.3.6 The advice previously in circular 2/1993 is now, for authorities in England, in Defra
Circular 1/09, paragraphs 5.48 to 5.50.

191 7.3.7 The advice previously in circular 2/1993 is now, for authorities in England, in Defra
Circular 1/09, paragraphs 5.51 to 5.53.

192 7.3.8 In *R (Manchester City Council) v Secretary of State for Environment, Food and Rural Affairs*
(2007), the City Council sought, through judicial review, an order quashing the decision of
an inspector not to confirm an order made by the council under HA 1980 s 118B to close a
footpath for the purpose of crime prevention. The inspector found that there would be
sufficient benefits in preventing and reducing crime that disrupted the life of the community,
to make it expedient, under section 118B(a), that the path should be stopped up for the
purposes of preventing crime.
However, in considering whether, under section 118B(7), it was expedient, having regard to
all the circumstances, to confirm the order, he concluded it would not be expedient for the
path to be closed. The reasons were that the footpath provided a utility and recreational
function; that the proposed alternative route was twice the distance and alongside roads, (one
part carrying heavy traffic), and was less attractive to users of existing footpaths; that the
order path had a real purpose for a significant number of local people and that its closure
would be detrimental to the amenity of some local residents.
In the High Court, Sullivan J found that there was evidence on which the inspector was
entitled to reach the conclusion he did. The issue before the inspector had been one of
balance. It was possible that another inspector might well have reached a different
conclusion. But that was not to say that the inspector's conclusion was unreasonable. His
reasoning was entirely intelligible and the application was therefore dismissed

192 7.3.8 School security. *R (Hockerill College) v Hertfordshire CC* (2008) concerned a public footpath
that crossed the grounds of a school. The school applied to the CC for a special
extinguishment order under HA 1980 s118B(1)(b). The council declined to make the order.
The school applied to the court, in proceedings for judicial review, for an order quashing the
decision. In granting the order, the court held that the council had erred. When considering
(at the first stage) whether it was expedient, for the purposes specified (protecting pupils or
staff), that the order should be made, it had taken into account matters (set out in
s118B(8)(a)-(d)) required to be considered when deciding (at the second stage of the process)
whether to confirm the order,
When considering, at the first stage, whether it was expedient that the order should be made,
the council was entitled to bear in mind the requirements of sub-section (8) to the extent
that it would not be reasonable to make the order if there was no chance of the sub-section
(8) requirements being met. Nevertheless, the two stages of the process were distinct. The
council, in giving reasons for finding it inexpedient to make the order, had cited matters that
fell within subsection (8) (the fact that the path was well used; the need for improved security,
and the absence of a reasonably convenient alternative route). The order was accordingly
quashed (and the matter directed to be remitted to the council for reconsideration).

193 7.3.8, footnote 72, an area in Darlington has been designated by the Crime Prevention
(Designated Areas) Order 2007

193 7.3.9 In August 2008 Defra announced, following a consultation exercise, that it had
concluded that the right to apply provisions should not be implemented as they stood, and
that further primary legislation was needed to secure an effective framework for applications.

194 7.3.10 The power to divert ways in SSSIs was brought into effect in England on 21 May 2007
by the Countryside and Rights of Way Act 2000 (Commencement No. 12) Order 2007. The
Highways (SSSI Diversion Orders) (England) Regulations 2007 have been made to prescribe
the form of applications and orders. Defra has issued guidance on the use of the power

(Non-statutory advice on new provisions relating to diversions of rights of way for the protection of sites of special scientific interest (SSSIs)).

196 7.4 The advice previously in circular 2/1993 is now, for authorities in England, in Defra Circular 1/09, in particular chapter 7.

196 7.4.1 The Department for Communities and Local Government has issued guidance to local planning authorities on the validation of planning applications. The guidance states (page 23) that applications for full planning permission should be accompanied by a site plan on a scale of 1:200 or 1:500 showing accurately all public rights of way crossing or adjoining the site.

The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2008 requires all planning applications in England after 6 April 2008 to be made on a standard form published by the Secretary of State.

New development orders replaced, in England, from 15 April 2015 the previous development orders relating to development management and permitted development : the Town and Country Planning (Development Management Procedure) (England) Order 2015 and Town and Country Planning (General Permitted Development) (England) Order 2015.

See also Defra circular 1/09, paragraph 7.4.

197 7.4.1 In *Malvern Hills District Council v Secretary of State for Housing, Communities and Local Government & Anor* (2021) the DC challenged the granting of planning permission for development obstructing a footpath, arguing that the Inspector had failed to treat the blocking of the path as a material consideration. The court disagreed with that argument, holding that the Inspector did not fail to treat the need to protect public footpaths as a material consideration.

199 7.4.2 From February 2011 the Planning Inspectorate administered, on behalf of the Secretary of State, orders under TCPA 1990 ss 247, 251 and 261 that affected rights of way.

199 7.4.2 Sections 11 and 12 of the Growth and Infrastructure Act 2013 amended TCPA 1990 ss 253 and 257 so that in England, with effect from 25th June 2013, orders may be made after a planning application has been submitted but before permission has been granted. The regulations have been amended to provide for the content of such orders: Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations 2013.

A similar amendment was made in Wales from 16 March 2016: section 38 of the Planning (Wales) Act 2015, brought into force by the Planning (Wales) Act 2015 (Commencement No. 3 and Transitional Provisions) Order 2016 article 5.

199 7.4.2 In *R (Network Rail Infrastructure Limited) -v- Secretary of State for the Environment, Food and Rural Affairs and Ors* (2017) a planning permission had been granted for development subject to conditions which, at the time of the inquiry into an opposed order under s 257, were that : (a) an order had been made and confirmed diverting a footpath so that it no longer afforded access from the development across an adjacent railway line; or (b) that such an order had not been confirmed by the SoS. Objectors argued that the latter condition meant that it could not be said that the diversion of the path was necessary to enable the development to proceed. The Inspector closed the inquiry without hearing arguments on the merits of the case, accepted the objectors' argument and refused to confirm the order.

Network Rail, which had requested the conditions on safety grounds, challenged the decision. In the High Court, Holgate J concluded that the Inspector had been wrong to treat one part of the condition as rendering consideration of the order on its merits unnecessary, and accordingly quashed the decision. On appeal by the SoS to the Court of Appeal, *R (Network Rail Infrastructure Limited) -v- Secretary of State for the Environment, Food and Rural Affairs and Ors* (2018), his judgment was supported.

200 7.4.2 Procedure In *Beckley Parish Council v Secretary of State for Transport* (2010) a draft order was published under TCPA 1990 s 247 stopping up a length of byway open to all traffic and substituting a length of footpath. The parish council objected: just before an inquiry opened modifications were proposed by the county council to make the substitute route a (wider)

bridleway. The order was made with those modifications. The parish council challenged the decision, arguing that the proposed modifications should have been advertised, in line with the guidance in paragraph 10.11 of Defra circular 1/09. Nicol J dismissed their application, stating that s 252(8), which gave the Secretary of State power to make the order with modifications, did not require him to advertise any proposed modifications, and a circular could not fetter a statutory discretion. In any event, there had been an adjournment of the inquiry to allow the district council to consider its position, and thus there had been no prejudice.

200 7.4.2 Procedure In April 2014 Defra wrote to the Planning Inspectorate to advise that it considered that an Inspector could, within the power to modify an order, change the wording (including title) of a “diversion” order to that of a “stopping-up” order (and vice versa) where such a change of description was considered more accurately to reflect the effect of the order. [Letter available on the Inspectorate’s website.]

204 In *Carpenter v Calico Quays Ltd* (2011) it was held that in deciding what is a 'reasonably convenient' means of access under HA 1980 s 125(3)(b), it was relevant to have regard to what existed before the change.

206 7.4.5 Harbours and docks The Secretary of State for Transport has delegated to the Marine Management Organisation (MMO) his functions under the Harbours Act 1964 relating to harbour revision and harbour empowerment orders: Harbours Act (Delegation of Functions) Order 2010 SI 2010 No 674. The MMO has published a guide to its new functions.

212 7.5.1 footnote 131 The advice previously in circular 2/1993 is now, for authorities in England, in Defra Circular 1/09, paragraph 5.56. Paragraph 9.9 of the circular advises on costs arising from s 116 applications.

214 7.5.3 In *R (Ramblers’ Association) v Secretary of State for Defence* (2007), it was held that
(a) the power in section 16 of the 1842 Act to stop up or divert footpaths or bridleways is not confined to land that is in the process of being acquired;
(b) the requirement of section 17 that where, in exercise of the power conferred by section 16, a way is stopped up, 'another path or road shall be provided', is not satisfied by the existence of an alternative route on existing public rights of way: while some of the alternative route could be on existing rights of way, some part of the route had to be new, how much being ‘a question of fact and degree’;
(c) there is no requirement that the other ‘path or road’ should be of the same legal nature as that stopped or diverted, provided the use permitted is of no lesser nature than that on the path diverted or stopped up. Thus a footpath can be replaced by a bridleway, but not a bridleway by a footpath.

217 7.7.1 In *Wilson and Motoring Organisations’ Land Access and Recreation Association v Yorkshire Dales National Park Authority* (2009), the failure of the authority to give proper consideration to the duty imposed by section 122 was a ground on which the court quashed orders that restricted the use of certain ways to non-motorised vehicles (the other ground being that the reasoning of the authority in reaching decisions to make orders had not been rational).

217 7.7.1 In *Trail Riders Fellowship and Ors v Powys CC* (2013)] the court quashed a decision by the CC to make a TRO because of the possibility that the members of the committee who decided to make the order had been influenced by comments made in the report to them about ongoing court proceedings relating to the route in question.

217 7.7.1 In *AA & Sons v Slough Borough Council* (2014) Mr Justice Green considered a wide range of challenges to the making of a TRO before rejecting them all.

217 7.7.1 *Tomkins v City of London Corporation* (2020) was a challenge to the making of an experimental TRO. It succeeded on two grounds: inadequacy of the statement of reasons, and failure to comply with the requirement to make documents available for public inspection.

217 7.7.1 *Trail Riders Fellowship v Hampshire CC* (2018) was a challenge by the TRF to the CC's decision to make TROs to prohibit the use of three green lanes by mechanically-propelled vehicles. The High Court dismissed the challenge. On appeal to the Court of Appeal [*Trail Riders Fellowship v Hampshire CC* (2019)], that Court held that the High Court had been correct. In relation to the balancing exercise under RTA 1984 s 122, Longmore LJ said it was not a particularly difficult or complicated exercise and it covered three points:

1) the decision-maker should have in mind the duty (as set out in section 122(1) of the 1984 Act) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) so far as practicable;

2) the decision-maker should then have regard to factors which may point in favour of imposing a restriction on that movement; such factors will include the effect of such movement on the amenities of the locality and any other matters appearing to be relevant which will include all the factors mentioned in section 1 of the 1984 Act as being expedient in deciding whether a TRO should be made; and

3) the decision-maker should then balance the various considerations and come to the appropriate decision.

217 In *Trail Riders Fellowship v Wiltshire CC* (2018) the High Court quashed a TRO made by the Council because of its failure to consult as required by the regulations.

218 New sections 22CA (permitting charging) and s 94A (permitting bollards) were introduced into RTRA 1984 by Counter-Terrorism and Border Security Act 2019 s 15 from 12/4/2019.

220 7.7.1 and footnote 163. In February 2011 the Department for Transport withdrew the circular on special events orders.

221 7.7.1 The power for a national park authority in England to make traffic regulation orders was brought into operation on 1 October 2007: Natural Environment and Rural Communities Act 2006 (Commencement No. 1) (England) Order 2007. Regulations, the National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007, require the RA and OSS, among others to be consulted on proposed orders. Defra has issued guidance to national park authorities on their new order-making powers.

221 7.7.1 *Stubbs (oao GLEAM) v Lake District National Park Authority & Ors* (2020) was a challenge to a decision by the Authority not to consider making a TRO on two unsealed roads. The court held that at that stage the duty under RTRA 1984 s 122 was not engaged, and that in any event there had been no error of law in the way the Authority had decided the issue.

221 7.7.2 In *Ramblers' Association v Coventry City Council* (2008) Mr Michael Supperstone QC, sitting as a deputy High Court judge, considered a challenge by the RA to the making of a gating order by the Council. In rejecting the challenge, he made the following points. First, when considering whether "the existence of the highway is facilitating the persistent commission of criminal offences or anti-social behaviour" (section 129A(3)(b)), a council should consider the position as at the date of the making of the order. Second, the word "persistent" in section 129A(3)(b) is an ordinary English word, commonly understood to mean "continuing or recurring; prolonged", that does not require further definition. Third, what was "expedient" would depend, as the section stated, on "all the circumstances". He accepted that utility, cost and practicality of a lesser restriction were all factors that could be taken into account when considering whether or not to impose a blanket restriction.

221 7.7.2 The power in HA 1980 ss 129A-129G to make gating orders was replaced on 20 October 2014 with a power under Anti-Social Behaviour, Crime and Policing Act 2014 for unitary authorities, London borough councils and non-metropolitan district councils to make public space protection orders (PSPOs). [Anti-Social Behaviour, Crime and Policing Act 2014 (Commencement No. 7, Saving and Transitional Provisions) Order 2014] A local authority may make a PSPO (s 59) if it is reasonably satisfied that two conditions are met. The first is that either: (a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or (b) it is likely

that activities will be carried on in a public place within that area and that they will have such an effect. The second is that the effect, or likely effect, of the activities: (a) is, or is likely to be, of a persistent or continuing nature; (b) is, or is likely to be, such as to make the activities unreasonable; and (c) justifies the restrictions imposed by the PSPO. A PSPO must identify the public place where the activities are being restricted ("the restricted area") and either: (a) prohibit specified things being done in the restricted area; or (b) require specified things to be done by persons carrying on specified activities in that area; or (c) do both of those things. The only prohibitions or requirements that may be imposed by a PSPO are ones that are reasonable to impose in order either: (a) to prevent the detrimental effect on the quality of life from continuing, occurring or recurring; or (b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence. A prohibition or requirement may be framed so as to apply: (a) to all persons, or only to persons in specified categories, or to all persons except those in specified categories; (b) at all times, or only at specified times, or at all times except those specified; (c) in all circumstances, or only in specified circumstances, or in all circumstances except those specified.

Although the wording of a PSPO is not prescribed in the Act or by regulations, the Act [section 59(7)] does require that it: (a) identify the activities that are having a detrimental effect on the quality of life; (b) explain that it is a criminal offence to do anything prohibited under, or fail to comply with a requirement of, a PSPO; and (c) specify the period for which the order has effect (see below as to duration and possible extension). Section 67 makes it an offence for a person, without reasonable excuse: (a) to do anything that the person is prohibited from doing by a PSPO, or (b) to fail to comply with a requirement to which the person is subject under a PSPO. The penalty is either a fine of up to £1,000 (level 3 on the standard scale) or a fixed penalty notice of up to £100 (s 68). Such a notice may be issued by a police constable, a police community support officer (s 69(2)) or a person authorised by the local authority. Statutory guidance for front-line professionals was issued by the Home Office in July 2014.

The application of PSPOs to highways is covered by ss 64 & 65. Section 65 prevents PSPOs being made to restrict the public right of way over certain routes, essentially the busiest roads (as was the case with gating orders). However it does not prevent PSPOs being made on such highways for other purposes, e.g. requiring a dog to be kept on a lead. Section 64 requires a local authority, before making such a PSPO, to consider: (a) the likely effect of making the order on the occupiers of premises adjoining or adjacent to the highway; (b) the likely effect of making the order on other persons in the locality; and (c) in a case where the highway constitutes a through route, the availability of a reasonably convenient alternative route. Potentially affected persons must be notified by the authority of a proposed order, and given the opportunity to make representations. "Potentially affected persons" are defined as occupiers of premises adjacent to or adjoining the highway, and any other persons in the locality who are likely to be affected by the proposed order (e.g. users). A PSPO must not restrict the public right of way over a highway for occupiers of premises adjacent to or adjoining the highway, nor may it restrict the public right of way over a highway that is the only or principal means of access to a dwelling.

Where a highway is the only or principal means of access to premises used for business or recreational purposes, a PSPO may not restrict the public right of way over the highway during periods when the premises are normally used for those purposes. A PSPO that restricts the public right of way over a highway may authorise the installation, operation and maintenance of a barrier or barriers for enforcing the restriction, which the local authority may install, operate and maintain. However a highway does not cease to be regarded as a highway by reason of the restriction or the barrier.

Existing gating orders continue for 3 years from commencement unless replaced by PSPOs. After that date s 75 provides that the Act applies to them as if they were PSPOs.

by Ms Summers to the making of a PSPO restricting the walking of dogs. Held: (i) that as a local resident who owned a dog which she regularly walked in the public spaces concerned, she was an 'interested person' for the purposes of challenging the making of the PSPO; (ii) that two provisions in the PSPO should be struck out because they Council had not had evidence before it to justify their inclusion.

221 In *Dulgheriu & Anor v London Borough of Ealing* (2018) the claimant challenged the making by the Council of a public spaces protection order (PSPO) which provided for a 'safe zone' outside an abortion centre where protests had been held. On appeal to the Court of Appeal [*Dulgheriu & Anor v London Borough of Ealing* (2020)], the Court identified two issues: (i) whether an authority had power to make a PSPO where the activity to be regulated impacted only or primarily on the quality of life of occasional visitors to the locality rather than those who resided or worked in the locality or visited it regularly; (ii) whether the restrictions imposed by the PSPO were compatible with articles 9, 10 and 11 of the European Convention on Human Rights ("ECHR").

The Court of Appeal held that the expression "those in the locality" in section 59 included those who regularly visited or worked in the locality, in addition to residents. However it would depend on the precise local circumstances whether or not it extended to others.

In relation to the ECHR, the Court held that the judge in the High Court had been entitled to come to the conclusion that, on the particular facts of the present case, the article 8 rights of the service users visiting the Centre had outweighed the rights of the appellants and other pro-life protesters under articles 9, 10 and 11, and the terms of the PSPO were therefore proportionate.

223 7.7.5 Plant diseases The Plant Health (England) Order replaced, from 1 July 2015, the Plant Health (England) Order 2005

224 7.7.7 Powers can be granted to close rights of way to prevent the spread of disease under s 45C of the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008 – see for example Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 Regulation 6.

224 Further Reading Natural England published a new edition of A guide to definitive maps and changes to rights of way (NE 112) in 2008.

224 Further Reading The Planning Inspectorate issued revised versions of Advice Notes 9 and 16 in September and October 2009 of Note 19 in June 2014 and of Note 9 in November 2014.

225 The Planning Inspectorate's checklist for order-making authorities has been revised, most recently in March 2013.

225 Further Reading The Planning Inspectorate's Public Path Orders guide was revised in 2007. It has been superseded for English orders submitted to the Inspectorate from 1 October 2007 by new guidance (itself revised, most recently in June 2017).

Chapter 8

Page

226 8.1 The Planning Inspectorate is now making decisions on definitive map modification and public path orders for England and Wales available on its website (from August 2015 on GOV.UK).

226 8.1 The Planning Inspectorate published in March 2013 an aide-memoire to assist authorities submitting orders to the Inspectorate.

226 8.1 footnote 1. The previous advice in Circular 2/1993 about what to send with orders has been replaced, for authorities in England, by advice in paragraphs 4.26 and 5.30 of Defra circular 1/09 to authorities to use the Inspectorate's checklist..

226-232 8.1, 8.2, 8.3 The Rights of Way (Hearing and Inquiry Procedure) (England) Rules 2007 apply to modification and public path orders in England submitted to the Secretary of State on or

after 1st October 2007. The Planning Inspectorate (PINS) has issued a publication (revised, most recently in March 2013) which explains the rules, includes copies of the rules and a Defra circular, and also sets out a procedure, similar to the rules, for orders determined by the written representations procedure.

The Rules require notice to be given of the following matters:

Notice to be given by the Secretary of State (or PINS on his behalf):

- (a) Preliminary notice indicating whether an inquiry or hearing will be held and its date, time and place [Rule 4]
- (b) Any pre-inquiry meeting [Rule 15]
- (c) Intention to disagree with the inspector [Rules 11 and 23]
- (d) Proposed modifications [Rule 27]
- (e) Decision [Rules 13, 14, 25 and 26]

Notice to be given by the Inspector:

Decision to take into account any subsequent material [Rules 12 and 24]

Notice to be given by the order-making authority:

Notice of hearing or inquiry on site and in a local newspaper [Rules 5(3) and 16(3)]

The order-making authority has the following duties:

- (a) to ensure that, within eight weeks of the start date, the Secretary of State has received its statement of case [Rules 6(2) and 17(1)]
- (b) to ensure that the Secretary of State receives any proofs of evidence (and summary if necessary) not less than four weeks before the start of the inquiry [Rule 20]
- (c) to ensure that notice of the date, time and place of a hearing or inquiry is placed on site and in a local newspaper not less than four weeks before it starts [Rules 5(3) and 16(3)]

The order-making authority has the following rights:

- (a) to receive preliminary notice indicating whether an inquiry or hearing will be held and its date, time and place [Rule 4(4)(b)]
- (b) to receive from the Secretary of State a copy of any other statement of case [Rules 6(6)(b) and 17(6)(b)]
- (c) to receive from the Secretary of State a copy of any further information he required any person to supply [Rules 7(3) and 18(3)]
- (d) to appear at a hearing and give oral evidence or call someone else to do so [Rules 8(1)(a) and 9(6)(a)]
- (e) to receive notice of any pre-inquiry meeting [Rule 15(2)]
- (f) to appear at an inquiry, and unless determined otherwise by the inspector, to begin proceedings [Rules 19(1)(a) and 21(4)]
- (g) if appearing at an inquiry, to give or call another person to give, oral evidence and to present, or call another person to present, any matter; and to cross-examine any person giving evidence or presenting any matter to the inquiry [Rules 21(5) and 21(6)]
- (h) to receive notice of the intention of the Secretary of State to disagree with the inspector and to be given an opportunity to make representations; and to receive notice of any re-opened hearing or inquiry [Rules 11(6), 11(9), 23(6) and 23(9)]
- (i) to receive notice of a decision by an Inspector to take into account any subsequent material and to be given an opportunity to make representations, and to receive notice of any re-opened hearing or inquiry [Rules 12(3), 12(6)(a), 24(3) and 24(6)(a)]
- (j) to receive notice of the decision [Rules 13(2), 14(2), 25(2) and 26(2)]

The dates for hearings and inquiries have to be:

- (a) for a hearing, within 20 weeks of the 'start date' (the date of the preliminary notice, or, where that is not practicable, the earliest possible date [Rule 5(1)]

(b) for an inquiry, within 26 weeks of the ‘start date’ (the date of the preliminary notice, or, where that is not practicable, the earliest possible date [Rule 16(1)]

The date, time or place of an inquiry or hearing may be changed, subject to notice being given [Rules 5(2) and 16(2)]

Where a proof of evidence is more than 1,500 words long, it has to be accompanied by a summary [Rule 20(4)]

In *Powell v Secretary of State for Environment, Food and Rural Affairs and Anor* (2009) the claimant had purchased a house through the curtilage of which ran a way the subject of a modification order to add it to the definitive map. He had been assured by the vendor that the vendor’s solicitors would maintain an objection they had lodged to the order, but subsequently discovered that they had failed to submit documents to the Inspectorate in accordance with the inquiry rules. A request by the claimant’s representative for an adjournment to allow time for proper preparation had been refused both by the Inspectorate in advance of the public inquiry arranged to hear objections and by the Inspector at the inquiry.

The High Court (Michael Supperstone QC, sitting as a deputy judge) held that whilst the impact of the order on the claimants might not be relevant to the substantive issue before the Inspector, it had been relevant to matters of procedural fairness arising during the proceedings, and in particular to the determination of the application for an adjournment. In his view, the refusal of the application for an adjournment amounted to a breach of the rules of natural justice and the Inspector’s decision to confirm the order was quashed.

- 227 8.2.1 The Planning Inspectorate has revised Advice Note 1, most recently in May 2013.
- 231, 232 8.2.11 footnotes 14 and 15 Advice formerly in circular 2/1993 is now, for authorities in England, in Defra circular 1/09, chapter 9. The chapter was amended in a revised version of the circular issued in October 2009.
- 232 8.2.11 The power to award costs in Wales on TCPA orders extended to include costs of the Welsh Ministers and is now contained in full in new TCPA 1990 s 323C, inserted by Planning (Wales) Act 2015 s 49 and brought into force on 1 March 2016 by the Planning (Wales) Act 2015 (Commencement No. 3 and Transitional Provisions) Order 2016 article 2.
- 235 Further Reading The Planning Inspectorate has revised Advice Notes 1 (most recently in May 2013), 2 (April 2011), 3 (most recently in June 2014) and 10 (November 2014), and withdrew Advice Note 2 in January 2014 as its subject matter is covered by the Inspectorate’s Guidance Booklet. The Planning Inspectorate issued new Advice Note 21 in June 2009 (revised in May 2013) advising Inspectors how to deal with cases where it is alleged that there were procedural irregularities in respect of public path or definitive map orders, and new Advice Note 23 in November 2014, dealing with how the Inspectorate deals with objections and representations to definitive map modification and public path orders, to replace Advice Note 7.
- 236 Further Reading The Planning Inspectorate’s checklist for order-making authorities has been revised, most recently in March 2013.
- 236 Further Reading The Planning Inspectorate’s Definitive Map Orders and Public Path Orders guides have been superseded for English orders submitted to the Inspectorate from 1 October 2007 by new guidance (itself revised, most recently in June 2017).

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- 237 9.1 In *Herrick v Kidner and Somerset CC* (2010), Cranston J said (obiter) that the authorities establish ‘a number of principles with regard to an obstruction of the highway: first, members of the public are in general entitled to unrestricted access to the whole and each part of a highway; secondly, their right to such access is principally to pass and repass but it is also to enjoy other amenity rights; thirdly, those other amenity rights must be reasonable and usual and will depend on the particular circumstances; fourthly, any encroachment upon the

highway which prevents members of the public from the enjoyment of these access and amenity rights is an unlawful obstruction; fifthly, the law ignores de minimis, or fractional obstructions; and sixthly, a highway authority cannot deprive itself of the power to act against an unlawful obstruction by refraining from exercising its statutory powers against it, or by purporting to give it consent.’ (Para 33.)

239 9.2.1 *Mayor, Commonality and Citizens of the City of London v Samede, Barda, Ashman and persons unknown* (2012). Protestors set up a camp consisting of about 175 tents on highway land outside St Paul’s Church in London. The claimant authority sought an order for possession of the land, a declaration that under common law or under HA 1980 s 143 it was lawfully entitled to remove tents, and an injunction preventing the defendants from interfering with the removal. The protestors claimed that the granting of the relief sought would constitute and infringement of their rights under Article 10 (Freedom of expression) and Article 11 (Freedom of assembly) of the European Convention of Human Rights. The court held that that in the light of the fact that the presence of the camp was incompatible with the lawful function and character of the land as a highway; the interference with the rights (under Article 9) of worshippers attending the church, the nuisance caused by noise and smell and the damage to local trade, the interference with the claimants’ rights under Articles 10 and 11 was proportionate, lawful, and justified. The relief sought was granted.

239 9.2.1 Ziegler and the other defendants were charged with wilful obstruction of the highway under HA 1980 s 137 following a protest at an arms fair. The district judge dismissed the charges. Having regard to the defendants’ right to freedom of expression under article 10 of the European Convention on Human Rights (“ECHR”) and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that “on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants’ limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable”.

The DPP appealed by way of case stated to the High Court, which allowed the appeal [*Director of Public Prosecutions v Ziegler & Ors* (2020)]. On an appeal [*Director of Public Prosecutions v Ziegler & Ors* (2021)] the Supreme Court considered whether deliberate physically obstructive conduct by protesters was capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

By a majority of 3-2, the Court held that a review of the case law of the European Court of Human Rights showed that the protection of articles 10 and 11 ECHR extended to a protest which took the form of intentional disruption obstructing others. However, the extent of the disruption and whether it was intentional were relevant factors in the assessment of proportionality. The factors relevant to this assessment included in particular that the appellants’ action had been, and had been intended to be, a peaceful gathering, which had given rise to no form of disorder, had not involved the commission of any offence other than the alleged section 137 offence, had been carefully targeted at vehicles heading to the fair, had involved no complete obstruction of the highway, and, insofar as the obstruction had lasted 90-100 minutes, had been of limited duration. The district judge had been entitled to take these factors into account in determining the issue of proportionality in favour of the appellants. There had been no error or flaw in his reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality.

240 9.2.3 In *Herrick v Kidner and Somerset CC* (2010), Cranston J said ‘In my view interfere [with the right of passage] means to get in the way of, in other words, the structure must impede the right of passage or prejudice other amenity rights, either generally or in particular. There is no reason to confine interference to physical interference. An object can get in the way of the right of passage or other amenity rights because of its psychological impact.’ (Para 47.) [Gateway constructed at entrance to drive leading to a country house consisting of three

square, brick pillars, with a single gate for pedestrians on one side of the central pillar and double gates for vehicles on the other side; gateway held to constitute obstruction of public footpath; Crown Court (instead of ordering the removal of the central pillar and the gates, and the erection of a finger post indicating a public footpath) should have required total structure to be removed.]

242 9.2.6 The maximum penalty for the third offence has been amended to one-twentieth of the greater of £5,000 or level 4 on the standard scale by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 Sch 3 para 1

243 9.3 In *Ali v City Of Bradford Metropolitan District Council* (2010) it was held that whilst a highway authority may be liable for a nuisance that it created, no action lies at the suit of an individual under either section 41 or section 130, nor by virtue of section 263(1), of the Highways Act 1980 against a highway authority either for breach of statutory duty or for private nuisance in respect of injury suffered as a result of the failure of the authority to exercise the power conferred by section 149 to secure the removal of matter that constitutes a nuisance.

244 9.3 Advice formerly in circular 2/1993 is now, for authorities in England, in Defra circular 1/09, chapter 6.

258 9.7.2 Defra published in October 2014 Dealing with irresponsible dog ownership : Practitioner's manual providing a wide range of guidance.

259 9.7.3 The Control of Horses (Wales) Act 2014 s 2(1) gives a Welsh local authority power to impound a horse which is on any highway, or in any other public place, in the local authority's area if the local authority has reasonable grounds for believing that the horse is there without lawful authority. The Act contains further provisions about the giving of notices, keeping of records and recovery of costs in case where a horse is impounded under its provisions. The Control of Horses Act 2015 gives, from 26 May 2015, similar powers to English local authorities.

261 9.8.2 HA 1980 s 147, subsections (2A) and (2B), added by CRWA 2000 s 69, provide that in exercising the power under section 147 to authorise a gate or a stile, an authority must have regard to the needs of persons with mobility problems and empowers the Secretary of State to issue guidance on this.

The provision was brought into force in Wales on 1 April 2007: Countryside and Rights of Way Act 2000 (Commencement No.9 and Saving) (Wales) Order 2006. The Welsh Assembly Government has issued statutory guidance to local authorities in Wales.

The provision was brought into force in England from 1 October 2007 by the Countryside and Rights of Way Act 2000 (Commencement No. 14) Order 2006. Defra has issued non-statutory guidance to local authorities in England.

261 9.8.2 Extended advice to authorities in England on stiles and gates is included in Defra circular 1/09, paragraphs 6.7 to 6.11

261 9.8.2 Guidance on structures was published by Defra in October 2010.

261 9.8.2 As to the powers of a highway authority under HA 1980 s 66 to erect structures (e.g., bollards, railing, fences) that prevent access across a footway to adjacent land (and consideration of parallel powers under ss 80, 124 and 184) see *Cusack v London Borough of Harrow* (2013).

262 9.8.2 In *Kind v Northumberland CC* (2012) it was 'not seriously disputed' by the parties, and it was accepted by the court, that in the phrase 'other gates, stiles or other works' in HA 1980 s 147(1), 'other works' includes a cattle grid.

265 9.8.5 *Coates v Crown Prosecution Service* (2011) was an appeal against conviction for riding a SEGWAY on a pavement contrary to section 72 of the Highways Act 1835. Munby LJ described a SEGWAY as "a technologically advanced form of personal transportation consisting of a small gyroscopically stabilised platform mounted on two wheels, on which the traveller stands, powered by a battery driven electric motor. A vertical joy-stick is used

to steer. Speed is controlled by leaning forward (to go faster) or standing up straight (to slow down). Its maximum speed is 12½ miles per hour”.

The court considered the provisions in section 72 in two parts. The first was the provision that it should be an offence ‘ ... if any person shall ride upon any footpath or causeway by the side of a road or set apart for the accommodation of foot passengers’.

The court held that :

- (a) ‘ride’ was not confined to riding a horse;
- (b) ‘ride’ connoted being on or in the thing being ridden;
- (c) “To be carried along on a wheeled contraption or machine, whether powered or not, can be, within the meaning of section 72, to ride”;
- (d) “You do not have to be seated to be riding”.

The court concluded that the accused was, within the meaning of section 72, riding the SEGWAY, and so was guilty of an offence under this first part.

The second part was the provision that it should be an offence to ‘drive any ... carriage of any description ... upon any such footpath’.

The court held that :

- (a) section 85(1) of the Local Government Act 1888 enacted that ‘ ... Bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highways Acts’. Since a SEGWAY came within the term ‘and other similar machines’, and the 1835 Act ‘is an “always speaking” statute’ (its provisions apply notwithstanding that the meaning attached to terms might change over time), a SEGWAY was a carriage within the second limb of section 72; and,
- (b) the accused had ‘driven’ the SEGWAY, (“drive’ for the purposes of section 72 has quite a wide meaning. The ‘driver’ may be in or on the thing being driven but need not be, as the example of the drover shows. One drives a motor cycle by sitting on it, just as one drives a car by sitting in it, but the coachman of a stage coach, like the Victorian cabbie on his Hansom, is driving the horses although seated on the coach rather than the horses.” Per Munby LJ)

The court concluded that the accused was guilty of an offence under the second part of the section. The appeal against conviction was therefore dismissed.

The court also held that in the charge before the District Judge, that the accused ‘willfully rode a motor vehicle, namely a SEGWAY, upon a footpath ... contrary to section 72 of the Highways Act 1835’, the words ‘motor vehicle’ were surplusage, since neither limb of the section required that the vehicle ridden/driven should be a motor vehicle.

In *Chief Constable of North Yorkshire v Saddington* (2000), it was held that since a Goped was a vehicle ‘intended or adapted for use on roads’ within RTA 1988 s 185(1), and so a ‘motor vehicle’ within that sub-section, a user was required (under s 87(1)) to hold a driving licence; and (under s 143(1)) a policy of insurance in respect of third party risks.

265 9.8.5 RTA 1988 ss 12A-12F were added by Deregulation Act 2015 s 73, and commenced on 10th March 2017 by the Deregulation Act 2015 (Commencement No. 7) Order 2017. They permit highway authorities in England to authorise motor racing events on the highway. The bodies authorised to organise events are the Royal Automobile Club Motor Sports Association and the Auto-Cycle Union : Road Traffic Act 1988 (Motor Racing) (England) Regulations 2017.

269 9.8.12 Section 1 of the Laser Misuse (Vehicles) Act 2018 came into effect on 10th July 2018. It makes it an offence, subject to the defences in subsection (2), to shine or direct a laser beam towards a vehicle which is moving or ready to move if the beam dazzles or distracts, or is likely to dazzle or distract, a person with control of the vehicle. There is no requirement for the vehicle to be on a highway. Section 3 defines ‘vehicle’ as meaning any vehicle used for travel by land, water or air, and ‘laser beam’ as meaning a beam of coherent

light produced by a device of any kind.

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- 276 10.2.5 In *Barlow v Wigan MBC* (2020), commenting on *Gulliksen*, the Court of Appeal held that a local authority may be considered as separate bodies, depending on the context and that although the path in question had been constructed by an authority that was at the time the highway authority, it had not been acting in that capacity.
- 277 10.2 In *R (Redrow Homes) v Knowsley Metropolitan Borough Council* (2013) it was held that an agreement under HA 1980 s 38 could include a contribution to the cost of maintenance by the highway authority after the date on which the way became maintainable at public expense, a decision affirmed by the Court of Appeal in *R (Redrow Homes Ltd) v Knowsley MBC* (2014).
- 281 10.4.3 Replace existing text with:
“10.4.3 What kind of surface? The effect of section 49(4) of the Countryside and Rights of Way Act 2000
Provisions, subsequently repealed, in WCA 1981 s 54(7) and CA 1968 Sch 3 state that nothing in those sections, or in WCA 1981 s 53, obliged a highway authority to provide, on a way shown on a definitive map as a byway, a metalled carriageway or a carriageway which was by any other means provided with a surface suitable for the passage of vehicles. This provision was reportedly taken by some authorities to mean that depiction of a way as a byway in some way reduced their liability to maintain it. It is submitted that this was an incorrect reading of the provisions, and that their correct interpretation was that the effect of an order under WCA 1981 s 53 or s 54, or the reclassification of a RUPP as a byway under CA 1968, was to leave unchanged the extent of maintenance liability on a particular way. CRWA 2000 s 49(4) re-states and extends the provision in relation to the reclassification by that Act of RUPPs as restricted byways, and the requirement that any way so reclassified will be maintainable at public expense. It states that nothing in ss 48 or 49 obliges a highway authority to provide on any way a metalled carriageway or a carriageway which is by any other means provided with a surface suitable for cycles or other vehicles.”
- 282 10.6.1 The new HA 1980 s 147ZA provision was brought into force in Wales from 1 April 2007 by the Countryside and Rights of Way Act 2000 (Commencement No.9 and Saving) (Wales) Order 2006. The Welsh Assembly Government has issued guidance on the provisions.
- 282 10.6.1 The new HA 1980 s 147ZA provision was brought into force in England from 1 October 2007 by the Countryside and Rights of Way Act 2000 (Commencement No. 14) Order 2006. Defra has issued non-statutory guidance to local authorities in England on the provisions.
- 285 In *Vernon Knight Associates v Cornwall Council* (2013), the Court of Appeal held that a highway authority was under a duty to ensure that a drainage system installed in a highway functioned properly, and therefore liable for any flooding arising out of a failure to do so.
- 285 10.7.1 In *R (Dillner) v Sheffield City Council* (2016) the Court held that “the starting point for considering whether a tree within a highway should be retained or removed is its effect or otherwise on the role of that street as a highway – i.e. to facilitate passage and repassage,” and the works to remove such trees came within the duty under HA 1980 s 41.
- 286 10.7.1, footnote 44 Advice formerly in circular 2/1993 is now, for authorities in England, in Defra circular 1/09, paragraph 6.5.
- 290 Further Reading Guidance “*Understanding the British Standard for Gaps Gates and Stiles: BS5709:2006 explained*” has been published by the Pittcroft Trust.

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- 292 11.2.3 Defra circular 1/09 refers, at paragraph 2.9 to the regulations and to Natural England’s advice on waymarking of restricted byways.
- 292 11.2.3 fn 4 The Traffic Signs Regulations and General Directions 2002 were replaced with effect from 22nd April 2016 by the Traffic Signs Regulations and General Directions 2016. Sign 2610.2, for the “Direction along a public right of way, concessionary path or permissive path indicated by waymarks” is item 21 in Sch 12 Part 28 (page 361). It allows considerable flexibility in background colour and additional text.

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- 297 12.1.2 Section 40 of the Natural Environment and Rural Communities Act 2006 requires every local authority to have regard, so far as is consistent with the proper exercise of its functions, to the purpose of conserving biodiversity when undertaking those functions. Defra has issued guidance to local authorities on this duty.
- 302 12.1.5, footnote 9, the 1992 regulations have been replaced by the Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007 and the Street Works (Registers, Notices, Directions and Designations) (Wales) Regulations 2008. These require registers to be indexed, to comply with BS 766 Part 1 and, by no later than 1st April 2009, to be based on a geographical information system. The Department for Transport has published new and revised guidance on street works, which includes guidance on the registers.
- 303 12.1.8 The membership of national park authorities in England has been revised from 8th May 2007 by the National Park Authorities (England) Order 2006.
- 304 12.2.1 Section 40 of the Natural Environment and Rural Communities Act 2006 requires every government department and agency, to have regard, so far as is consistent with the proper exercise of its functions, to the purpose of conserving biodiversity when undertaking those functions. Defra has issued guidance to public authorities on this duty.
- 304 12.2.1 Part 2 (section 21) of the Infrastructure Act 2015 places a duty on the Secretary of State for Transport to set a Cycling and Walking Investment Strategy for England, to review or replace the Strategy regularly (at least once every five years) and to report periodically to Parliament on progress towards meeting its objective. Part 2 was brought into force on 31 July 2015 by the Infrastructure Act 2015 (Commencement No. 3) Regulations 2015.
- 309 12.4.3 Defra published in March 2007 a report by Cranfield University The social and economic benefits of Public Rights of Way - quantifying value for money and associated PROWTool for highway authorities to use in their improvement plan work.
- 311 12.4.4 The regulations governing membership of Local Access Forums in England have been revised (Local Access Forums (England) Regulations 2007), and revised guidance has been issued.
- 311 12.4.4 Advice on the role of Local Access Forums in relation to rights of way is contained, for authorities in England, in Defra circular 1/09, paragraph 3.2
- 312 After 12.4.4 The Active Travel (Wales) Act 2013 requires local authorities in Wales to produce active travel maps and deliver year on year improvements in active travel routes and facilities. It requires highways authorities in Wales to make enhancements to routes and facilities for pedestrians and cyclists in all new road schemes and to have regard to the needs of walkers and cyclists in a range of other highway authority functions. It also requires the Welsh Ministers and local authorities to promote active travel journeys in exercising their functions under this Act.
- The Act applies only to those areas specified in a direction issued by the Welsh Ministers.

The statutory direction, which applies only in urban areas with a population of at least 2,000, and the related guidance can be found here - link.

The Act was brought into force on 25 September 2014 by the Active Travel (Wales) Act 2013 (Commencement) Order 2014.

314 12.5.2 The Equality and Human Rights Commission has replaced the Disability Rights Commission.

315 12.5.3 In *LDRALtd & Ors v Secretary of State for Communities and Local Government & Ors* (2016) a grant by the Secretary of State of planning permission was quashed for reasons including that the public sector equality duty in section 149 of the Equality Act 2010 had not been properly considered in terms of effect the development would have on access to the riverside by people with disabilities.

315 12.5.4 Advice on the application of the Disability Discrimination Act to rights of way is, for authorities in England, contained in Defra circular 1/09 at paragraphs 1.3, 5.4 and 6.8

319 12.6.2 For consideration of the meaning of ‘public place’ in section 139 of the Criminal Justice Act 1988, see *Harriot v Director of Public Prosecutions* (2005), (area set back from road in front of bail hostel held not to be a ‘public place’).

321 12.6.4 The Openness of Local Government Bodies Regulations 2014, which came into force on 6th August 2014, permit members of the public to report and commentate on public meetings of local government bodies in England. They also require written records to be kept of certain decisions taken by officers under delegated powers (regulation 7).

322 12.6.4 footnote 76 Section 47 was amended from 1st June 2014 to extend the exemption from copyright infringement as to allow public authorities to publish material on-line : the Copyright (Public Administration) Regulations 2014.

324 12.6.5 The duty of public authorities to provide ‘environmental information’ is imposed, not by the Freedom of information Act 2000, but by paragraph 5 of the Environmental Information Regulations 2004, (implementing European Council Directive 2003/4/EC). The terms ‘public authorities’, ‘environmental information’ are defined in the regulations (para 2), the latter term including planning applications and planning permissions.

In *Markinson v Information Commissioner* (Information Tribunal Appeal Number:EA/2005/0014 FER 0061168), X complained to the Information Commissioner (established by the Freedom of Information Act 2000 and charged by regulation 18 of the Environmental Information Regulations with hearing complaints under those Regulations) that the charge of £6 made by the King’s Lynn and West Norfolk Borough Council for a copy of a planning application was excessive. Under regulation 8, an authority may not charge for the inspection of information. It may charge for copies of information supplied, provided that the charge does ‘not exceed an amount which the public authority is satisfied is a reasonable amount’.

The Information Commissioner, being satisfied that the authority had satisfied itself that the amount charged was (taking into account the (sic) ‘legal significance’ of the document) reasonable, rejected the complaint. X appealed (under section 58 of the Freedom of information Act 2000) to the Information Tribunal.

The Tribunal found that the Council and the Commissioner had failed to take into account guidance on making a charge for the provision of information, and that ‘the Commissioner was wrong to conclude that the Council’s decision was one that a reasonable authority, which had properly instructed itself as to the applicable law and relevant facts, could have reached’. The Tribunal ruled that the Council should re-assess the charges it makes for providing copies of ‘environmental information’ and that in making the re-assessment it should adopt as a guide price the sum of 10p per A4 sheet, as identified in the good practice guidance on access to and charging for planning information published by the office of the Deputy Prime Minister and as recommended by the Department for Constitutional Affairs, being free to exceed that price only if it could demonstrate that there was a good reason for doing so,

taking into account guidance by Defra to the effect that any charge should be at a level that does not exceed the cost of producing the copies.

324 12.6.5 A number of decisions of the Information Commissioner and Information Tribunal have been summarised and are available as a download from the BBE website.

324 12.6.6 The Local Government Ombudsman has published a list of decisions on rights of way cases between 1993 and 2007.

324 12.6.6 In *R(ER) v Commissioner for Local Administration* (2014) the Court of Appeal rejected a submission that the Local Ombudsman had jurisdiction to investigate the consequences of a decision if investigation of the decision itself was excluded by LGA 1972 s 26(6), which covers matters such as actions where there is a right of appeal to a tribunal or a possible remedy by way of court proceedings.

328 12.7.1 In *R (Horvath) v Secretary of State for Environment, Food and Rural Affairs* (2007) the Court of Appeal dismissed the appeal and varied the direction.

In *Horvath (Agriculture)* (2009) the European Court of Justice held : (i) that the UK government had been entitled to introduce cross-compliance measures relating to public rights of way; and (ii) that the respective administrations in England and Wales had been entitled to introduce different cross-compliance measures (the provisions about rights of way not applying in Wales).

328 Further Reading A Welsh version of “*By All Reasonable Means*” has been published.

328 Further Reading Guidance “*Understanding the British Standard for Gaps Gates and Stiles: BS5709:2006 explained*” has been published by the Pittecroft Trust.

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330 13.1.2 Where legal action is taken by an private person against a landowner to right a wrong that constitutes a criminal offence, (e.g. obstruction of the highway, see 13.2.1), the action takes the form of a private prosecution. For the power of the Crown Prosecution Service to take over the conduct of a private prosecution, see *R (Gujra) v Crown Prosecution Service* (2012)

330 13.1.2 The Criminal Procedure Rules 2015 applied to prosecutions from 5 October 2015, replacing the Criminal Procedure Rules 2014.

331 13.1.3 Section 141 of the Tribunals, Courts and Enforcement Act 2007, brought into force on 1 April 2008, gives the court the power to substitute its own decision in certain cases of judicial review where the decision maker is a court or tribunal, the decision is quashed on the ground that there has been an error of law and if the High Court is satisfied that it is the only decision the court or tribunal could have reached. Tribunals, Courts and Enforcement Act 2007 (Commencement No. 3) Order 2008.

332 13.1.3 The circumstances in which the court may overturn the decision of an administrative body include instances in which a procedure has been followed that is unfair to one of the parties. In *R (Chaston) v Devon CC* (2007), owing to uncertainty as to the correct route of a path, the surveying authority appointed an inspector to hold a non-statutory inquiry to hear the evidence and make a recommendation as to the correct route. The inspector found that of three possible routes, the correct one was down steps constructed by nearby landowners on a line that took the path away from the front of their properties. The other two routes were down a lane that ran in front of the properties. The inspector found that the correct route was, as contended by the landowners, down the steps. The authority subsequently received further representations from members of the public that supported a line that passed down the lane. The authority notified the landowners but did not refer the matter back to the inspector. The authority resolved to reject the inspector’s conclusion and determined that the correct line passed down the lane.

In an application for judicial review of the authority’s decision the landowners sought an order that the decision should be quashed. The High Court held that, to have acted in a

procedurally fair manner, the authority should have either informed the landowners of the further representations and invited them to comment, or referred the matter back to the inspector. Its failure to follow either course meant that the manner in which the decision had been reached was contrary to the rules of natural justice. The decision was therefore quashed and the matter referred back to the inspector for reconsideration in the light of the fresh evidence supplied.

333 13.1.4 The Magistrates' Courts Fees Order 2008 as amended by the Magistrates' Courts Fees (Amendment) Order 2009 and the Magistrates' Courts Fees (Amendment) Order 2014, includes fees for the following matters:

(a) (fee 1.1) for attendance on an application which requires a justice of the peace to perform a function away from the court premises (e.g. viewing a highway), £50;

(b) (fees 8.1 and 8.3) on commencing proceedings where no other fee is specified and where leave or permission is not required, £205, and for a hearing at which the proceedings are contested, £515.

335 13.2.1 'The court's powers' For the approach to be taken on the award of costs to an applicant, see *Derbyshire CC v High Peak Magistrates' Court* (2013). In *Wheeler v Norfolk CC* (2014) a decision of the magistrates' court to award costs to a landowner was quashed on the basis that the court had had no power to do so.

335 13.2.1 'When is the procedure not available?' On the entitlement of the Director of Public Prosecutions to take over and discontinue private prosecutions under s 6(2) of the Prosecution of Offences Act 1985, see *R (Gujra) v Crown Prosecution Service* (2012).

337 13.2.2 See *Begum & Anor v Luton BC* (2018) regarding the service of informations when a court counter is closed.

345 13.4.3 In *Ali v City Of Bradford Metropolitan District Council* (2010) it was held that whilst a highway authority may be liable for a nuisance that it created, no action lies at the suit of an individual under either section 41 or section 130, nor by virtue of section 263(1), of the Highways Act 1980 against a highway authority either for breach of statutory duty or for private nuisance in respect of injury suffered as a result of the failure of the authority to exercise the power conferred by section 149 to secure the removal of matter that constitutes a nuisance.

349 13.5.5 In *Dean and Chapter of Rochester Cathedral v Debell* (2016) the Court of Appeal overturned the decision of the county court that the Cathedral had been liable to Mr Debell for an injury he suffered, Elias LJ holding that the judge had to apply the concept of reasonable foreseeability taking a practical and realistic approach to the kind of dangers which the Cathedral were obliged to remedy.

351 13.6.1 For the meaning of 'sufficient interest' and as to whether, where an issue involves the public interest, an applicant for judicial review must show a personal interest in the matter, see *Walton v The Scottish Ministers* (2012).

352 13.6.2 *Birmingham City Council v Sharif* (2019) was an application to discharge an injunction intended to prevent the applicant from taking part in car-cruising on highways in the Council's area. It was argued that the Council could and should have tackled the problem by making a public space protection order. The court dismissed the application, holding "There is no general principle that only in exceptional circumstances should a Court grant an Injunction where an alternative, specific statutory remedy is available or the Court should not do so where breach can carry more severe sanctions than breach of a PSPO nor is there any basis for the argument that local authorities cannot seek a remedy with more serious consequences in the event of a breach or that the Court cannot grant such a remedy if it considers it justified and proportionate so to do."

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- 368 14.2.1 Natural England has published England Leisure Visits – report of the 2005 survey (NE13). This found that 21.2 million visits to land to which access had been granted under the 2000 Act had been undertaken by people living in England over a 12-month survey period.
- 370 14.2.3 Text on the Marine and Coastal Access Act 2009 which provides for increased coastal access in England has been included in a separate file. The file also includes the relevant provisions of the 2009 Act and earlier legislation as amended by the Act. It was revised (v4) in October 2018.
- 371 14.2.5 and footnotes 25-27, 33-35. The Access to the Countryside (Maps) (England) Regulations 2013 have replaced the Access to the Countryside (Maps in Draft Form) (England) Regulations 2001, Access to the Countryside (Provisional and Conclusive Maps) (England) Regulations 2002, Access to the Countryside (Provisional and Conclusive Maps) (England) (Amendment) Regulations 2003, Access to the Countryside (Correction of Provisional and Conclusive Maps) (England) Regulations 2003 and Access to the Countryside (Correction of Provisional and Conclusive Maps) (England) (Amendment) Regulations 2005, all of which have been revoked.
- 373 14.2.6 The period between reviews of the maps in England has been extended, by the Countryside and Rights of Way Act 2000 (England) Regulations 2013, to fifteen years for the first review and twenty years for subsequent reviews.
- 373 14.2.6 Revised conclusive maps for Wales were published by Natural Resources Wales in September 2014.

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- 391 15.1.3 The 1992 regulations have been replaced by the Town and Country Planning (Control of Advertisements) (England) Regulations 2007, with guidance in Department for Communities and Local Government Circular 03/2007. The effect on advertisements visible from rights of way has not been changed.
- 392 15.2.1 The Digital Economy Act 2017 s 4 and Sch 1 inserted a new Sch 3A into Telecommunications Act 1984 (replacing Sch 2) for a replacement electronic communications code. Part 8 of the Code applies to street work rights. The change took effect from 28th December 2017 : Digital Economy Act 2017 (Commencement No. 3) Regulations 2017.
- 395 15.3 The Cotswold Way was officially opened on 24 May 2007.
- 395 15.4.1 On 1 April 2009 the following changes were made to local government in England. In Cornwall, Durham, Northumberland, Shropshire and Wiltshire the county council has become a unitary authority. In both Bedfordshire and Cheshire two unitary authorities have been created: Bedford Borough and Central Bedfordshire and Cheshire West and Chester and Cheshire East respectively.
- 396 15.5 A table listing when order-making authorities should send copies of orders to the Ordnance Survey is, for authorities in England, in Defra circular 1/09, paragraphs 4.29 and 5.59.

Part II : text of selected statutes

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- 507 Public Order Act 1986 s 5 – the amount that may be charged as a fixed penalty for leaving litter has been increased to £90 by the Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) (No. 2) Order 2013
- 621 Environmental Protection Act 1990 s 88 – the amount that may be charged as a fixed penalty for leaving litter has been increased since 1st April 2018 :
in England to not less than £50 (£65 from 1st April 2019) and not more than £150 by the Environmental Offences (Fixed Penalties) (England) Regulations 2017;
in Wales to not less than £75 and not more than £150 by the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) (Wales) Regulations 2007.
- 676 Anti-Social Behaviour Act 2003 s 44 – the amount that may be charged as a fixed penalty for graffiti, including defacing of signposts, has been increased :
in England to not less than £50 (£65 from 1st April 2019) and not more than £150 by the Environmental Offences (Fixed Penalties) (England) Regulations 2017;
in Wales to not less than £75 and not more than £150 by the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) (Wales) Regulations 2007.
- 684 Clean Neighbourhoods and Environment Act 2005 s 56 – the amount that may be charged as a fixed penalty under a dog control order has been increased :
in England to not less than £50 and not more than £80 by the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) Regulations 2007;
in Wales to not less than £75 and not more than £150 by the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) (Wales) Regulations 2007.
- 684 Note to Clean Neighbourhoods and Environment Act 2005 s 57 - The Controls on Dogs (Non-application to Designated Land) (Wales) Order 2007 make the same provision for Wales as applies in England, namely that dog control orders cannot be made in respect of a ‘road’.