LEGAL JUDGMENTS AND REPORTS: CASE SUMMARIES PUBLIC RIGHTS OF WAY AND COMMONS/VILLAGE GREENS

The provision of case summaries below does not mean that there is no need to read the judgment in full where a case is relevant to an Order Decision!

Note: High Court Transcripts predominantly of relevance to planning issues can be found in the PINS knowledge library https://pinsknowledgelibrary.org.uk/vufind/.

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

A

Robinson v **Adair**

(QBD)[1995] NPC 30, [1995] The Times 2 March

Summary: Concerns illegal vehicular use post 1 December 1930 when it became an offence to drive a mechanically propelled vehicle without lawful authority on a footpath or bridleway; vehicular use on a footpath or bridleway unable to provide user evidence under s31 HA 1980 to upgrade to byway - no public rights can be acquired by actions prohibited by statute. Overruled by Bakewell judgement.

Robinson Webster (Holdings) Ltd v **Agombar** and another

[2001] unreported (QBD)[2001] EWHC 510 (Ch), [2002] 1 P & CR 20

Summary: (see ROW Note 3/02) concerns the sufficiency of historical evidence to show dedication of public vehicular rights. The lane in question was numbered on the Tithe Map, reference in the Tithe Apportionment showed its occupation by 'parish officers'. Judgment: "very strong indication that it was regarded as a publicly maintainable highway at the time". The lane was uncoloured on the Finance Act Map (excluded from the taxable land of a hereditament). Judgment: "most material evidence in relation to the status of [the lane] at the time".
Also, Etherton J said "It is clear…that public rights may be established over a cul-de-sac by actual use as of right by members of the public".

R v SSETR ex parte **Alconbury** Developments Ltd and others

[2001] UKHL 23

Summary: dealt with the question whether certain decision making processes of the SSETR were compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as incorporated in the Human Rights Act 1998. Held that the existing procedure of inquiry before an Inspector, decision by the SS, and right of appeal on a point of law to the High Court accorded with article 6.

Asghar Ali v SSEFRA, Essex County Council and Frinton and Walton Town Council

[2015] EWHC 893 (Admin)

Key Words: Adequacy of reasoning; use of "infelicitous" language

Summary: An Inspector's decision was challenged as irrational. Although stating that the evidence as to locking a door was "sound and reliable" and that she "had no reason to doubt " the evidence that the door had been locked, she found on the balance of

probabilities that the door had not been locked. The judge stated that the Inspector's wording "may have been clearer" and that there were "infelicities in her language". Nevertheless he concluded that on a reasonable reading of the decision, the Inspector meant that whilst she had no reason to doubt the evidence *in itself*, the evidence was not sufficient when looked at together with the rest of the evidence, including extensive evidence from users of the path, to satisfy her on the balance of probabilities that the door was locked.
The Inspector accepted that the door was locked at Christmas 2011. However, it was perfectly rational to conclude that, as the purpose of the path was for getting to local shops and businesses, the locking of a door at Christmas when those shops and businesses were closed, was not effective to provide sufficient evidence that there was no intention to dedicate. The acts on the part of the landowner were not sufficiently overt to bring to the attention of the public who used the way that the landowner had no such intention.

Allen v Bagshot Rural District Council

[1970]
Summary: (see ROW Advice Note No. 19 for application to Human Rights legislation) It is doubtful an adjoining landowner or occupier constitutes a class of person whose interests would be considered by a local authority or the SS when making or confirming a diversion order. (This case was decided under s111 of the HA 1959, which equates with s119(6) of the HA 1980, however, the expediency test in s119(1) differs to that in s111(1))

R v SSE ex parte **Andrews**

(QBD)[1993] COD 477, [1993] JPL 52
Summary: concerns the interpretation of sections 8, 10 and 11 of the 1801 General Inclosure Act; *'ultra vires'* awards. It questioned whether the commissioners had the power to set out a 4ft wide public footpath under the General Act, in the absence of specific provision in the local act. Judgment: s8 of the 1801 Act empowered commissioners to set out new public carriage roads of 30+ ft wide, and to reorganise roads and tracts (which may be less than 30 ft wide) across land to be inclosed directly affected by the setting out of new carriage roads. s11 of the Act only extinguishes pre-existing carriage roads if they are not set out. It does not touch pre-existing footpaths and bridleways. **Warning:** there is a widespread agreement amongst rights of way practitioners that this judgment is 'wrong'. Nevertheless it must be followed until overturned.

R (on the application of John David **Andrews**) and SSEFRA

[2015] EWCA Civ 669 Court of Appeal
Key Words: S10 Inclosure Consolidation Act 1801
Summary: The Court of Appeal held that section 10 of the Inclosure Consolidation Act 1801 (the 1801 Act) does empower enclosure commissioners to create *public* bridleways, as opposed to only *private* bridleways. The Court found that there were many examples of inconsistency of language in the 1801 Act and that a "purposive interpretation" should be adopted, ie one which reflects the intention of Parliament.
The purpose of the Act was to consolidate in one statute the clauses "usually contained "in earlier private enclosure Acts. A large number of pre-1801 Acts authorised commissioners to appoint public as well as private bridleways and footpaths and the Court found that it seemed unlikely that Parliament would not have intended to give commissioners a power which they had previously repeatedly exercised. Furthermore, in 1801, public rights of way on foot and horseback were as important for the public in getting around as were the public carriageways for vehicular traffic and would have had far greater importance that private ones. The Court stated that it was difficult to identify any strong public interest in a commissioner setting out private rights on private enclosed land. The Court concluded that S10 should be interpreted as giving commissioners power to create new public bridleways and footpaths unless the language of the section could not bear that meaning.
Looked at in isolation of the rest of the statute and without regard to its underlying purpose the most natural interpretation of the first few lines of S10 is that the word "private" governs all the items in the list. However it is not impossible to read the word

"private" as governing only the first item, namely roads, and to read the remaining items as unqualified by the word private. There are other indications in the Act which suggest that Section 10 was intended to cover both public and private bridleways and footpaths and there are many linguistic imperfections in the Act.

Attorney-General v **Antrobus**

[1905] 2 Ch 188

Summary: concerns a cul-de-sac path leading to Stonehenge, closed off by the landowner. Judgment: "…the want of a *terminus ad quem* is not essential for the existence of a public road", and "a landowner may by express words, or by conduct…be shown to have dedicated even a cul-de-sac to the public". On Tithe maps has been effectively superseded by Maltbridge and Agombar. Confirms that there is no such thing as a right to wander freely.

Applegarth v SSETR

(QBD)[2001] EWHC Admin 487, [2002] 1P & CR 9, [2002] JPL 245, [2001] 27 EG 134 (CS)

Summary: concerns interpretation of s31(1) and s31(2) of HA 1980 – the proviso and 'bringing into question'. Mr Applegarth had extensive rights over the road in question, but did not own the freehold of the soil or surface. Judgment: no impediment to the (unknown) freeholder dedicating public rights. Even though the owner was unknown, that did not mean that someone in Mr Applegarth's position was relieved of the need to show sufficient evidence of a lack of intention to dedicate on the part of the landowner. s31(2) places no limit at all on the circumstances in which the public's right may 'otherwise' i.e. otherwise than by an owner's notice under s31(3) be brought into question. In particular it does not limit it to actions of the landowner. Munby J stated: "Whether someone or something has "brought into question" the "right of the public to use the way" is, as it seems to me, a question of fact and degree in every case."
Also, public rights may be acquired over a private right of way.

R (oao) **Ashbrook** v East Sussex County Council

[2002] EWCA Civ 1701, [2003] 1 P & CR 191

Summary: concerns obstructions and duty of highway authority. This case is not relevant to Inspectors making decisions on diversion orders.

Ashby and Dalby v SSE and Kirklees Metropolitan District Council

[1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508

Summary: a builder obstructed a path and started development before seeking a TCPA diversion order. The issue was whether such an order could be made where much of the development had been completed, but some work remained to be done. Judgment: TCPA orders can still be made as long some of the authorised development remains to be completed, but if it had been completed the powers in TCPA (now s247 and s257) cannot be used. Where development, in so far as it affects a right of way, is completed, the power to make orders under Section 257 is no longer available (see paragraph 7.21, RoW Circular 1/09).

Austerberry v Oldham Corporation

[1885] LR 29 Ch D 750

Summary: in the absence of statutory authority, the reservation by a private individual of a right to level a toll in respect of highway user was not recognised by the courts if it was alleged to have occurred after 1189.
Concerned maintenance of what had been a private road. In 1837 several landowners agreed to build a road for agricultural use to bypass an inconvenient road. The Trustees of the Company set up built and maintained it and established tollgates to charge tolls, including to the landowners for non-agricultural use. By 1880 the area had become part of the town of Oldham. Oldham Corporation acquired the site of the road from the trustees and stopped collecting tolls, allowing it to become public highway, though not maintainable at public expense. They decided to charge frontagers with improvement costs. One objected, arguing the Corporation were successors in title of the trustees who has covenanted to maintain the road from the proceeds of tolls. The Corporation argued

successfully the maintenance covenant was not binding on them as successors to the original covenantor (see RWLR 14.2 p85).

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Barkas v North Yorkshire CC

[2012] EWCA Civ 1373
Towns and Village Greens
Summary: Where members of the public use land for recreation 'of right' or 'by right' then that land cannot be registered as a town or village green in the basis of use by the inhabitants of a locality or neighbourhood within a locality as such use is not 'as of right'.

R (on the application of **Barkas**) v North Yorkshire County Council and another

[2014] UKSC 31 Supreme Court
Key Words: Registration of a town or village green; "as of right", Beresford judgement
Summary: In this case the land claimed as a town or village green was held and maintained by the Council for public recreation pursuant to s12(1) of the Housing Act 1985. Lord Neuberger found that "so long as land is held under a provision such as S12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise."
Beresford was found to be wrongly decided by the House of Lords. In that case the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period and therefore there was no basis upon which it could be said that the public use of the land was "as of right"; it was "by right". It was made clear by Lord Carnwath that this does not mean that land in public ownership can never be subject to the acquisition of village green rights. It depends on the facts and whether the land is held or laid out for public recreational use.

R v SSE ex parte **Bagshaw and Norton**

(QBD)[1994] 68 P & CR 402, [1995] JPL 1019
Summary: (see ROW Note 14/05, Training Notes S9 Annex 9.4) concerns Sch 14 appeals and reasonable allegation. s53(3)(c)(i) involves consideration of two tests, on the balance of probabilities – test A does a right of way subsist, or test B is it reasonably alleged to subsist. Test A requires clear evidence in favour of the applicant and no credible evidence to the contrary. If there is a conflict of credible evidence and no incontrovertible evidence that a way cannot be reasonably alleged to subsist then the SS should find that a right of way is reasonably alleged to subsist and make a direction accordingly. It is for the SS to decide whether "a reasonable person, having considered all the relevant evidence, could reasonably allege a right of way to subsist". Owen J said "Whether an allegation is reasonable or not will depend on a number of circumstances…However, if the evidence from witnesses as to user is conflicting, but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem reasonable to allege such a right ". (Approved in the Emery judgement which provides further clarification on 'reasonably alleged to exist' at the Sch 14 stage).
Also, by inference, appears to accept that an order based on presumed dedication may be made under either s53(3)(b) or s53(3)(c)(i).
Further, there was no rule of law that you cannot have a right of way to a cul-de-sac in the countryside.

Bakewell Management Ltd v Brandwood and others

[2003] EWCA Civ 23, [2003] 1 WLR 1429, (HL)[2004] UKHL 14, [2004] 2 AC 519, [2004] All ER 305, [2004] 2 WLR 955,[2005] 1 P & CR 1
Summary: (see ROW Advice Note 12, ROW Note 14/04) illegal user cannot be user as of right. Concerned a challenge to the charging of exorbitant sums by owners of common land for vehicular access over that land to private houses. It is an offence to drive without lawful authority on common land (see particularly s34(1) RTA 1988).
Judgment: this offence was not a bar to the acquisition of a vehicular right of way by

long use. If it was open to a landowner to dedicate a highway to the public, then that dedication could constitute 'lawful authority' for the purposes of s34(1). Robinson v Adair (1995) overruled and Hanning v Top Deck Travel Group Limited (1993) 68 P & CR 14 overturned. May not be lawful authority if it leads to a public nuisance.
Note: s66 of the NERCA 2006 reverses the effect of the Bakewell decision: After the commencement date, no public right of way for mechanically propelled vehicles is created unless by an enactment or instrument or otherwise on terms that expressly provide for it to be a way for such vehicles; or by construction in exercise of powers conferred by any enactment, of a road intended to be used by such vehicles.

R v City of Sunderland ex parte **Beresford**

[2003] UKHL 60, [2004] 1 AC 889, [2004] 1 All ER 160
Summary: (see ROW Note 24/03) although the case concerned an application to register land as a village green, it has application in the rights of way context. Held: to establish that use was *precario* there needed to be a positive act of granting permission that went beyond tolerance or acquiescence. Encouragement to use did not establish that use was *precario*. Permission had to be temporary and revocable. Lord Bingham, "a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put". Lord Rogers, "I see no reason in principle why, in an appropriate case, the implied grant of a revocable licence or permission could not be established by inference from the relevant circumstances."

R v Lake District Special Planning Board ex parte **Bernstein**

(QBD)[1983] The Times 3 February
Summary: a diversion made under s119 HA 1980 must provide a new path for at least some of its length. A path created on an already existing one would effectively mean an extinguishment. Hodgson J said "It seems to me clear that what section 119 is concerned with is moving the line of an existing path and, therefore, providing a new path in which event the old one can be stopped."

Berry v SSEFRA and Devon County Council

(QBD)[2006] EWHC 2498 (Admin)
Summary: concerns *de-minimus* - whether events in the last year of the 20 year period satisfied the proviso in s31 HA 1980. The landowner submitted a landowner evidence form to the OMA in December 1998 stating his lack of intention to dedicate the way. He made a statutory declaration under s31(6) that he had no intention to dedicate, in January 1999. Later that year he erected a sign denying the existence of any public right of way. The date of bringing into question was taken as the date of the sign. The Inspector determined the s31(6) declaration and the erection of the sign were indistinguishable, and that as the landowner evidence form had been submitted within the last month or so of the 20 year period, that it was *de-minimus*. The judge concluded the weight of evidence showed the sign had been erected in July or August 1999. A period of 6 or 7 months between a clear intention not to dedicate and the later date of bringing into question could not be *de-minimus.*

Betterment Properties (Weymouth) Ltd v Dorset County Council

[2012]EWCA Civ 250 Court of Appeal
Key Words: Registration of a town or village green; as of right; effect of signs and vandalism of signs; interruption of 20 year period by third party works; rectification of the register; delay.
Summary: Was user "as of right" when the reason witnesses had failed to see signs appeared to be because they were vandalised and removed on a regular basis shortly after they were erected. The Court of Appeal referred to the judge's finding at first instance that if left in place, the signs were sufficient in number and location and were clearly enough worded so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. The appeal judges concluded that there was a "world of difference" between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. It was not necessary to take legal action, put notices in local papers or distribute leaflets.

Where part of a site is fenced off by a third party (in this case to carry out drainage works) it is sufficient to disrupt the 20 years user of land where the fencing results in a physical ouster of local inhabitants from the land. However, the disruption must be inconsistent with the continued use of the land as a village green. If the 2 competing uses can accommodate each other, then time does not cease to run.
Delay is not a barrier to rectification of the register under s14 unless it is shown that other public and private decisions have been taken on the basis of the existing register which has operated to the significant prejudice of the respondents or other relevant interests. Sullivan LJ added that a delay of a decade would be capable of being a delay that was so long that prejudice could be inferred. See ***Paddico*** for further discussion of delay.

Attorney General v **Beynon**

(CA) [1970] Ch 1, [1969] 2 All ER 273
Summary: concerns the width of a way. Goff LJ said "It is clear that the mere fact that a road runs between fences, which of course includes hedges, does not *per se* give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up. One has to decide the preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or circumstances to the contrary."

R v SSE ex parte **Billson**

(QBD)[1998] 2 All ER 587, [1998] EWHC 189 (Admin), [1998] 3 WLR 1240, [1999] QB 374
Summary: concerns duration of no intention to dedicate; a revocable deed; rights over common land and the effect of s193 of the Law of Property Act 1925 which created public rights of air and exercise. In this case, users of the tracks in question were permitted to use them by way of a revocable deed, conferring rights of access, executed by the landowner but which had not been publicised. Use by the public was held to be by licence not as of right, even though they believed it was as of right. A lack of intention to dedicate need not be shown for the whole 20 year period under s31 HA 1980 – the words 'during that period' do not mean throughout that period.

R v SSE ex parte **Blake**

[1984] JPL 101
Summary: concerns interruption to use by a locked gate. Judgement: "It would be impossible ever for a landowner to prevent the acquisition of a right of way over land…by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way round and then …claim that they were using the way; whereas what had happened in fact was that they were acknowledging the existence of the obstruction…by their very actions to avoid it". Also, an intention not to dedicate must be demonstrated by an overt action likely to come to the attention of users. A notice does not have to be in place for the whole period; it is evidence for the time displayed.

British Transport Commission v Westmorland County Council

(HL)[1957] 2 All ER 353, [1958] AC 126
Summary: dedication must be compatible with the purpose of land held. A public right of way can be dedicated over a railway line provided that public use of the footpath was not incompatible with the statutory purposes of the railway authority. Judgement of Parke J in R v Inhabitants of Leake (1833) "If the land were vested by the Act of Parliament in Commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." Incompatibility is a matter of fact. "Whether at the date when the question is considered by the tribunal of fact, there is any

likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

Attorney General ex rel. Yorkshire Derwent Trust Ltd v **Brotherton**

HL [1991] 3 WLR 1126
Summary: concerns public right of navigation, whether waterway equivalent to public right of way that could be acquired by long user; Rights of Way Act 1932. Held, the expression 'a way…upon or over any land' in s1(1) of the RWA 1932 (see now s31(1) HA 1980) referred to the physical site upon which the feature described as 'the way' ran and where the way had been enjoyed by the public in a certain manner and for a period of time it was deemed to be dedicated, as land itself which was capable of ownership, to the public use as a highway; that the extension of the meaning of 'land' made by s1(8) was intended to cover situations where the relevant land was permanently or temporarily covered by water, such as a ford or causeway and nothing turned on the words 'upon or over'; and that, accordingly, on its proper construction s1 did not apply to navigable rivers.

Buckland and Capel v SSETR

(QBD)[2000] EWHC Admin 279, [2000] 1 WLR 1949, [2000] 3 All ER 205
Summary: (see ROW Note 3/00, Barton Drove) concerns procedure when an award is *ultra vires*. The Inclosure Award (under an act of 1797) set out a private road 20 ft wide but the wording made it clear that it was to be available for the wider public. The Act empowered the setting out of public roads with a 40 ft minimum width. Judgement: "The Commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute. It was not open to them to circumvent the conditions necessary before a road would become a public highway by purporting to create a private way but to make it open to the public at large." However, notwithstanding the lack of power of Commissioners to create new highways, the way could subsequently be dedicated as public.
Note: no longer relevant to the definition of BOAT.

Burrows v SSEFRA

(QBD) [2004] EWHC 132 (Admin)
Summary: (see ROW Note 4/04) concerns the interpretation of a 'Private Road – access only' notice near an official 'Public Footpath' notice, and the meaning of erect and maintain; whether an Order decision should cover points relevant to an OMA's jurisdiction to make an order, that are not raised at the inquiry. A Nicol QC concluded the "adequacy or otherwise of the notice in its context as an expression of the landowner's intention was a question of fact for the Inspector". The intention of the person erecting the notice may be inferred from how it was likely to be interpreted by those who saw it. In this case, the sign was held to be insufficient to demonstrate a lack of intention to dedicate the way for walkers and horse riders. A notice is only effective for the purposes of s31(3) of the HA 1980 if erected by the owner of the land over which the way runs, or a person acting on their behalf. It does not have to be maintained throughout the whole 20 year period, only for some substantial time during that period. Also, modification/correction of the DM requires the discovery of evidence – an inquiry cannot simply re-examine the same evidence considered when the DM was first drawn up. There must be some new evidence, which when considered together with all the other evidence available, justifies the modification/correction.

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Calder v SSE

(CA)[1996] EGCS 78
Summary: s247 of TCPA 1990 empowered the SS to make a diversion order if he thought it was necessary to enable the development to be carried out in accordance with the grant of planning permission. It was not for the SS acting under s247 to postulate other developments if he was satisfied that diversion was necessary to allow the permitted development to be carried out.

R(oao) **Cheltenham** Builders Ltd v South Gloucestershire District Council
(QBD) [2003] EWHC 2803 (Admin)
Summary: concerns the registering of land as a village green, as of right. Held, having regard to the judgement in Sunningwell, the question must be not whether those using the land knew that their use was being objected to or had become contentious, but how the matter would have appeared to the landowner, since in cases of prescription the presumption arises from the latter's acquiescence.

R v SSE ex parte **Cheshire County Council**
(QBD)[1991] JPL 537, [1990] COD 426, 179, 180
Summary: concerns the tests in s118(1) and s118(2) of the HA 1980. Auld J considered an Inspector is not required to delve too deeply into the issue of 'need' for a path when dealing with an extinguishment order under s118. The issue at the confirmation stage is the question of expediency, having regard to the extent the path would be likely to be used by the public and the consequential effect on the land if it is extinguished.

R(oao) **Connaughton** v West Dorset District Council
(QBD)[2002] EWHC 794 (Admin), [2002] All ER (D) 392
Summary: concerns termination points of footpaths; whether this is where a footpath crosses another highway; whether a diverted route can follow the line of an existing path. Under s119(2) of the HA 1980 the termination points of a public footpath are matters of fact to be determined in the circumstances of each case. The purpose of s119(2) being to enable a walker to reach their destination when walking between two points. Thus a termination point need not be where a footpath crosses another highway, although the numbering of paths on the DM whilst not conclusive of termination points is a relevant factor. Other factors include the general geography of the path and the destination that a path user might be expected to wish to reach.
s119(7)(b) expressly contemplates a situation where at least part of a diverted route can run along the line of an existing path (see Bernstein).

R v **Cornwall County Council** ex parte MJ & RF Huntington
(QBD)[1992] 3 All ER 566, (CA)[1994] 1 All ER 694, [1994] JPL 816
Summary: a person "has no right to question the validity of an order in the courts between the time it is made and the time, if any, when it takes effect". On the proper construction of paragraph 12(3) to Sch15 of WCA 1981, challenges before as well as after the 42 day appeal period were precluded. But also "insofar as the applicants also desire to raise matters of legal complaint regarding the process whereby the [OMA's] came to make their decisions to make modification orders in the first place… the applicants will be able to do so under the express provisions of paragraph 12(1)."

R v SSE ex parte **Cowell**
[1992] JPL 370, (CA)[1993] JPL 851
Summary: concerns tolls. This is a difficult case concerning s31 HA 1980 and the proviso – George Laurence (RWLR 8.2 p47) appears to have had difficulty understanding what was decided. For example, despite s31, Rose LJ held that there must be an intention to dedicate on the part of the landowner of which user by the public is evidence. The issue of the landowner's intention does not arise if the case fails on the preceding conditions. Nothing in s31(1) suggests that 'sufficient evidence', if intention not to dedicate, is limited either to or by matters identified in subsections (3)-(6).

Cubitt v Maxse
[1873] LR 8 CP 704
Summary: concerns 'setting out' and public acceptance. If an inclosure Act and Award provided for a new highway to come into existence following various statutory processes such as certification, then if, for example, there was no certification, no highway came into existence. It was possible, however, even if there was no certification, for a highway to come into existence following inclosure by the normal common law rules of dedication and acceptance, if there was acquiescence by the owner and use by the public (but see discussion in RWLR 9.3 p163 and consider whether the presumption of

regularity may apply if no evidence of certification).

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AMG **Darby** v First Secretary of State and Worcestershire County Council

(QBD) [2003] EWHC 299 (Admin)

Summary: (see ROW Note 3/03) The appellant thought a diversion order had been confirmed. He encouraged people to use the 'new' path. The order had not been confirmed. A DMMO was made to add the path to the DM. The appellant's actions in encouraging use of the path during the 20 year period did not show lack of intention to dedicate.

Davies v Stephens

[1836]

Summary: this case was about a footpath in the Parish of St Ishmaels, leading from a road to the sea at Monk Haven on Milford Haven. For 30 or 40 years, while the land was occupied by tenants, the path was used by fishermen, bathers, and people getting seaweed, wreck etc from the beach. A gate was sometimes locked across the way, which had never been repaired by the Parish. Held: "all the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them. A gate being kept across it is also a circumstance tending to show that it is no public road, but not a conclusive one; for a road may originally have been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying." (see also Rowley and Lewis v Thomas)

Davis v Whitby

[1974] 1 Ch 186, [1974] 1 All ER 806

Summary: use of a way by different individuals, each for periods of less than 20 years, is sufficient if, taken together use covers a continuous period of 20 years or more. (This case dealt with a private right of way)

Dawes v Hawkins

[1860] 8 CB (NS) 848, 141 ER 1399

Summary: dedication of a way to the public cannot be for a limited time, but in perpetuity. An ancient highway over a common was diverted by an adjoining landowner and a new road provided which the public used for over 20 years, after which the original road was re-opened to the public. However, public rights over the original road were retained. "It is an established maxim – once a highway, always a highway; for the public cannot release their rights, and there is no extinctive prescription." It was also held that public user on land adjoining a right of way, if it is referable to the way having been illegally obstructed or allowed to become foundrous, affords no reasonable evidence of a dedication over that adjoining land.

R v SSE ex parte Smith (on behalf of the Seasalter Chalet Owners' Association) and C **Deller**

[1993] unreported

Summary: a decision had been made not to award costs to the appellants following a DMMO inquiry. The Inspector's decision to confirm the order had been quashed by a Consent Order. Held: the Council's decision to make the DMMO was 'badly flawed'. The Inspector, in stating that the Council had acted reasonably, was Wednesbury unreasonable. Basic flaws in the process of making a decision to make a DMMO may therefore lead to an award of costs to the successful party at the subsequent inquiry on the grounds of 'unreasonable behaviour'.

Doherty v SSEFRA and Bedfordshire County Council

(QBD) [2005] EWHC 3271

Summary: (see ROW Note 6/06) concerns a diversion order, confirms that s119(1) HA 1980 refers to the interests of the owners, lessees or occupiers across whose land the path or way currently passes and across whose land the diverted path will run. Where the path or way crosses land where no diversion is proposed, those landowners etc will have an interest as members of the public under s119(1) and where relevant under the tests in s 119(6)(a) to (c). Judgement confirms a diversion order can be made other than on the application of the owner, lessee or occupier.
Where the path's alignment is challenged, this must be dealt with under the provisions of s53 of the WCA 1981. Confirms that s56 of that Act provides conclusive evidence of the existence/alignment of a way and this must be the starting point for consideration of a PP diversion order.

R v SSETR ex parte **Dorset County Council**

(QBD)[1999] EWHC 582 (Admin), [1999] NPC.72, [2000] JPL 396
Summary: (see ROW Note 3/00) concerns the 'proviso' in s31 of HA 1980. Held: all it requires is sufficient evidence of a lack of intention to dedicate: overt and contemporaneous evidence was usually required, but there was no rule that it had to be directed at users of the way. On the issue of 'bringing into question', Denning LJ's judgment in Fairey was approved. "Whatever means are employed, they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway." NB: in this case it was the owner who challenged users. That might not always be the case.
See also Godmanchester and Drain concerning lack of intention to dedicate.

Du Boulay v SSEFRA (Du Boulay Consent Order)

QBD[2008] Claim No. CO/8352/2007
Summary: (see ROW Note 1/09) concerns exception under s67(3) of NERCA 2006 regarding applications – they must be made in strict accordance with para 1 of Sch14 to the WCA 1981. See also Winchester.

Dunlop v SSE and Cambridgeshire County Council

(QBD) [1995] CO/1560/94, [1995] 70 P & CR 307, [1995] 94 LGR 427, [1995] COD 413
Summary: (see ROW Advice Note 11) concerns definition of 'private carriage road'. A road was set out as a 'Private Carriage Road' in an inclosure award made under an act which incorporated the provisions of the 1801 General Inclosure Act. Held: there was nothing in the 1801 Act which suggested that inclosure acts or highway law generally differentiated between carriage roads according to whether private or public vehicles were permitted to go along them. The meaning of 'private carriage road' had therefore to be determined in the context of the 1820 Award. NB the judgment contains a useful and fascinating disquisition on the historical development of public and private ways and the distinction, which lasted until the 19th century, of 'common ways'.
Also, use of the terms 'CRF' and 'CRB' have no legal significance.

Dyfed County Council v SSW

[1989] 58 P & CR 68, (CA)[1990] 59 P & CR 275, [1990] COD 149
Summary: concerns use for recreational activities. There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way. In this case, however, concerning recreational use of a path round a lake, the area of which was set out in an inclosure award 'for the use of all persons interested in this inclosure', it was found that the presence of the public could be accounted for by this wording – which implied that the right to use the lake must have implied a right to walk along its perimeter – and no public right of way arose. "if …the route was only used as an incident of the fishing, swimming, sunbathing, picnicking etc, then …the use for sunbathing and matters of that kind is not capable of giving rise to a presumption of dedication as a highway", but "…use by the public for pure walking …was capable of founding a case of deemed dedication of the footpath whether or not such walking was itself purely recreational."(see article in RWLR 6.3 p1 where the author considers this wrongly decided.)
Also, concerning the Inspector's decision, the reasons given must be sufficient to enable a court to determine whether or not the decision is right in law.

Attorney General & Newton Abbot RDC v **Dyer**
[1945] 1 Ch 67
Summary: on cul-de-sacs, it is "clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another. Thus there may be a public right of way to a view point or beauty spot,…even to the sea's margin and thence returning." In this case the foreshore was privately owned, "…evidence of the user…on their way to a walk over, or picnic upon the foreshore, cannot be regarded as evidence of user as of right, since in regard to their activities on the shore, such persons can at best have been licensees of the owner or exercising some customary privilege confined to the inhabitants…" But "…where…there is a body of evidence of user of the way strictly as a public way, it is legitimate to add and to rely upon evidence of user in connection with the privilege mentioned…on the ground that the privileged class of licensees or local inhabitants are also members of the public and pass along the way in their latter character."

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R v **East Mark**
[1848] 11 QB 877
Summary: held that dedication might be presumed against the Crown from long acquiescence in public user; and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public use in such a manner as to satisfy the jury that a dedication to the public was intended.

R v **Edmonton**
[1831] 1 Mood & Rob 24
Summary: there is a rebuttable presumption that the soil over which a highways runs is owned by the owners of the adjoining land, to the middle of the highway (*ad melium filum*).(see also Beynon)

The Queen on the application of **Elveden Farms Limited** v SSEFRA
[2013] EWHC 644 (Admin)
Key Words: adequacy of reasons; interim decisions
Summary: The reasoning in decisions must be read with appropriate generosity and against the background of the knowledge known to the parties to the decision making process. The case concerned the width of part of the Icknield Way. The judge found that the Inspector's preliminary decision contained insufficient reasoning to enable the claimant to know why it had won or lost and that the second report wouldn't permit an informed reader to know with a sufficient degree of certainty why the inspector maintained his earlier conclusion.
The judge appeared confused as to the nature of interim decisions and the modification process and with regard to what action he should take eg. "I propose to quash the order or proposed order, whichever is the correct description of it".

R v SSW ex parte **Emery**
(QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83
Summary: approves Bagshaw and Norton. Provides further clarification of the reasonably alleged to subsist test at the Sch14 stage. This was a case about conflicting evidence of use. Held in relation to WCA 1981 s53: where there is a conflict of apparently credible evidence, a right of way is 'reasonably alleged to subsist' if, reasonably accepting the evidence of one side, and reasonably rejecting that of the other, the right would be shown to exist. Also, an order made under s53(2) following a Sch14 procedure still allows the applicant and objectors the right to appeal under Sch15 when conflicting evidence can be heard at a public inquiry and the matter subsequently determined.

Eyre v New Forest Highway Board
[1892] 56 JP 517
Summary: concerns the meaning of 'highway' at common law; cul-de-sacs; dedication;

and maintenance. The summing up to the jury by Wills J is often quoted as a masterpiece of its kind. It deals with the concept of dedication of highway rights, the relevance of evidence of lack of repairs by the parish, the changes introduced by the 1835 HA, the implications of unsuccessful attempts to prevent public use where there is some earlier evidence pointing to a dedication, the right to deviate over foundrous land, rural cul-de-sacs, and the need to look at the evidence relating to the whole of a route even when only a part is in dispute. The CA held that this summing up was a "complete exposition of the law on the subject.
Where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it. "What would be the meaning in a country place like that, of a highway which ends in a cul-de-sac and ends at a gate…whoever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again?". (see also Moser v Ambleside and Roberts v Webster)

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Fairey v Southampton County Council

(QBD)[1956] 1 All ER 419, (CA) [1956] 2 QB 439
Summary: concerns whether ROWA 1932 is retrospective; intention to dedicate; differentiation between common law/statute law dedication; burden of proof. A landowner objected to the inclusion of a footpath on the DM. He had objected to public use of the way in 1931, but there was evidence of public use for the 20 years prior to 1931 and the path was held to be public by virtue of the 1932 Act. The fundamental judgment by Lord Denning on 'bringing into question' (HA 1980 s31). "In order for the rights of the public to have been "brought into question" the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they might be apprised of the challenge and have a reasonable opportunity of meeting it." "…a landowner cannot escape the effect of twenty years' prescribing by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality…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 – the public who used the path…that he had no intention to dedicate."
See also Godmanchester and Drain.

Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales

(QBD)[2001] CO/3844/2000, [2001] EWHC Admin 360, [2001] 82 P & CR DG19, [2001] 24 EG 161 (CS)
Summary: a DMMO was confirmed adding a bridleway to the DM over the claimant's land. Dedication was presumed under s31 HA 1980 on 20 years' uninterrupted use. The line of use altered somewhat when the claimant was carrying out building works. The evidence was that the line moved laterally by no more than 20 metres. Held: "I am un-persuaded that the Claimants have any case on the ground of inadequate precision. The route is sufficiently defined albeit it may have varied slightly from time to time."

Fortune and others v Wiltshire Council and Taylor Wimpey

[2010] EWHC B33 (Ch) [2012] EWCA Civ334
Summary: (RWLR 7.1 p91-95) concerns the status of Rowden Lane - documentary evidence and what constitutes a List of Streets (Wiltshire's LoS comprised a computer database of highways) – effect of NERC Act. Evidence of reputation is considered. In relation to documentary evidence a mass of documents provided a broad picture which emerged largely consistently over time. McCahill J on the purpose of NERCA, "This analysis of the role and purpose of ss66 and 67 NERCA leads me to conclude that s67(2) NERCA should not be given a restrictive interpretation. On the contrary, Parliament having extinguished certain public vehicular rights of way merely because they were not shown on a definitive map, on which many of them simply could not be recorded, a purposive interpretation should be given to the exceptions, especially when the burden

of proof is cast upon the person seeking to establish that a particular unrecorded right of way has not been extinguished. Moreover, it seems to me appropriate that, if NERCA starts from the premise of abolishing such a wide category of vehicular highways …the exceptions to this extinguishment should not, in the absence of clear and compelling language to the contrary, be construed narrowly." It was held that a list under s36(6) should include minor highways that were maintainable at public expense, but the omission of minor highways is not fatal. Held, that a s36(6) List must be in writing-but this encompasses many different forms- including for the purposes of the HA 1980 and s67 of NERCA 2006 records held on a computer database of ways maintained at public expense which can be made available to the public by printing off a copy or displaying it on a computer screen. Considering Wiltshire Council's books of maps of maintainable highways, it was held that a list under s36(6) did not have to be in any particular format or to contain a statement as to what it was. Although Wiltshire's list also contained unadopted roads, this was irrelevant when it contained several thousand roads that were maintainable. Held, an authority can only have one list under s36(6) at any one time.

Robert **Fowler** v SSE and Devon County Council

(CA) [1991] 64 P & CR 16, [1992] JPL 742

Summary: concerns status of DM through discovery of evidence. An Inspector confirmed a DMMO upgrading a footpath to a bridleway. The appellant challenged the validity of the Order. Held: the definition of footpath as a highway over which the public had a right of way on foot only did not mean that no higher rights could exist – the recording of a way as a footpath did not extinguish higher rights that had existed at the date of the DM. The following claims of the appellant were also rejected: that s31(10) of HA 1980, read in conjunction with s56(1) of WCA 1981 prevented reliance being placed on s31(1) of HA 1980 as a means of establishing any higher right; that the Order was invalid because the Inspector had no legal qualifications (the judge suggested surveying qualifications might be more suitable – George Laurence disagrees, see RWLR 81.1 p2)

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Commission for New Towns & Worcestershire County Council v JJ **Gallagher** Ltd

[2002] EWHC 2668 (Ch), [2003] 2 P & CR 3

Summary: (see ROW Note 3/04, Beoley Lane) concerns weighing documentary evidence; definition of a private carriage road in an inclosure award (incorporating the 1801 Act provisions) in relation to evidence of a pre-existing public carriageway. The status of a lane claimed to be a public vehicular highway but which was shown in an inclosure award of 1824 as a "private carriage road" was in question. Neuberger J accepted other evidence was sufficient to show that the route was a public carriageway prior to (and since) the date of the inclosure award, saying "the mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the inclosure documentation is outweighed…One piece of high quality or convincing, evidence will frequently outweigh a large number of pieces of low, or weak quality evidence…While the inclosure documentation does represent powerful evidence, it is not unequivocal…" and "in the light of the provisions of the Inclosure Act 1801, that, if (the) lane was a public carriageway at that time, the Inclosure Award cannot have deprived it of that status." He did not disagree with the interpretation of "private carriage road" adopted by Sedley J in the Dunlop case that it meant "a private road (as opposed to a public highway) for carriages." Thus although the highway presumption is "Where a piece of land which adjoins a highway is conveyed by general words, the presumption is, that the soil of the highway, *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it" (Berridge v Ward 1861), in this case, the lane, owned by two people, farmed as pastureland with tithe rent-charge apportioned to it was not inconsistent with it being a public carriageway. Regarding the transfer of private rights, it was held that there must be evidence of private use before it was conveyed. Grant of a private right to use the lane was unnecessary since a public right already existed.

[redacted]
[2013] EWHC 3560 (Comm)
Key Words: Reliability of oral evidence based on recollection
Summary: this is a commercial case concerning investment risks and has nothing to do with ROW. However, it contains an interesting assessment of the value of oral evidence and the unreliability of human memory. Only paras 15 to 23 of the judgement are of interest.
The judge states that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances when memory is already weak due to the passage of the time. The process of civil litigation itself subjects the memories of witnesses to powerful biases, eg a desire to assist the party who has called the witness, the procedure of preparing a statement a long time after the relevant events, which statement may go through a number of iterations which cause a witness's memory of events to be based increasingly on the statement and later interpretations of it rather than the original experience of events.
The judge's conclusion was that "the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts….it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth"

Gloucestershire County Council v Farrow & others

[1985] 1 WLR 741
Summary: a letter directed to a Highway Authority was accepted as 'bringing into question' for the purposes of s31 HA 1980 (but see Fairey). The market place at Stow on the Wold had originally been dedicated as a highway subject to a right to hold a weekly market. The market was discontinued about 1900, and subsequently the land was used as a highway. When an attempt was made to revive the market it was held that because of 20 years' uninterrupted use as a highway, the land had been re-dedicated without any restriction.

R v SSETR ex parte **Gloucestershire County Council**

(QBD)[2001] ACD 34, [2001] JPL 1307
Summary: concerns s118 HA 1980 extinguishment order in respect of a footpath which had in part fallen into the River Severn. The main issues in relation to waterside paths were whether there was a right to deviate where a footpath had been destroyed by erosion; whether the path moved inland as the river bank eroded; liability in respect of bank erosion and whether the Inspector's decision could be upheld because a new path had been dedicated following public use. Held: there was no general right to deviate other than the usual case where a landowner had obstructed a way; there was no known law which provided for the moving of the footpath inland as a consequence of bank-side erosion; whilst dedication of a route was always possible, there was in this case, no evidence of a defined line that could have been dedicated (in any event this issue was not argued before the Inspector).

R (oao) **Godmanchester Town Council and Drain** v SSEFRA and Cambridgeshire County Council

[2005] EWCA Civ 1597, [2006] 2 All ER 960, [2006] 2 P & CR 1) [2007] UKHL 28, [2007] 3 WLR 85, [2007] 4 All ER 273
Summary: (see ROW Notes 10 and 11/2007)(RWLR 6.3 p109-116) concerns lack of intention to dedicate; overt acts by the landowner to be directed at users of the way; duration of no intention to dedicate. The HL reversed the earlier judgment of the CA and rejected the judgments of Sullivan J in R v SSE ex parte Billson (1999) and Dyson J in R v SSETR ex parte Dorset CC (1999) which held that a landowner did not need to publicize to users of the way his lack of intention to dedicate. Hoffmann LJ approved the *obiter dicta* of Denning LJ in Fairey (1956) who held "in order for there to be 'sufficient evidence 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 – the people who use the path…that he had no intention to dedicate". Hoffmann LJ held that "upon the true construction of s31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is … objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him]' of the notion that the way was a public highway". Evidence in the form of letters between the landowner and the planning authority, and the terms of a tenancy agreement were held by the HL to be insufficient evidence of a lack of intention to dedicate. They had not been brought to the attention of the public so the users could not have known what the owner's intention was.
It also upheld the earlier decision of Sullivan J in Billson that "during that period" in s31(1) did not mean that a lack of intention had to be demonstrated "during the whole of that period". The HL did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; this would depend upon the facts of a particular case.

Goodes v East Sussex County Council

(CA) [1999] RTR 210, (HL)[2000] UKHL 34, [2000] 1 WLR 1356, [2000] 3 All ER 603
Summary: the duty of a highway authority under s41(1) of HA 1980 to maintain the highway did not require the authority to keep it free of ice.

R on the application of **Goodman** v Secretary of State for Environment Food and Rural Affairs (Eastern Fields)

[2015] EWHC 2576 (Admin)
Key Words: Registration of a town or village green; "as of right" and "by right"; implied appropriation; implied permission.
Summary: The court held that, for there to have been an implied appropriation, there must be evidence that the local authority met the statutory test for appropriation set out in s122 of the Local Government Act 1972. ***Barkas*** is not authority for the proposition that land can be appropriated without any evidence of the council having considered whether the land was no longer required for the use for which it was held and that appropriation can be deduced from the management of the land.
The inspector found that visits of a circus and funfair would have alerted a reasonable person to the fact that they were using the land by permission and therefore by virtue of an implied licence. However, the judge found that the situation was different to that in ***Mann*** by reason of the land being in public rather than private ownership. Also the nature and character of the events, although charged for, were at least arguably not inconsistent with a public entitlement to use the land.
For there to be an implied permission there must be evidence that the landowner intended to grant permission. In the case of land owned by a local authority the fact that the intervening acts of the landowner were of themselves for the purposes of public recreation is also relevant. Eastern Fields was publicly owned and the types of events that the public were charged for were not inconsistent with a public entitlement to use the land.

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Hale v Norfolk County Council

[2000] EWCA Civ 290, [2001] Ch 717, [2001] RTR 397
Summary: this case sums up the previous judgments on the 'hedge to hedge' presumption (see Beynon). If the preliminary question of whether a fence adjoining a highway was put up in order to separate it from the neighbouring land is answered in the affirmative, there is a rebuttable presumption that the public's right of passage extends as far as the fence. But "it seems to me much less clear that there is any foundation for a presumption of law that a fence or hedge which does, in fact, separate land over part of which there is an undoubted public highway from land enjoyed by the landowner has been erected or established for that purpose. It must, in my view, be a question of fact in each case." "It must depend… on the nature of the district through which the road

passes, the width of the margins, the regularity of the line of hedges, and the levels of the land adjoining the road; and (I would add) anything else known about the circumstances in which the fence was erected." (Lord Chadwick)

Hall v Howlett

[1976] EGD 247

Summary: concerns whether an overgrown lane was an obstructed public highway. Deeds of a property adjoining a lane from 1879 and 1905 referred to the lane as public. An inclosure award (no date given in the judgment but presumably before 1879) laid out a 20 ft wide 'Private carriage road and driftway'. It was held that this setting out was "almost conclusive that the [inclosure] commissioners did not think that there was already a public highway there, because there is no basis to establish and lay out a new private road over existing public highway".

Hall v SSE

(QBD)[1998] JPL 1055, [1998] EWHC 330 (Admin)

Summary: concerns building across line of footpath; building completed and then part demolished; whether development substantially completed. Held: in relation to TCPA 1990 diversion and extinguishment, 'substantial completion' must be considered according to the context; where a discrete and substantial part of a planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved. Permission was for construction of 2 houses and 2 garages. The path in question cut across the corners of one proposed house and one proposed garage. A s257 order was made, the house and garage built, but before the inquiry part of the new garage was demolished, the objector claiming that therefore the development was not substantially complete. But at the time of the inquiry the planning permission was spent in so far as the highway was concerned.

[redacted]

[2002] EWCA Civ 1281 Court of Appeal

Key Words: S119 Highways Act 1980; Council no duty to submit opposed Order to Secretary of State

Summary: the District Council made an Order under s119. Objections were received and the Council decided not to submit the Order to the Secretary of State for confirmation. The Court of Appeal held that the word "may" in S119(1) gave the authority a discretion as to whether or not to make an order and that in exercising that discretion it was entitled to take into account matters set out in Section 119 (6). "It would be ridiculous for the Council to be forced to put under way the whole machinery necessary to secure a footpath diversion order where it was manifest that at the end of the day the order would not be confirmed".

Having made an order, the Council has the power not to continue with the process and therefore has no duty to submit the order to the Secretary of State. Reasons may have become apparent which make the Council change its mind and a decision not to submit for confirmation is not perverse or irrational if reasonable persons could differ in their view. The persons charged by statute to make the decision whether to proceed are the local authority. "It would be an uneconomic and an unjustified use of the Secretary of State's time and judgement to require him to adjudicate upon an order the proposer of which no longer supports it".

Harvey v Truro Rural District Council

[1903] 2 Ch 638

Summary: Joyce J said "Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper." and, "The possession of a squatter on the highway since 1886 cannot bar the public right."

Hayling v Harper

[2003] EWCA Civ 1147

Summary: illegal user cannot be user as of right. Concerns vehicular access to dwelling

house over public footpath, long user, Road Traffic Act 1988, whether criminal offence to drive over public footpath without lawful excuse. Held, driving a vehicle on a footpath without lawful authority is unlawful and an easement cannot be acquired by conduct which at the time is prohibited by statute (s34 RTA 1988).

Hereford & Worcester v Pick

[1996] 71 P&CR 231
Summary: Dedication by user may be prevented if the user amounts to a public nuisance.

Hertfordshire County Council v SSEFRA

(QBD) [2005] EWHC 2363 (Admin), (CA)[2006] EWCA Civ 1718
Summary: (see ROW Note 24/06, **Tyttenhanger**) concerns the powers to create, divert and extinguish footpaths and the proper interpretation of the wording of s118 of the HA 1980 with regard to creation agreements; whether the Inspector was correct in not taking a creation agreement into account when considering whether or not to confirm three extinguishment orders. The Council had made public path extinguishment orders and entered into related creation agreements for the creation of replacement paths. The agreements stated the creations were to become effective immediately before the extinguishments of the related lengths of paths. The appeal against the Inspector's decision was dismissed, and the decision of Sullivan J was upheld: the correct interpretation of s118 precluded taking creation agreements into account, while allowing concurrent creation or diversion orders to be considered.
Whilst creation agreements that are conditional and rely on the confirmation of the order cannot be taken into account when determining orders, a sealed unconditional creation agreement already in force may be considered.

[redacted]

[2008] EWHC 2060 (Admin)
Key Words: S118B Highways Act 1980; School Special Extinguishment Order; expediency
Summary: the decision making process is staged. At the first stage of deciding whether or not to make an order the Council has a wide balancing discretion and has to address the question of expediency. Although there is a great overlap between the considerations at the first stage and at the later confirmation stage, in this case 2 of the 3 reasons given by the Council for not making the order were from sub-section 8 (confirmation stage). Members had "taken their eyes off the expediency ball" and had looked at the broad question of whether there should be a SEO.
In addition the Council failed to give proper and adequate reasons.
Hargrave v Stroud District Council and Manchester City Council v Secretary of State for Environment, Food and Rural Affairs referred to.

Hollins v Oldham

(Ch)[1995] C94/0206 unreported
Summary: (see Advice Note 4 paragraph 2.42, s12 of the Consistency Guidelines) concerns the interpretation of map evidence relating to Pingot Lane, and the meaning of the phrase 'cross road'. The judge acknowledged 2 categories of road shown on Burdett's 1777 map and in respect of a cross road said "This latter category, it seems to me, must mean a public road in respect of which no toll is payable. This map was probably produced for the benefit of wealthy people who wished to travel either on horseback or by means of horse and carriage…There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use" and "Pingot Lane must have been considered, rightly or wrongly, by Burdett as being either a bridleway or a highway for vehicles". Finance Act, Tithe, OS and sale and conveyance documents were also considered. "The whole of the documents have to be examined to assess their reliability…This applies just as much to official documents such as the definitive map or ordnance survey sheets or tithe surveys as it does to other records such as commercially produced maps."

Hollins v Verney

[1884] 13 QB 304

Summary: concerns sufficiency of user. A (private) right of way was claimed, but use had been only intermittent, for the purpose of carting wood. The judgment of Lindley L J contains a very full discussion of the idea of interruption and how it interacts with the idea of a full period of 20 years, comparing, for example 'without interruption' to 'without cessation' and looking at a situation where there is no use in the first year of 20, but there was evidence of previous use. "No user can be sufficient which does not raise a reasonable inference of such continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute (Prescription Act 1832) is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized, and if resistance to it is intended."

R v SSE ex parte **Hood**

[1975] 1 QB 891, [1975] 3 All ER 243

Summary: this case deals with RUPP reclassification and is now redundant.

Mark **Horvarth** v SSEFRA

[2009] European Court Case C-428/07

Summary: includes reference to significance of prows in the landscape and may be of relevance to arguments made about the historic value of paths in PP cases. Questioned, whether a Member State is permitted to include requirements relating to the maintenance of visible public rights of way in the standards of good agricultural and environmental condition of land. Considers the importance of row to the landscape and the preservation of 'human habitats' in rural areas. Confirmed prows are to be regarded as landscape features within the relevant Regulation; and a statutory obligation guarantees a minimum level of maintenance and avoids the deterioration of habitats.

R v Planning Inspectorate Cardiff ex parte **Howell**

(QBD)[2000] EWHC Admin 355, [2000] NPC 68

Summary: (see ROW Advice Note 12) concerns post 1930 vehicular use on a RUPP subject to a reclassification order. Roch LJ adopted the approach taken in the Stevens case regarding post 1930 vehicular use saying "the Inspector started from the premise that any post-1930 vehicular use must be automatically disregarded: that is to say that the Inspector assumed the very fact that could only be established after a review of all the evidence had been concluded, that prior to December 1930 there was no vehicular right of way…" In Stevens Sullivan J considered evidence of vehicular use post 1930 was admissible in lending credibility to pre-1930 use for claims made under common law. (see also Robinson v Adair and Stevens v SSETR)

Hue v Whiteley

[1929] 1 Ch 440

Summary: concerns use 'as of right'. A route to Box Hill had been used by the public for recreation. It was held that motive for user was irrelevant in considering whether dedication could be implied. "Does it make any difference that it is desired [NB: this is one of the series of judgments, now overruled, where it was assumed that 'as of right' implied a subjective belief in a right to use a route] to use the way for business or social purposes, or for walking to benefit health, or for a stroll through a beauty spot?"

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R v Devon County Council ex parte MJ & GJ **Isaac** and another

[1992] unreported

Summary: whether the statutory scheme (for applying to the courts in rights of way cases) meant that judicial review could not be applied for.

J

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Jaques v SSE
(QBD)[1995] JPL 1031
Summary: concerns common law dedication; true construction of s31 HA 1980; no intention to dedicate; burden of proof; effect of wartime requisitioning. This case is largely of historical interest, in the development of understanding of the 'proviso' in s31 of the HA 1980. But there is a subsidiary point about capacity to dedicate. It was held that "the bare fact that there was not a person in possession of the land capable of dedicating the way could not of itself defeat a claim under section 31(1)… However, a right of way could not arise under section 31 if at some time during the relevant period there was *no person at all* having the legal right to create a right of way. Where the only person in possession is a tenant, he together with his landlord can create a right. But where land is requisitioned…no person having an interest in the land had the power to dedicate."

Jenkinson v SSE
[1998] QBCOF 98/0210/4?
Summary: concerns width. Edge Road, formerly a RUPP reclassified to bridleway, for which an application was made to modify to footpath. It had been set out at inclosure as an occupation road 18-24 ft wide. The OMA made an order to specify the full width. Walker LJ considered whether the Inspector had evidence of public use as a bridleway and whether such use extended over the full width, and found there was no dedication effected by the inclosure award and it was subsequent public use which was essential. He also considered the physical boundaries and found they were not set out by reference to the highway (a requirement if presumption is based on boundaries alone without evidence of user - see Beynon), but that the Inspector had a good deal of evidence before him of public use "and there was adequate evidence from which it could be inferred that that user was over the whole irregular width of the track".

Jennings v Stephens
[1936] 1 Ch 469
Summary: held "Accordingly, use as of right by the inhabitants of the locality is sufficient."

Jones v Bates
(CA)[1938] 2 All ER 237
Summary: concerns dedication at common law; meaning of 'as of right' (ROWA 1932); burden of proof; bringing into question. Provided use is of a kind capable of being challenged, it is immaterial that the reason why the user was not challenged was that the owner believed the way to be public. This is another case where subjective 'as of right' (in implied or presumed dedication of a right of way) was argued, i.e. it was assumed that 'as of right' implied a belief in the user that he/she had a right to use the path in question. However it contains, in the judgment of Scott L J, what is called in Jaques a 'full and convenient description of the common law' and is worth reading for that. It also contains discussion of the idea of 'interruption' – there must be interference with the enjoyment of a right of passage. On use as of right, it is for those denying that the rights exist to prove that there was compulsion, secrecy or licence, if that is claimed. On continuity of use, "A mere absence of continuity in the de facto user will not prevent the statute from running…No interruption comes within the statute unless it is shown to have been an interference with the enjoyment of the right of passage."

June Jones v Welsh Assembly Government
(QBD)[2009] EWHC 3515 (Admin)
Summary: (see ROW Note 9/09) concerns a DMMO made by Ceredigion CC. Further to

an inquiry an Inspector proposed to modify the order in relation to the route of the footpath. The final decision confirmed the order as made. Ms Jones claimed the Inspector had failed to sufficiently deal with an interruption to the order route (the construction of a building). Judgement was made that the decision could not stand and an order be made to quash the decision. Ms Jones claimed there was no power to quash only the Inspector's decision, and that the dmmo must also be quashed. Held that the dmmo itself should be quashed.

K

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Kotarski v SSEFRA & Devon CC

(QBD)[2010] Draft judgement, [2010] EWHC 1036 (Admin)
Summary: (see ROW Note 07/2010) (RWLR 8.2 p189-191) this was a Part 8 challenge against the Inspector's decision to confirm the order thus modifying the DM to resolve an anomaly between the map and statement. The decision was challenged on the basis that there was no evidence or insufficient evidence of subsistence of a public right of way on the relevant date. Also concerned the discovery of evidence and whether it should be 'new' evidence. The judgement confirms that a drafting error can be 'discovered evidence' to add a missing route to the map and effect a positional correction of a route already on the DM. The judge noted that the decision was "...both clear and comprehensive". The appeal was dismissed. (see also Norfolk CC, Trevelyan, Simms and Burrows & Mayhew) (see defra Circular 1/09 for the evidential tests for confirming an order to downgrade or delete a prow)

K. C. Holdings (Rhyl) Ltd v SSW and Colwyn Borough Council

(QBD)[1990] JPL 353
Summary: it does not follow that once it has been established that it is necessary to stop up a path to allow development to take place (considering an order under s257 TCPA 90) then confirmation of an order will automatically follow. This was not a rubber-stamp provision. "That part of the Act was concerned to give protection to the interests of persons who might be affected by the extinguishment of public rights, in which circumstances it was hardly surprising that under s209 [this was TCPA 1971] there was a discretion to consider the demerits and merits of the particular closure in relation to the particular facts that obtain."

Kent County Council v Loughlin and others

[1975] JPL 348, 235 EG 681
Summary: judgement, by Lord Denning, held that the fact that a particular road is not shown at all on a Tithe map is evidence that there was no road at the location in question at the date of the tithe survey, but it could have existed as a footpath. Otherwise the judgement merely emphasises the importance and reliability of tithe map evidence in general.

R v SSE ex parte **Kent County Council**

[1990] JPL 124, (QB)[1994] CO/2605/93, [1994] 93 LGR 322
Summary: concerns proposed deletion of a whole footpath where only part incorrectly shown, the existence of which was not disputed but its precise route unknown. Held: "it seems inherently improbable that what was contemplated by s53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in s56 of the 1981 Act, the existence but not the route, of which was never in doubt."

R (oao) **Kind** v SSEFRA

(QBD)[2005] EWHC 1324 (Admin), [2006] QB 113
Summary: (see ROW Notes14/05, 16/05) the question at issue was whether the reclassification of a RUPP as a bridleway had had the effect of extinguishing any vehicular rights that might have existed over the RUPP. It was held that it did not.

Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council

[2012] EWHC 1976 (Admin)
Key Words: S31 Highways act 1980; definition of public highway; connection to other

public land.
Summary: A way to which the public has no right of entry at either end or at any point along its length cannot be a public highway at common law. The claimed path was across a plot of land on which there was a line of paving stones connecting at one end to land occupied by a health centre and at the other to the forecourt of some shops. Both the health centre land and the land on which the shops were situated was in private ownership with no public right of way over either of them. Members of the public entered both pieces of land as licensees.
Under S31 the relevant way must not be "a way of such character that use of it by the public could not give rise at common law to any presumption of dedication". The judge found that as a matter of principle the concept of an "isolated highway" is incongruous because such a way does not have all the requisite essential characteristics of a highway, as the public do not have a right "freely and at their will" to pass and repass. They can only do so by virtue of a licence to enter and cross other land, which licence could be withdrawn at any time. Where access to the way might lawfully be blocked at any time by adjacent landowners, the public's ability to pass along the way is not as of right and is of such fragility that it simply does not and cannot have the necessary characteristics of a highway. Case law, *Bailey v Jamieson (1875-76) LR 1 CPD 329*, supports this view. The situation is quite different to a cul-de-sac which it is clear can, in law, be a public highway.

L

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R (oao) **Laing Homes** Ltd v SSEFRA ex parte Buckinghamshire CC

[2003] EWHC 1578 (Admin), [2003] 3 PLR 6
Summary: concerns registering land as village green and whether s13(3) and s22 of the Commons Registration Act 1965 are compatible with Article 1 of Protocol 1 to the European Convention on Human Rights (see also Oxfordshire, RWLR s.15.3 pg135).

Lasham Parish Meeting v Hampshire County Council and SSE

[1992] 65 P & CR 3, 91 LGR 209, (QBD) [1993] 65 P & CR 331, [1993] JPL 841, [1993] 91 LGR 209
Summary: (ROW Advice Note 7)(RWLR 8.2 p41) concerns duly made objection and relevance, amenity considerations cannot be taken into account. A council is not entitled to disregard an objection to an order (reclassification in that case) and confirm it as an unopposed order just because the objection is irrelevant. Potts said an objection is duly made "if it is made within the time and the manner specified in the Notice of Order" and "I am unable to find anything in the legislation requiring an objector to set out legally relevant grounds before an objection could be said to be "duly made"." But Potts J suggested that the SS (PINS) could have an active role in, for example, writing to those making irrelevant objections reminding them of the costs regime. Confirms that the only issue in dealing with s53 and s54 cases is what public rights of way exist: suitability and amenity must be disregarded in deciding whether to confirm an order.

Leeds Group plc v Leeds City Council

[2010] EWHC 810 (Ch) [2011] EWCA Civ 1447
Summary: (RWLR 15.3 p167-174) concerns town and village greens and the erection of prohibitory notices and meaning of neighbourhood and locality. (see also R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council)

Legg & others v Inner London Education Authority

[1972] 3 All ER 177
Summary: applies to the modification of orders. Megarry J stated "But throughout there must, I think be the continued existence of what is in substance the original entity. Once it reaches the wholesale rejection and replacement, the process must cease to be one of modification…For one proposal to be fairly regarded as a modification of another proposal one must be able to perceive enough in it of that other, to recognise it as still being the proposal, even though changed…The line may well be hard to draw, but there comes a point where the modifications have swamped or eaten away so much of the

original that it is impossible to regard what there is as still being the original in a modified form".

R (oao) **Leicestershire County Council** v SSEFRA

(QBD)[2003] EWHC 171 (Admin)

Summary: (see ROW Note 3/03) concerns the arguments in Bagshaw and the test to be applied at the confirmation stage; presumption against change. Consideration of an order modifying the map to show a route shown running through one property to run through another (Manor Cottage and Glebe Cottage). Collins J held "the only issue which the Inspector had to determine was essentially which was the correct route to be shown on the map" requiring him to consider "both whether, in accordance with section 53(3)(c)(i), a right of way not shown subsisted, and also, in accordance with section 53(3)(c)(iii), whether there was no public right of way over land shown on the map". "The presumption is against change rather then the other way around". If there is insufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in everyone's interest that the map is to be treated as definitive. The starting point is s53(3)(c)(iii), and only if there is sufficient evidence to show that that was wrong (ie on the balance of probabilities the alternative was right) should a change take place.

Lewis v Thomas

[1950] 1 KB 438

Summary: concerns interruption; intention to dedicate. "Although such an act as locking a gate across a way which is used as of right by the public prima facie constitutes an interruption of the enjoyment of the way within the meaning of s1 of the Rights of Way Act 1932, and none the less so because during the time while the gate is kept locked no-one had happened to try to use the way, the absence of any intention to challenge the right of the public to use the way is material to the question whether there has in fact been any interruption within the meaning of the section." The gate in question was locked only at night, and for the purpose of preventing cattle straying into a field where corn was stacked. The interruption must be with intent to prevent public use of the way. "…the question of the intention of the interrupter is primarily relevant if, and only if, the owner, against whom the right of way was asserted, seeks to prove no intention to dedicate."

Logan v Burton

[1826]

Summary: Under an inclosure Act, the commissioners were empowered to stop up footways as well as carriageways running over land to be inclosed and over old inclosures. The failure of the commissioners to obtain a justice's order for the stopping up of a footpath meant that the footpath had not been effectively stopped up and continued post-inclosure.

M

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Maltbridge Island Management Company v SSE and Hertfordshire County Council

[1998] EWHC Admin 820, [1998] EGCS 134

Summary: the relevant sections of the judgement concern the weight to be given to Tithe map and Finance Act evidence. "The tithe map and apportionment evidence is undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time. Because both public and private roads were not tithable, the mere fact that a road is shown on, or mentioned in, a tithe map or apportionment, is no indication as to whether it is public or private. But if detailed analysis shows that even if he was not required to do so, the cartographer, or the compiler of this particular map and apportionment, did in fact treat public and private roads differently, whether by the use of different colours, the use or non-use of plot numbers, or other symbols, or in schedules or listings, I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way." The weight to

be attached is a matter for the Inspector. It cannot be conclusive.

R (oao) **Manchester City Council** v SSEFRA

[2007] EWHC 3167 (Admin)

Summary: (see ROW Note 2/08) concerns an Inspector's decision not to confirm a special extinguishment order for the reasons of crime prevention (s118B of HA 1980). The decision turned on the issue of expediency. Sullivan J said the weight to be given to oral or written evidence or a petition is entirely a matter for the Inspector; having referred to an issue once in an OD, an Inspector is not required to repeat the point over and over. On the issue of expediency and ss 7, he said even though an Inspector has been satisfied that the conditions for making the order (ss1(a) and (3)) have been satisfied and it is expedient to make the order looking at the matter from the point of view of crime prevention, he may decide it is not expedient to confirm the order, having regard to wider considerations. ss(7) requires the decision maker to have regard to all of the circumstances. The words "and in particular" require regard to the factors listed in subparagraphs (a) to (c) but do not require those factors to be given most or any enhanced weight. With regard to resolving detailed issues (eg graffiti, rubbish etc) the issue for the Inspector was one of balance.
The RA appealed (see Footpath Worker Vol.25 No.4, p9-11). The principal matter to be determined by the court was the operational effect of the words 'in particular' within s118B(7) before the three criteria (a-c). Held "The weight to be given to the various factors in issue in a planning or highway inquiry, provided those factors are legally relevant, is entirely a matter for the Inspector's expert judgement. The use of the words "in particular" in the context of a subsection which is expressly conferring a very broad discretion on the decision-taker to decide whether confirmation of the order is "expedient", and is expressly enjoining him when doing so to have regard to all material circumstances, was not intended to displace that underlying principle." The Inspector's decision was upheld.

Mann v Brodie

[1885] HL 378, 10 App Cas 378

Summary: concerns common law dedication; sufficiency of user; presumption; Scottish law (Lord Blackburn compares with English law). A public right of way depends on use by the public as of right, continuously and without interruption. The number of users must be such as might reasonably have been expected if the way had been unquestionably a public highway. User must be from one terminus to another, not private use, or use by licence. On common law dedication, held "Where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware the public was acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was." On interruption, the landowner must "take steps to disabuse those persons (the users) of any belief that there was a public right."

Maroudas v SSEFRA

(QBD) [2009] EWHC 628 (Admin), (CA) [2010] EWCA Civ 280

Summary: (see ROW Note 03/2010) (RWLR 7.1 p65-67) the main issue in this case was whether vehicular rights had been extinguished by the NERCA or whether the application for a modification order constituted a valid application under s53(5) of the WCA 1981, triggering an exception set out in the Act. The application was not signed, dated, did not apply to the whole route and was not accompanied by a map. The claimant contended that it was not a valid application and consequently the exception s67(3) of NERCA did not apply and the order should not have been confirmed. The appeal against the decision of the HC to uphold the decision was allowed and the earlier judgement reversed. Some minor departures may be acceptable - for the purposes of section 67(3), a valid application may be made where supplementary information is provided to make good an error or omission in the application, at any rate if the information is provided within a very short time of the submission of the application form. (see also Winchester)

Marriott v SSETR

(QBD)[2000] [2001] JPL 559

Summary: (see ROW Advice Note 10) concerns the correct approach under Sch15 to the WCA 1981 and the procedure to be adopted in relation to the confirmation of orders made under s53(2) of the 1981 Act; and by analogy to inquiries and hearings held under paragraph 2(3) of Sch 6 to the HA 1980 and paragraph 3(6) of Sch 14 to the TACPA 1990. Sullivan J said "an inquiry or hearing will be required under paragraph 8(2)(b) only if an objection has been "duly made". Whilst an objection need not detail the grounds on which it is based in order to be duly made (see Lasham) it must be an objection "with respect to the proposal" [of the Inspector to modify the Order]". Thus at a second inquiry into proposed modifications, only objections to the proposed modification should be heard. Procedure to be followed after a proposed modification has been advertised (i) where objections or representations are made that only relate to the proposed modification; (ii) where evidence is submitted or submissions are made at a second inquiry or hearing that do not relate to the proposed modification; (iii) where there is a mixture of objections and representations some of which relate and others which do not relate to the proposed modification; and (iv) where there are objections or representations that do not relate to the proposed modification.

Massey & Drew v Boulden & Boulden

[2002] EWCA Civ 1634, [2003] 1 WLR 1792, [2003] 1 P & CR 22, [2003] 2 All ER 87

Summary: concerns vehicular access to a property over a track across a village green. Held: on the true construction of s34(1) of the RTA 1988, the phrase 'land of any other description' meant what it said and was not to be construed *ejusdem generis* with the words 'common land' and 'moorland'. The wording of s34(1)(a) was unambiguous. Prescriptive rights for vehicular access can only be acquired over 'land forming part of a road' ie a public highway or a road over which the public already has access in accordance with the definition in s192 – that is access to a track in the sense of using it as a road.

Seemingly vehicular rights can be acquired through post-1930 long user, provided that certain conditions are met.

R v SSETR ex parte **Masters** (1998)
R v SSE & Somerset County Council ex parte David H Masters & M P **Masters**

[1999] CO 3453/97

Summary: WCA 1981; modification of Map to indicate route as a byway instead of a RUPP; challenge to confirmation of order.

Masters v SSETR

[2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151

Summary: (see ROW Advice Note No.8) Definition of BOAT; balance of predominant user; evidential status of 1929 handover map; OS maps. The word 'byway' in s66 of the WCA 1981 was to be given a purposive construction, and not be limited to those byways that were currently and actually used by the public for predominantly pedestrian or equestrian purposes. Roch LJ held: It is in my judgment clear that Parliament did not contemplate that ways shown in definitive maps and statements as RUPPs should disappear altogether from the maps and statements simply because no current use could be shown, or that such current use of the way as could be established by evidence did not meet the literal meaning of s66(1) and that Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic. The CA's judgement means that for a carriageway to be a BOAT equestrian or pedestrian use is not a precondition, or that such use is greater than vehicular use. The test relates to its character or type and in particular whether it is more suitable for use by walkers and horse riders than vehicles.

Roch LJ read the word 'particulars' as "referring to the details such as the position, width

of the public path or BOAT and any limitations or conditions affecting the public right of way thereover". He did not consider that the deletion of a BOAT from the DMS was a modification of particulars contained in the map and statement.

Mayhew v SSE

[1992] 65 P & CR 344, (QBD) [1993] 65 P & CR 344, [1993] JPL 831, [1993] COD 45
Summary: (see ROW Note 20/05, Advice Note No.7) concerns status of DM and its modification through 'discovery' of evidence; suitability; traffic regulation orders. Evidence to support an order under s53(3)(c) need not be new or fresh evidence. It may already have been in the surveying authority's possession, but becoming aware of it or a new evaluation of the significance of it can amount to the discovery of new evidence. Potts J adopted parts of the judgement in Simms and Burrows. The word 'discovery' suggests the finding of some information which was previously unknown (when the DM was prepared), and which may result in a previously mistaken decision being corrected. ie. the discoverer applying their mind to something previously unknown to them. Also, the power under s53(2) of the 1981 Act is not to make such modifications as appear desirable, but requisite in consequence of the events in ss(3).

Merstham Manor v Coulsdon and Purley Urban District Council

[1937] 2 KB 77
Summary: concerns the ROWA 1932, 'as of right' and without interruption. "Actually enjoyed by the public as of right" means that the exercise of such right has been actually suffered by the owner. "As of right" means in the exercise of a right vested in the public and not by permission of the owner from time to time given. On interruption, " …public user is essentially to some extent intermittent, occurring as it does only when individual members of the public make use of the way…It is "actual enjoyment" which must be without interruption… the word interruption is properly construed as meaning actual and physical stopping of the enjoyment…" Also, tithe maps make no distinction between a public and a private road, their object is to show what is titheable and the roadways are marked on them as untitheable pieces of land whether they are public or private.

Midland Railway Corporation v Watton

[1886] 17 QBD 30
Summary: it would be incorrect to describe a road as a turnpike merely because the proprietors take tolls for the use of it, without being subject to any statutory liabilities in respect of it, such as are imposed on the trustees of turnpike roads. A turnpike can only be dedicated under statute.

R(oao) **MJI (Farming) Ltd** v SSEFRA

(QBD) [2009] EWHC 677 (Admin)
Summary: (see ROW Note 7/09) concerns a s26 HA 1980 order for a BR link on the South Downs Way. Objections to the order and interim decisions made by the Inspector resulted in modifications to record the disputed length of route as a 4 metre wide FP. Held, such width was not necessary or expedient to the creation of the FP (as opposed to a BR), having regard to the public amenity and impact on the landowner affected, s26(1) requires the tests to be applied both in respect of the principle of the FP and also to the detail of its alignment, length and width. With regard to the adequacy of the order map, the judge remarked that when dealing with the creation and maintenance of public rights, at the time they are created it is vital they are precisely and accurately defined, not just in the interests of the affected landowner but also in the interests of the public at large, who wish to exercise the benefit of those rights.

Morley Borough Council v St Mary the Virgin, Woodkirk (Vicar and Churchwardens)

[1969] 3 All ER 952
Summary: ecclesiastical law, faculty, jurisdiction, consecrated ground, use for secular purposes, burial ground, road improvement scheme. Held, the court had jurisdiction to allow consecrated ground which was still in use for sacred purposes to be used for a secular purpose as public convenience could justify the grant of a faculty for such purposes as a footpath or a part of a highway. The faculty would be granted in this case

because the public interest outweighed the interest of the respondents; the cost of alternative routing of the road, the danger which would be created if there were no improvement and the fact that all exhumed remains could be re-interred in the same graveyard made the grant desirable. See also Re St John's, Chelsea.

Moser v Ambleside Urban District Council

(CA)[1925] 89 JP 118, 23 LGR 533
Summary: concerns the effects of ancient maps; highway dedication; strict settlement; interruptions; notices; use for pleasure – a cul-de-sac leading to a waterfall. Between 1834 and 1842 a tenant was capable of dedicating a way over the land in question. He conveyed it in 1842 to trustees upon a settlement which was assumed to be strict. He died in 1875 leaving the land to be sold by the trustees. They sold it in 1879. The purchaser mortgaged it to the trustees of the will of another testator. In 1899 the trustees of a third testator bought the land which was then in strict settlement. Two small scale maps showed a road on the line of the alleged highway, and it was shown on OS in 1913 as a footpath. This was considered sufficient evidence with public user that a way was presumed to have been dedicated between 1834 and 1842. Evidence of a locked gate, people having been turned back, notices which could have referred to trespass on adjacent land and use predominantly to reach a waterfall were insufficient to rebut dedication. On interruption, Mackinnon J said "…a single act is very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge" but "an ineffective interruption, either by the owner or a tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication."

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The **National Trust** v SSE

(QBD) [1998] EWHC 1142 (Admin), [1999] COD 235, [1999] JPL 697
Summary: concerns intention not to dedicate. By permitting the public to wander at will over NT land, user as of right is precluded. Held: it is necessary to decide whether there was user as of right and not permissive user before the presumption of dedication in s31 can operate.

R v Wiltshire County Council ex parte **Nettlecombe** Ltd & Paul Nicholas David Pelham

(QBD)[1997] EWHC 1040 (Admin), [1998] JPL 707
Summary: (see ROW Advice Note 8) concerns definition of BOAT. Dyson J said "…the language of the definition is clear and unambiguous. It is expressed in the present tense, and refers to current use, not past or potential use." The judgement did not clarify whether present use should include vehicular use, or whether use by pedestrians and horse riders was needed to satisfy the definition for a BOAT. (See Masters for BOAT definition)

Newhaven Port and Properties v East Sussex CC

[2012] EWHC 647 [2013] EWCA Civ 276
Town and Village Greens
Summary: Land which is a tidal beach and inundated by water for periods of the day can still be registrable as a town or village green if use by the inhabitants of a locality or neighbourhood within a locality satisfies the remaining tests under s15 of the 2006 Act or its predecessors. Use of the land may be regulated by byelaws, but for those byelaws to render use precarious, the landowner has to take some overt action to communicate the existence of those byelaws to the public – in the same way that Godmanchester requires overt acts on the part of the landowner to communicate a lack of intention to dedicate.

R (on the application of **Newhaven** Port and Properties Limited) v East Sussex County Council and another

[2015] UKSC 7 Supreme Court

Key Words: registration of a beach as a town or village green; rights over the foreshore; byelaws; implied licence; statutory incompatibility.

Summary: The case concerned the decision of East Sussex County Council to register an area of beach at Newhaven as a village green. The Supreme Court judgement covers 3 issues.

1. Whether the public have an implied licence to use the foreshore for sports and pastimes and therefore user could not have been "as of right". The Court concluded that the issue was of wide-ranging importance but declined to determine it as it was not necessary to do so for the purpose of determining the appeal. The lower courts had found that members of the public used the beach for bathing "as of right" and not "by right" and the Supreme Court proceeded on the assumption that that was correct.

2. Whether byelaws gave the public am implied licence to use the beach. The relevant byelaws were not displayed and the majority of the Court of Appeal considered that it was essential that any licence be communicated to the inhabitants before it could be said that their usage of the land was "by right". However, the Supreme court referred to the judgement in ***Barkas*** and found that it is not always necessary for a landowner to draw attention to the fact that use of the land is permitted for use to be treated as "by right". They concluded in this case that there was a public law right, derived from statute, for the public to go on the land and use it for recreational purposes and that this amounted to an implied licence. Accordingly use was "by right" rather than "as of right".

3. Statutory incompatibility. The Supreme Court held that where Parliament has conferred on a statutory undertaker (in this case the harbour authority) powers to acquire land compulsorily and to hold and use that land for defined statutory purposes (in this case a working harbour), the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. However, the ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.

Nicholson v SSE

[1996] COD 296

Summary: concerns ROWA 1932; HA 1980 s31; WCA 1981 s54 reclassification as a BOAT; statutory dedication; common law dedication; owner's grant of a right of passage to public. In the case of a claim based on less than 20 years, inference of dedication will depend on the facts of the case, "*Prima facie* the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication…"

Norfolk CC v Mason

[2004]

R (oao) **Norfolk County Council** v SSEFRA

(QBD)[2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994

Summary: (see ROW Notes 3/05, 16/05, 20/05, ROW Advice Note 5) The judgement confirmed that where there is a discrepancy between the DM and the DS, from the relevant date of the map and until such time as the map was modified following a review, the map takes precedence. Pitchford J said "…the correct approach to the interpretation of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way", and where there is a conflict the map takes precedence because "…the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map". Held: "For the purpose of s56 of the WCA 1981, the definitive map is

the primary and source document. If the accompanying statement cannot be read as supplying particulars of the position of the footpath on the map then the position as shown on the map prevails over the position described in the statement. It is conclusive evidence unless and until review under s53(2)…". "…the number of occasions when the statement cannot be regarded as compatible with the map will be rare. The question whether they are in irreconcilable conflict is a matter of fact and degree. In reaching a conclusion whether the statement can be reconciled with the map, a degree of tolerance is permissible, depending upon the relative particularity and apparent accuracy with which each document is drawn. Extrinsic evidence is not relevant to this exercise save for a comparison between the documents and the situation on the ground at or about the 'relevant date'." "At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the *Trevelyan* presumption. Each should be accorded the weight analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate."

Norman & Bird v SSEFRA
(QBD) [2006] EWHC 1881 (Admin), [2007] EWCA Civ 334
Summary: (see ROW Notes 16/06, 7/07) concerns lack of intention to dedicate. Laws LJ said "In my judgement it is helpful to distinguish between two possible states of affairs. One is where a landowner merely asserts that he never had an intention to dedicate the relevant way to the public, but gives no evidence, nor is there any other evidence, of any overt act which tends to corroborate that state of mind on his part. The second is where the landowner gives evidence of overt acts barring the public, putting up notices and so forth, although there may not be any independent evidence of such acts, and the landowner's own evidence is again given after the event, perhaps some considerable time after the event." "The Inspector was required to find facts relevant to the proviso" and "appears to have proceeded on the basis that in order to satisfy the proviso contemporary evidence verified in some way had to be produced". This was held to be a flawed approach, suggesting the Inspector was looking, perhaps exclusively, for evidence that was contemporaneous with the events in question or evidence which actually arose during the 20 year period.

R v SSE ex parte **North Yorkshire County Council**
(QBD) [1998] EWHC 962 (Admin), [1999] COD 83, [1999] JPL B101
Summary: concerns the 'belief virus' that for the presumption of dedication to arise, user must have been as of right and in the belief that the user had a legal right to use the way. This view was overturned in Sunningwell.

Northam Bridge and Road Co. v London and Southampton Railway Co.
[1840]

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R v Isle of Wight County Council ex parte **O'Keefe**
[1989] JPL 934, [1989] 59 P & CR 283
Summary: concerns the interpretation of s53 and s54 of WCA 1981 and the OMA's pre-order making responsibilities, including advice from officers as to the correct application of the law to evidence. Held, a decision would be quashed if it could be shown that the decision-making process was flawed. This could arise either because there was a wrong or inadequate appreciation of the law or, because the evidence was presented without proper explanation or emphasis. Council officials failed to present the evidence fully as they did not qualify the strength of the user evidence or a proper assessment of the submissions by Mr O'Keefe on the strength of the evidence. They failed to properly consider the legal problems arising with regard to dedication to the public as they had not considered the effect that the land was held on trust and was subject to a mortgage would have on that dedication.

O'Keefe v SSE and Isle of Wight County Council

[1996] JPL 42, (CA)[1997] EWCA Civ 2219, [1998] 76 P & CR 31, [1998] JPL 468

Summary: resulted from a challenge to the legality of the DM process in general and s53 and s54 of the WCA 1981. Concerns evidence of intention, meaning of 'as of right'. It was argued that an order made under s53(3)(c)(i) of the WCA 1981 for the addition of a footpath should have been made under s53(3)(b). Held: s53(3)(c)(i) is drafted widely enough to encompass user evidence. Pill J said there is "no impediment to the way being made by reference to section 53(3)(c)(i). It meets the case. Parliament thought it right to specify a particular statutory presumption which arises from the Highways Act [1980 s31] in a specific paragraph [s53(3)(b)], but that does not remove jurisdiction to make an order to which the presumption is relevant under the general powers in paragraph (c)(i)". OMAs are reminded to make their own assessment of the evidence rather than accept their officers' view without question. (Comment on 'as of right' has been superseded by Sunningwell)

Oxfordshire County Council v Oxford City Council & Robinson

[2004] EWHC 12 (Ch), [2004] Ch 253, [2005] EWCA Civ 175 (HL)[2006] UKHL 25, [2006] 2 AC 674, [2006] 4 All ER 817

Summary: (Trap Grounds) the HL held that in the case of an application to have land registered as a village green under the Commons Registration Act 1965, the 20 year period of user required must precede the date of application, not (as held in the CA) the date of registration (see also Laing Homes and Redcar, RWLR s15.3 pg 135).

R (**Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust** v Oxfordshire County Council

[2010] EWHC 530 (Admin)

Summary: (RWLR 15.3 p167-174) concerns town and village greens and the erection of prohibitory notices and meaning of neighbourhood and locality. On notices, the fundamental question is what the notice conveyed to the user; evidence of actual response to the notice by actual users is relevant; the nature, context and effect of the notice must be examined; it should be read in a common sense not legalistic way; would more actions/notices by the landowner have been proportionate to the user; subjective intent of what a notice is to achieve is irrelevant unless communicated to the users or a representative of them. (see also Leeds Group plc v Leeds City Council)

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Paddico (267) Limited v Kirklees Metropolitan Council & others

[2011] EWHC 1606 Ch [2012] EWCA Civ 262

Town and Village Greens – on the meaning of locality

Jonathan Adamson v **Paddico** (267) Limited (1), Kirklees Metropolitan Borough Council (2), William John Magee (3), Thomas Michael Courtney Hardy (4)

[2012] EWCA Civ 262 (Court of Appeal)

Key Words: Registration of a town or village green; rectification of the register; effect of delay; meaning of "locality".

Summary: The appeal related to an Order that the register of town and village greens be amended by the deletion of the entry relating to Clayton Fields. The case confirmed Lord Hoffman's observations in the *Oxfordshire* case and Vos J at first instance that a "locality" within s22 (1) of The Commons Registration Act 1965 and s98 of the Countryside and Rights of Way Act 2000 is singular and must have legally significant boundaries. The Edgerton Conservation Area although having legally significant boundaries, could not be a "locality" as the boundaries were legally significant for a particular statutory purpose and defined by characteristics relating to special architectural or historic interest rather than by reference to any community of interest on the part of its inhabitants. Furthermore, the Conservation Area was not in existence for the full 20 year period.

The Court of Appeal also found the Vos J conclusion relating to the "predominance" test

to be correct and confirmed that it is necessary to show that the land is used predominantly by the inhabitants of a defined locality.

The longer the delay in seeking rectification the less likely it is that it will be just to order rectification of the register. In this case the delay of over 12 years was "by the standards of any reasonable legal process, so excessive as to make it not just to rectify the register". Carnwath LJ suggested that he would regard " a delay beyond the normal limitation period of 6 years as requiring very clear justification". However, the Court of Appeal was not unanimous on the issue with Patten LJ dissenting on the basis that the registration had been found to be unlawful and there was no injustice in the Appellant being deprived of rights to which he was never entitled. See ***Betterment*** for further discussion of delay.

Parker v Nottinghamshire CC and SSEFRA

[2009] EWHC 229 (Admin)
Summary: (see ROW Note 3/09) concerns whether or not the order made under s53 WCA 1981 adequately described the width of the way to be added to the DMS; and whether the Inspector had proper regard to the Trent Navigation Act 1783 by which private rights of way were created alongside the river (and over the claimed route) thus, it was argued, negating the evidence of the 1771 Inclosure Act and 1773 Award, which it was further argued had not been carried out in accordance with the legal requirements. The Inspector's approach and conclusions reached on the Inclosure Act and Award, and on the Navigation Act, were upheld. The judge held that a description of the width of a row can be provided by giving a numerical description, by reference to physical features, or, as in this case, by reference to a plan with a width marked on it (as referred to in Defra's non-statutory guidance of 12/02/07). He also remarked that the Council would no doubt assist the landowner in determining how much of their land was affected by the row (ie. it's not up to the Inspector, precise detail cannot always be achieved!).

Parkinson v SSE and Lancashire CC

[1992]

Parry v SSE and Shropshire CC

[1998]

Paterson v SSEFRA

[2010] EWHC 394
Summary: (RWLR 6.3 p139-144) concerns the relevant 20yr period for s31 HA and interaction of public and private rights over the same land. Held, the proper interpretation to be placed on notices, taking into account their context was a matter for the Inspector. In order for the presumption in s31(1) to operate it is only necessary to identify some period of 20yrs back from the date of bringing into question – ss31(2) does not identify the 20yr period as when the way was first brought into question, but enables reliance to be placed on any 20yr period ending with such an event. The meaning of the wording of notices displayed on the way was a matter for the Inspector and how users understood signs in a particular context may indicate how a reasonable person would interpret them in that context. Notice under s31(5) would count as sufficient evidence of a lack of intention to dedicate provided it is given in the relevant period. Sales J concluded the evidence of actions in 1934 should be assessed by reference to the terms of the current rather than previous legislation. The existence of private rights whilst making it difficult for a landowner to make clear their intention could be resolved by clearly worded notices. It was a matter for the Inspector to conclude whether or not the landowners had made their position clear.

Pearson v SSEFRA and others (Pearson Consent Order)

(QBD)[2008] C0/1085/2008
Summary: (see ROW Note 11/08) conceded the Inspector applied the wrong test in considering s119(1) of the HA 1980. Under s119(1) the order can be made either in the interests of the landowner or of the public. The test does not require the expediency to be in the interests of both the landowner and the public. See also ROW Circular 1/09

and Defra letter 27/02/09.

Perkins v SSETR (Perkins Consent Order)

(QBD)[2002]
Summary: the cost of holding a second inquiry in respect of a modification subsequently requiring advertising is not a relevant consideration. "The consideration of expense was not material to the exercise of the discretion to propose modifications to an order given by paragraph 7(3) of Schedule 15 to the Wildlife and Countryside Act 1981".

Mr A and Mrs P **Perkins** v SSEFRA and Hertfordshire CC

(QBD)[2009] EWHC 658 (Admin)
Summary: (see ROW Note 5/09)(RWLR 8.2, p175-177) whether the order (confirmed with modifications) adequately and accurately identified the route of the FP. Challenged on 2 grounds – accuracy and breach of a previous Consent Order (1997, see Perkins Consent Order) in respect of the order plan. The issue came down to a question as to what degree of detail is possible and required as a matter of law. Judge remarked "I accept that 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…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" and, "The Inspector dealt with various issues relating to the precision with which the footpath could/should be displayed, the location of the route and the description in the statement. Her conclusions on those various points were a matter of judgement for her on the evidence available and, to a degree, were for her discretion as to how things should be shown within the order. That said…the principal issue is whether the Inspector erred in concluding that the "Definitive Statement" could provide "…the necessary detail" absent from the plan". The Judge concluded it was a matter for the Inspector. The Judge held the Consent Order quashing the 1997 order had no bearing on the present order. See also R v SSE ex parte Simms and Burrows.

R (oao) **Pierce** v SSEFRA

[2006]
Summary: (see ROW Note 14/06) concerns a s119 order under HA 1980 and whether or not the Inspector was right not to go on to consider the tests in s119(6)(a) to (c) having concluded the second test, that the way will not be substantially less convenient to the public had failed.

Poole v Huskinson

[1843] 11 M & W 827
Summary: concerns common law dedication; intention to dedicate; interruption; and limited dedication. The case concerned a private carriage road set out by an Inclosure Act. Local parishioners claimed it had become a churchway but not a public highway. Lord Parke "A single act of interruption by the landowner is of much more weight, upon a question of intention, than many acts of enjoyment." "There may be a dedication to the public for a limited purpose, as for a footway, horseway or driftway; but there cannot be a dedication to a limited part of the public, as to a parish." For dedication of a way to the public by the owner of the soil, "there must be an intention to dedicate…of which the user by the public is evidence, and no more" subject to rebuttal by contrary evidence of interruption by the owner.

Powell and Irani v SSEFRA and Doncaster Metropolitan Borough Council

(QBD) [2009] EWHC 643 (Admin)
Summary: (see ROW Note 5/09) claimed breach of natural justice in refusal to grant an adjournment at the Inquiry held; no evidence before the Inspector concerning the width of the way. The Judge concluded on the basis of the evidence before the Inspector the objector was not at fault in leaving others to pursue the objection, an agreement to that effect having been reached through solicitors; there was nothing to suggest he should have appreciated they were not pursuing the objection, and notice of an application for

adjournment was made at the start of the inquiry; written submissions summarised what needed to be done for the objector to properly prepare his case. "Whilst the impact of the Order on the Claimants may not be relevant to the substantive issues before the Inspector, it is, in my view, relevant to matters of procedural fairness arising during the proceedings, and in particular to the determination of the application for an adjournment". Held, the refusal of the application for an adjournment amounted to a breach of natural justice. In view of this, no judgement was made on the issue of width.

Powell and Irani v SSEFRA and Doncaster Borough Council
[2014] EWHC 4009 (Admin)
Key Words: S31 HA 1980; as of right; reasonable landowner; S53(2)(a) duty to modify definitive map and statement.
Summary: can presumed dedication arise under S31 Highways Act 1980 if use of the way by the public as of right is proved for a 20 year period, but the particular circumstances of the use are such that a landowner who is reasonably vigilant in protecting his rights cannot have been expected to prevent the use? The case concerned a decision to confirm a 2012 DMMO to add a route to the DMS which had been used for 20 years despite having been diverted by a public path order in 1967. The definitive map had never been updated to record the alteration and therefore the original line of the footpath remained on the definitive map. Held that it is "absolutely clear" from the authorities that there is no additional test over and beyond the tripartite test of nec vi, nec clam, nec precario. Posing the tripartite test is the law's way of assessing whether or not it is reasonable to expect that the use would be resisted by the landowner. The structure of the inquiry should be as follows: first, an examination of the quality and quantity of the use which is relied upon; then consideration of whether any of the vitiating elements from the tripartite test apply, judging the question objectively from how the use would have appeared to the owner of the land. There is no additional test of a reasonable landowner.
In addition it was argued that the 2012 order must be quashed as otherwise the OMA would not be able to fulfil its duty to modify the DMS to give effect to the 1967 order. It was held that the duty is to modify the map in a way which ensures that it reflects the up to date position and the 2012 order effectively superseded the 1967 order.
Conflict with para 4.35 of Circular 1/09 – "rights that cannot be prevented cannot be acquired".

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The **Ramblers' Association** v Kent County Council
(QBD)[1990] 154 JP 716, [1990] COD 327,[1990] 60 P & CR 464, [1991] JPL 530
Summary: concerns s116 of HA 1980 and powers of magistrates to stop up highways, mandatory nature of notices which were necessary in order to give the magistrates jurisdiction to hear an application to stop up a way. Wolf LJ said "In a sense, they could be described as technical. However, the importance of failing to give the required notices should not, for this reason, be underestimated because the notices were intended to bring to the attention of the public the proposals to stop up the public rights of way and, if the public were not aware of a proposal, they might be deprived of an opportunity of protecting the public rights to which they were entitled".

R (oao The Ramblers' Association) v SSEFRA **(Ramblers' Association Consent Order)**
QBD[2008] CO/2325/2008
Summary: (see ROW Note 1/09, and internal note drafted by B Grimshaw dated 10/02/09 seeking clarification from Defra on a number of points) concerns Godmanchester and Drain and the effect in law of a landowner depositing with the appropriate council s31(6) HA 1980 documents. Inspector's decision challenged on 3 grounds- that the deposit of a map and statement under s31(6) must be followed up by the lodging of a statutory declaration; if the deposit of a map and statement under

s31(6) is sufficient to satisfy a lack of intention on behalf of the landowner to dedicate a prow, then it must also act as a bringing into question; that there is no reason in law why sections of a route over which no lack of intention to dedicate has been shown cannot function as highways albeit cul-de-sacs where one end connects with a public highway. The Consent Order was granted on the basis of ground 3.

R (Lewis) v **Redcar** and Cleveland Borough Council

(QBD)[2008] EWHC 1813 (Admin), (CA)[2009] EWCA Civ 3, (SC)[2010] UKSC 11
Summary: (see RWLR 15.3 p139-146 for CA and p161-165 for SC comments) concerned whether a piece of open land which formed part of a golf course ought to have been registered as a town green under s15 of the Commons Act 2006. The Inspector found local residents when using the land for recreation deferred to golf players. Held, allowing the appeal: (1) the critical question is what are the respective rights of the local inhabitants and the owner of the land once it has been registered. The statutes give no guidance on this. The 1965 Act was intended to be a two stage process: the registers would establish the facts and provide a definitive record of what land was/not common land or town or village green, and Parliament would deal with the consequences of registration by defining what rights the public had over the land that had been registered. (2) The origin of deference lies in the idea that once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it (see Laing Homes Ltd). It would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20yr period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But accepting the rights on either side can co-exist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on a different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist. (3) The position may be that the two uses cannot sensibly co-exist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously. If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could, no doubt, be restrained by an injunction. The inspector misdirected himself on this point. The question then is whether the council's decision which was based on his recommendation can be allowed to stand if the facts are approached in the right way. (4) The facts of this case, as described by the inspector, show that the local inhabitants (except for Squadron Leader Kime) were behaving when they were using the land for sports and pastimes in the way people normally behave when they are exercising public rights over land that is also used as a golf course. They recognise that golfers have as much right to use the land for playing golf as they do for their sports and pastimes. Courtesy and common sense dictates that they interfere with the golfer's progress over the course as little as possible. There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers. When golf is being played gaps between one group of players and another provide ample opportunities for crossing the fairway while jogging or dog-walking. Periods of waiting for the opportunity are usually short and rarely inconvenience the casual walker, rambler or bird-watcher. (5) The court cannot find anything in the inspector's description of what happened in this case that was out of the ordinary. Nor does the court find anything that was inconsistent with the use of the land as of right for lawful sports and pastimes. Judgement can be accessed via PINS website in link to JPL issue 9,2010)

Reid v the Secretary of State for Scotland

[1999] 2 AC 512

Summary: Lord Clyde in his speech notes as follows: "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of [an] irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. These principles are quite clear."

R(oao) **Mr and Mrs Ridley** v SSEFRA and Mr and Mrs Ridley & Mrs M Masters v SSEFRA

[2009] EWHC 171 (Admin)

Summary: (see ROW Note 5/09)(RWLR 9.3, p175-177) concerns order upgrading a FP to BR at common law, confirmed following 2 inquires and 2 costs decisions. Challenged on grounds Inspector misunderstood relevant evidence and had regard to immaterial consideration; that the decision was perverse being based on insufficient evidence - the Judge held on this ground "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 a whole they do"; that there had been a failure to consider relevant evidence – all 3 grounds were dismissed. Costs decision challenged on grounds it was unarguable and should be refused as the decision mischaracterised guidance as procedural requirement, and failed to have regard to the fact a skeleton argument had been provided in advance of the second inquiry – both grounds dismissed. The Judge commented "The nub of the Inspector's reasoning for concluding that Mrs Masters' conduct was unreasonable was that Mrs Masters was undoubtedly aware that substantial material, which was going to be relied upon at the Inquiry, needed to be made available well before the Inquiry began" and with regard to the skeleton argument, "The Inspector concluded that that document was inadequate to allow anyone to prepare in relation to the information later brought forward at the Inquiry. This was pre-eminently a matter for the Inspector". On documentary evidence, the absence of any deduction for prow in a valuation carried out under the 1910 Act does not necessarily signify that there was no recognised highway over the hereditament in question. Failure to claim such a deduction was unlikely to prejudice the landowner unless the land attracted the annual charge, known as "undeveloped land duty", which was imposed by reference to the "assessable site value" of undeveloped land (the value of the land as a building site after deducting the actual or estimated cost of clearing the site). While a way may be uncoloured on the FA map, it does not necessarily point to it being a public carriage road. On Tithe, the different treatment of sections of the route reflected those parts enclosed and that part enclosed on one side, for apportionment purposes the value of the whole of the land inclusive of the track being assessed.

R v SSE ex parte **Riley**

(QBD)[1989] 59 P & CR 1, [1989] JPL 921

Summary: concerning the Countryside Act 1968 and whether reclassification as a bridleway or footpath extinguished vehicular rights. The judge took the view that it did not.

Note: Defra letter to OMAs March 2004 which considered such rights had been extinguished, and R (Kind) v SSEFRA which held they had not.

Re St John's, Chelsea

[1962] 2 All ER 850

Summary: ecclesiastical law, consecrated ground, church site, proposed use of site as car park. Held, a faculty for the secular use of consecrated ground cannot be granted unless the proposed user falls within the restricted category of wayleaves, or the purpose for which the ground was originally consecrated can no longer lawfully be carried out.

Re St Martin le Grand, York; Westminster Press Ltd v St Martin with St Helen, York (incumbent and parochial church council) and others

[1989] 2 All ER 711

Summary: concerns right of way over ecclesiastical property, prescription, user as of right, presumption of grant of faculty. Held, a right given to a person to pass over consecrated land cannot, without the grant of a faculty, amount to more than a licence granted by the incumbent for the duration only of his incumbency, and cannot be binding on his successors in title to the freehold. The principle that consecrated land should be protected from secular use is not an absolute one. See also Morley BC v St Mary the Virgin, Woodkirk.

Roberts v Webster

[1967] 66 LGR 298, 205 EG 103

Summary: concerns evidential weight of inclosure documents. An appeal against a decision of the justices at quarter sessions where they had to decide whether a highway existed before 1835 and whether it was publicly maintainable. Their decision was based on inclosure evidence that the way existed in 1859. Widgery J stated: "It seems to me that the inclosure award of 1859 is very powerful evidence indeed to support the view that Pipers Lane at that time was reputed to be a public highway....If they (the justices) concluded, as they did, that the inclosure award was such a powerful piece of evidence that they should infer from it that a highway existed over this road in 1859, I can see no fault in their doing so. Indeed, speaking for myself, I am prepared to say that had I been sitting with the justices at quarter sessions, I feel sure that I should have adopted the same view."

Also held: (notwithstanding Eyre v New Forest Board) there was no rule of law that a cul-de-sac in a country district could never be a highway, and if there was some attraction at the end which might cause the public to wish to use it that could be sufficient to justify the conclusion that a public highway had been created.

Hywel James **Rowley** and Cannock Gates Ltd. v SSTLR

(QBD)[2002] EWHC 1040 (Admin), [2003] P & CR 27

Summary: (see ROW Note 19/02) concerns s31 of HA 1980 (statutory presumption of dedication) – whether a tenant's positive actions could be attributed to the landowner. Elias J "seemed acquiescence of the tenant was the basis of the case for the assertion that there was user as of right… it would surely be implied that the tenant would have the right to decide who should be entitled to go onto his land and whom he may forbid. I find it difficult to see why the tenant's acquiescence should bind the landlord, but not positive acts taken by the tenant in accordance with the exercise of his rights over the property, to exclude strangers." And "if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that."

"In the context of whether or not permission has been granted, therefore, the question is simply whether objectively viewed the evidence justifies the inference that there is implied permission, not whether the public are made aware of the acts relied upon as giving rise to that implication". (copy available in PINS High Court Transcripts under ROW)

Rubinstein and another v SSE

(QBD)[1989] 57 P & CR 111, [1988] JPL 485

Summary: Held that once a right of way was shown on the DM it could not be deleted – overturned by Simms and Burrows.

Sage v SSETR and Maidstone Borough Council

[2003] UKHL 22, [2003] 1 WLR 983, [2003] All ER 689

Summary: concerns an enforcement judgement. Held: the exception to development in s55(2)(a) TCPA 1990 applied only to a completed building on which work was carried out for its maintenance, improvement or other alteration. It did not apply to work required to complete a building which was subject to planning control. Even if the remaining work on an incomplete dwelling was to be carried out inside the building and did not materially affect its external appearance, it did not fall within the exception, and the building could not be regarded as substantially completed for the purposes of s171B(1). An application made for permission for a single operation was made for the whole of the building operation because final permission required a complete structure. If a building operation was not carried out, both internally and externally, fully in accordance with the permission, the whole operation was unlawful. That differed from where a building has been completed, but was altered or improved.

R v SSE ex parte **Simms & Burrows**

[1990] 3 All ER 490, (CA)[1990] 60 P & CR 105, [1990] WLR 1070, [1990] 89 LGR 398, [1990] JPL 746, [1991] 2 QB 354

Summary: concerns status of DM and its modification through 'discovery' of evidence, information "which may or may not have existed at the time of the definitive map". Read in conjunction with Circular 19/90 (WO Circular 45/90). The purpose of s53 and s54 of the WCA 1981 is to achieve a DM which shows accurately which rights of way exist. The DM is conclusive evidence of the existence of a public right of way unless and until it is modified. The judgement confirms that s53(3)(c)(ii) permits both upgrading and downgrading of highways and that s53(3)(c)(iii) permits deletions from the DM. Purchas LJ said he could "see no provision in the 1981 Act specifically empowering the local authority to create a right of way by continuing to show it on the map, after proof had become available that it had never existed" and there was a duty to "produce the most reliable map and statement that could be achieved", by taking account of "changes in the original status of highways or even their existence resulting from recent research or discovery of evidence". The 1981 Act recognises "the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy". Held that s53 and s56 could be reconciled once the purpose of the legislation as a whole was understood. Under s56, the map was conclusive evidence of the existence of a public right of way, unless and until there was a modification of the map under the provisions of s53.

Sinclair v Kearsley & Salford City Council

[2010] EWCA Civ 112

Summary: (reported in B&B 2011/1/3, attached to ROW Note 1/2011) concerns obstruction of an unadopted road along which an old footpath ran. "If a landowner is taken to have fenced against a highway, 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."

Skrentry v Harrogate Borough Council and others

[1999] EGCS 127

Summary: as a general rule, a route has to lead "to a destination to which the public was entitled to go".

R v SSE ex parte **Slot**

[1997] EWCA Civ 2845, [1998] 4 PLR 1, [1998] JPL 692

Summary: in the CA (1998) it was held that a property owner was denied natural justice when an Inspector and the OMA refused her permission to make independent representations when a diversion that she supported was objected to, and refused to

give her a copy of the objection letter.

R(oao) **Smith** v Land Registry (Peterborough Office) and Cambridge County Council

[2009] EWHC 328 (Admin)

Summary: concerns claim for adverse possession of land recorded on DM as a BOAT, whether a highway could be extinguished by adverse possession. The judge reviewed case law back to the C19th, including Bakewell, Harvey v Truro District Council ("The possession of a squatter on the highway since 1886 cannot bar the public right") and Turner v Ringwood Highway Board. As a matter of law, an adverse possession or squatter's title cannot be acquired on land over which a public right of way exists. (CA decision in London Borough of Bromley v Morritt [1999] unreported re: adverse possession).

R (on the prosecution of the National Liberal Land Co Ltd) v The inhabitants of the County of **Southampton**

(QBD)[1887] LR 19 QBD 590

Summary: concerns liability for repair of a bridge not built in a highway. Held, the fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county. On interpretation of 'the public' Coleridge LJ said "User by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word "public" in this connection must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge. In the present case, however, there is no doubt abundant proof of the user of the bridge by, and of its utility to, the public, confining the meaning of that word to that portion of the public which used it."

South Buckinghamshire District Council v Porter

[2001] EWCA Civ 1549, [2002] 1 WLR 1359, (CA)[2002] 1 All ER 425, [2003] UKHL, [2003] AC 558, [2003] 3 All ER 1, [2004]

Summary: passage from this planning case quoted in R oao Manchester City Council v SSEFRA concerns reasoning in Inspectors' decisions which can be read across to other decisions. Lord Brown stated "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Stevens v SSE

[1998] 76 P & CR 503

Summary: (see ROW Advice Note No.12) concerns rights along RUPPs and the effect of the RTA 1930 on vehicular user, the issue being whether the Inspector was correct in

deciding that no carriageway had been created, either at common law or by virtue of s31 of the HA 1980, by vehicular use post 1930. Sullivan J held that the mere fact of classification as a RUPP was not in itself evidence of the existence of any vehicular way. Evidence of vehicular use prior to and post December 1930 should be taken into account since evidence post 1930 may give credibility to user evidence before 1930 thus establishing dedication of vehicular rights at common law. "If, having looked at the evidence overall, including both evidence of user and the documentary evidence, the Inspector is satisfied that there was no dedication of the way for vehicular use at common law or by 20 years user prior to 1930, then and only then will it be possible to say that evidence of post 1930 use should be excluded because such use would have been unlawful". (see also R v PINS ex parte Howell)

R v SSE ex parte **Stewart**

[1979] 37 P & CR 279, [1980] JPL 175
Summary: concerned the tests in s118(1) and s118(2) of HA 1980 and the situation where a footpath could not be used because it was obstructed. The court found that a pine tree with a girth of 2'6", a hedge 4' wide and 12' high and an electricity sub-station were capable of being temporary obstructions and could be disregarded under ss(6). On obstruction, Phillips J "the prime question was, in the case of an obstruction, whether it was likely to endure." "…the difficulties of allowing obstructions, or any doubt as to the line of path, to count to any substantial extent as reasons for making a stopping up order. Were that to be so it would mean that the easiest way to get a footpath stopped up would be unlawfully to obstruct it and that could not be the policy." On expedient, "…the word 'expedient' must mean that, to some extent at all events, other considerations could be brought into play, if that were not so, there would be no room for a judgement, which was bound to be of a broad character, whether or not it was 'expedient'."

Suffolk County Council v Mason

(CA)[1978] 1 WLR 716, (HL)[1979] AC 705, [1979] 2 All ER 369
Summary: an entry on the DM does not necessarily remain conclusive evidence forever.

R v Oxfordshire County Council and others ex parte **Sunningwell** Parish Council

(HL)[1999] UKHL 28, [2000] 1 AC 335,[1999] 3 WLR 160, [1999] 3 All ER 385
Summary: (see ROW Advice Note No.6) concerns town or village greens, customary right, land used predominantly by villagers for informal recreation, whether belief in existence of right exclusive to villagers necessary, use for sport and pastimes, whether landowner's toleration prevents the claim. Held: "as of right" that is without force, secrecy or licence, did not require a subjective belief in the existence of that right; and toleration by the landowner was not fatal to a finding that user had been as of right. Hoffman LJ said: To require an enquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription, which depends upon acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose the actual state of mind of the road user is plainly irrelevant … in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in Hue and Whiteley (1929) has led the courts into imposing upon the time-honored expression 'as of right' a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription … user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.

Sweet v Sommer

(Ch)[2004] EWHC 1504, (CA) [2005] EWCA Civ 227
Summary: concerns a private right of way/easement of necessity (in this case vehicular) to a parcel of landlocked land which otherwise could not be used (other than if part of a building was demolished to create access); obstructing access to the land by reducing width, and locking a gate without having consulted the owner of the landlocked

land or providing them with a key.

Stevens v The General Steam Navigation Company Ltd.
[1903]

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Taylor v Betterment Properties (Weymouth) Ltd
[2012] EWCA Civ 250
Towns and Village Greens

Thornhill v Weekes
[1914] 78 JP 154
Summary: concerns the physical character of a way. On acquiescence and non-resident owners, "…the extent of the owner's acquiescence must in each case be a material question as to user, but much less cogent if such user is intermittent or small or if the owner is non-resident, especially if there is no bailiff or servants living there…". On permission, "…the user may be referable to licence where it is by people in the hamlet and it is necessary in each case to examine the surrounding circumstances in order to arrive at a conclusion". (see also Poole v Huskinson)

Thould v SSEFRA
(QBD)[2006] EWHC 1685
Summary: (see ROW Note 14/06) concerns deletion from DM of a bridleway following a Sch14 direction to the OMA to make the order and a Sch15 inquiry, adequacy of reasoning and whether an Inspector's decision was perverse. It was found that having considered the evidence including the cogent evidence presented by the claimants the Inspector concluded their evidence had not on the balance of probabilities displaced the presumption that the original DMS had been correctly made. Whilst he could lawfully have decided the other way, it was open to him to come to this conclusion and it was not perverse. Furthermore, his reasons for coming to the conclusion he did were sufficient to enable the claimants to know why he reached those conclusions.

Todd and Bradley v SSEFRA
(QBD)[2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, [2004] 4 All ER 497, [2005] 1 P & CR 16
Summary: (see ROW Note 16/04) concerns orders made under s53(3)(c)(i) of the WCA 1981, confirmed the burden of proof is 'on the balance of probabilities'. At the Sch15 stage a more stringent test is to be applied than at the Sch14 stage (see Norton and Bagshaw). An Inspector at the Sch15 stage should only consider whether the right of way subsists on the balance of probabilities.
Also, an Inspector should not take a significantly different view on the interpretation of the evidence to that presented by the parties, or refer to new material not before the inquiry, without giving the parties the opportunity to comment, before reaching a decision.

George **Trenchard** v SSE & Devon CC
[1996]

J **Trevelyan** v SSETR
[2000] NPC 6, (CA)[2001] EWCA Civ 266, [2001] 1 WLR 1264
Summary: (see ROW Advice Note No.20) concerns the need for cogent evidence to modify the DMS. s53(3)(c)(iii)case concerning an order which sought to delete a bridleway from the DM. Held: where the SS or an Inspector appointed by him had to consider whether a right of way which was marked on a DM in fact existed he should start with the initial presumption that it did. If there were no evidence that made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed the proper procedures had been followed, and therefore that such evidence existed. At the end of

the day, when all the evidence had to be considered, the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities. Evidence of some substance had, however, to be put in the balance if it was to outweigh the initial presumption that a right of way existed. Proof of a negative was seldom easy, and the more time that elapsed, the more difficult would be the task of adducing the positive evidence that was necessary to establish that a right of way had been marked on a DM by mistake.

Trail Riders Fellowship & Tilbury v Dorset CC & SSEFRA

[2013] EWCA Civ 553
Summary: a map which is produced at a scale of 1:25000 having been digitally derived from an original map at a scale of 1:50000 satisfies the requirements of paragraph 1(a) of Schedule 14 provided that it is indeed "a map" and that it shows the way or ways to which the application relates.

R (on the application of **Trail Riders Fellowship and another**) v Dorset County Council

[2015] UKSC 18 Supreme Court
Key Words: map to prescribed scale; S67 NERCA; *Winches*ter case; *Maroudas* case
Summary: A map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfies the requirement in paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981of being "drawn to the prescribed scale" in circumstances where it has been "digitally derived from an original map with a scale of 1:50,000". This is provided that the application map identifies the way or ways to which the application relates. Two of the five judges dissented.
A second issue regarding the effect of s67(6) NERCA 2006 did not arise for decision but the judgements contain interesting obiter dicta. Three of the five judges expressed the opinion that the saving provided by S67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might otherwise have been cured in one way or another. Lord Carnwath advocated a more flexible approach and questioned the correctness of *Maroudas* and Lord Clarke stated that he was sympathetic to Lord Carnwath's approach, albeit that he preferred to express no view on the matter. Please also see TRF v SSEFR and Dorset County Council [2016] EWHC 2083 (admin)

Trail Riders Fellowship v SSEFRA and Dorset County Council

[2016] EWHC 2083 (Admin)
Key Words: application in accordance with para 1 of Schedule 14 of WCA 1981; S61 NERCA 2006; *Winchester* case; *Maroudas* case
Summary: The judge was bound to follow clear Court of Appeal authority in *Winchester* and *Maroudas* that applications must be made in full accordance with paragraph 1 of Schedule 14. The argument in the Supreme Court in the *TRF* case between the different Justices was not about the interpretation and application of *Winchester* and *Maroudas* but whether those cases were rightly decided. The Supreme Court's obiter dicta (from both sides of the argument) make it plain that the approach in *Winchester* and *Maroudas* is a strict one, from which any departure in the making of the application from the statutory requirements will render it defective unless it is de minimis. In this case the failure to provide documents listed in the application was not unimportant. The purpose of the requirement is to enable those affected by an application to know the strength of the case they have to meet and no reader of the application and its enclosures would have been able to test the supportive material for himself.

Turner v Ringwood Highway Board

[1870] LR 9 Eq 418
Summary: when a highway exists the public has a right to use the whole of the width of the highway and not just that part of it currently used to pass or re-pass.

Turner v Walsh

[1881] 6 AC 636
Summary: dedication of the way in question to the public as a highway is presumed (or deemed) to have taken place, and the highway to have been created, at the beginning of

the relevant 20 years. Dedication may be presumed against the Crown at common law.

Wathes, Pearson, Young, Roberts and Lowe v SSEFRA **(T34x Protection Group Consent Order)**

QBD [2009] CO/9252/2008

Summary: (see ROW Note 2/09) concerns upgrading a bridleway to BOAT and application of the Winchester College judgement in CA. The Inspector was correct in concluding that no other subsection of ss67(2) or (3) of NERCA 2006 engaged to prevent extinguishment of mpv rights. However, the Inspector erred in interpreting Winchester to mean that 'the decision to make an order by a relevant authority is not rendered invalid if the application falls short of the strict terms of Schedule 14' since at para. 59 of the judgement Dyson LJ recognised the reference to "such an application" in s67(3)(b) is to an application made under s53(5) for the purposed of s67(3)(a), ie. one that was fully compliant with Sch14 para 1 and the 1993 Regulations. At para 62 he also emphasised that full compliance with Sch14 para 1 was necessary to engage s67(3)(b).

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Vasiliou v SST and another

(CA)[1991] 2 All ER 77, [1991] JPL 858

Summary: (see ROW Advice Note No.20 for application to Human Rights legislation) concerns TCPA orders and closure of a road causing loss of trade. The CA held that when exercising his discretion, the SS was not only entitled, but required to take into account the adverse effect the Order would have on all those entitled to the rights which would be extinguished by it, especially as there is no provision for compensation. "I can see nothing to suggest that, when considering the loss and inconvenience which will be suffered by members of the public…the minister is not at liberty to take into account all such loss, including the loss, if any, which some…such occupiers of property adjoining the highway, will sustain."

Vyner v Wirral Rural District Council

[1909] 73 JP 242

Summary: concerns deposited railway plans and books of reference accepted as evidence of a public right of way.

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Whitworth and others v SSEFRA

(QBD) [2010] EWHC 738 (Admin), [2010] EWCA Civ 1468

Summary: (see ROW Note 04/2010 for HC judgement) (see ROW Note 01/2011 for CA judgement)– concerns whether bicycle use can give rise to rights higher than a bridleway. The ground that there was no documentary evidence to justify the Inspector's conclusion the way was an ancient bridleway was dismissed. The appeal succeeded on the ground that the Inspector erred in law in finding that use of a bicycle would be consistent with a finding that (route BCD) was anything more than a bridleway, since members of the public have had a right to use bridleways for cycling since the coming into force of section 30(1) of the 1968 Act, "In the present case, the Inspector had found that by 1968, and before the relevant 20-year period the way had the status of a bridleway. After that time, use of the bridleway by cyclists would have been permitted by the 1968 Act. The owner would have had no power to stop it. There would be no justification therefore for inferring acquiescence by him in anything other than bridleway use…It follows that in considering the extent of deemed dedication, the use by cyclists should be disregarded." Carnwath LJ saw some force in the submissions that use by two cyclists "was on any view insufficient to support a finding of use as enjoyment as of right "by the public"."

Wild v SSEFRA

(QBD) [2008] EWHC 3641 (Admin) (CA) [2009] EWCA Civ 1406

Summary: (see ROW Note 2/2010)(RWLR, 6.2 p27-31) concerns inference of dedication at common law, issue of objections to public use having been made, but the landowner of the way is not known. It was common ground that Keith J who heard the application in the HC was entitled to interfere with the inspector's decision but only on ordinary judicial review principles. Inspector's decision made on implied dedication at common law having determined insufficient user to satisfy a 20 year period from 1978-1998 under s31 HA1980. "Mr Upton, for the appellant, does not seek to go behind the inspector's finding that ownership of the footpath had not been established, but the critical point seems to me to be that there was a possibility that he [the lord of the manor] and his predecessors owned it. Indeed, I would go so far as to say that on the evidence there were no other candidates. The fact that there was a possibility that he and his predecessors owned the land in my judgment makes the challenge to the Definitive Map and Statement in 1978 of great importance. As concluded by the inspector, from the moment of the 1978 inquiry there was public knowledge that it was challenged that the Order route was a public footpath. It must be inferred that the users knew they were using the path against that challenge, but the inspector does not deal with this. The state of mind of the users seems to me to be relevant to the status of the track. It was common knowledge that an objection had been made to the public use of the track by someone who might be the owner." "...what the inspector overlooks, is the impact of the 1975 objections at the 1978 inquiry and how they might be relevant to the nature of the use of the Order route thereafter. The objections at the 1978 inquiry seem to me to be no different in principle from those same objectors, had they chosen to do so, putting up a notice on the Order route saying there was no a right of way." "As the authorities make clear, it does not follow as night follows day that because there has been use there has been dedication by the owner; it is necessary to look at all the circumstances. There are various questions to be asked. Public user is the first question, then comes acquiescence and finally dedication." "In my judgment the inspector made an error of law in failing to have regard to the fact that objection had been raised publicly at the 1978 inquiry by a person or persons who might have been the owner or owners of the Order route." "...objection followed by inactivity hardly seems...to give rise to acquiescence from which dedication is to be inferred."

R (oao Warden and fellows of **Winchester** College and Humphrey Feeds Ltd) v Hampshire County Council and SSEFRA

(QBD)[2007] EWHC 2786 (Admin), CA [2008] EWCA Civ 431

Summary: (see ROW Notes 5/08, 6/08, 9/08 (Defra letters 02/06/08, 13/08/08 and 18/08/08)) concerns whether an application for a route to be shown as a BOAT made before 20 January 2005 (the relevant date for s67(3) of the NERCA 2006) was a section 53(5) of the WCA 1981 application for the purposes of s67(3)(a). It overturns the HC judgement on what constitutes an application in terms of s67(7) of the NERCA and paragraph 1 of Sch14 of the WCA 1981. An application must be accompanied by copies of all the documents relied on together with a map of the correct scale. Dyson LJ "In my judgement, as a matter of ordinary language an application is not made in accordance with paragraph 1 [of Sch14 to the WCA 1981] unless it satisfies all three requirements of the paragraph...It must be made in a certain form (or a form substantially to the like effect with such insertions or omissions as are necessary in any particular case). It must be accompanied by certain documents. The requirement to accompany is one of the rules as to how an application is to be made." And, "In my judgement, section 67(6) [of the NERC Act 2006] requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things *(de minimus non curat lex)*...Thus minor departures from paragraph 1 will not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances I consider that neither application was made in accordance with paragraph 1." And, further on paragraph 1 applications in the context of s67(3)(a), "The applicant is required to identify and

provide copies of all the documentary evidence on which he relies in support of his application. There is nothing in the language of the paragraph which supports the construction that the applicant's obligation is limited to identifying and providing copies of those documents on which he relies to which the authority does not have access." However, this need not apply to applications that do not come under s67(6) of the NERCA, "I wish to emphasise that I am not saying that ,in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)."

[redacted]

[2016] EWCA Civ 482 Court of Appeal

Key Words: effect of signs on "as of right"; meaning of "by force".

Summary: the appellants claimed that a right to park on land belonging to the respondents had been acquired by prescription. However at all times there was a clearly visible sign which made it clear that the land parked on was private and for use by the respondents patrons only. The issue was whether the signs were sufficient to prevent the appellants acquiring a right to use the land or whether the owners had acquiesced in the use so as to entitle the appellants to such a right notwithstanding the presence of the signs. The judgment contains a discussion of the meaning of the phrase "without force" and what constitutes protest on the part of the owner of the land.

It was held that in circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. It is not necessary for the owner to take further steps such as confronting the wrongdoers either orally in writing and still less to go to the expense of legal proceedings.

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R (oao) **Young** v SSEFRA

(QBD)[2002] EWHC 844 (Admin)

Summary: (see ROW Notes 7/02, 9/06 (revised May 2006) and ROW Advice Note No.9) clarifies the approach to be taken when considering the criteria for confirmation of a diversion order made under s119 of HA 1980. In deciding whether to confirm an order, Inspectors are required to consider the criteria in s119(6) as 3 separate tests, 2 of which may be the subject of a balancing exercise. W here the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, the Inspector is required to balance the interests raised in the 2 expediency tests – the interests of the applicant (i), and the criteria set out in s119(6)(a) (b) and (c) under (iii) to determine whether it would be expedient to confirm the order. Conversely, where the proposed diversion is seen as expedient in terms of (i) and (ii) but would be substantially less convenient the order should not be confirmed.

Turner J considered "substantially less convenient to the public" referred to such matters as the length, difficulty of walking and purpose of the path – features that readily fall within the natural and ordinary meaning of the word "convenient".

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(Information from a variety of sources)

Abbreviations	
AC	Appeal Court
All ER	All England Law Reports
CA	Court of Appeal
CB (NS)	Common Bench, New Series 1857-1866
Ch / ChD	Chancery reports (Chancery division, High Court)
COD	Crown Office Digest
CS	
DM/S	Definitive Map/Statement
DMMO	Definitive Map Modification Order
EG/EGCS	Estates Gazette / Estates Gazette Case Summaries
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC (Admin)	England and Wales High Court (Administrative Court)
HA	Highways Act
HC	High Court
HL	House of Lords
JP	Justice of the Peace
JPL	Journal of Planning and Environment Law
KB	King's Bench Division (High Court)
LGR	Local Government Reports
NERCA	Natural Environment and Rural Communities Act
NPC	
oao	on the application of
OD	Order decision
OMA	Order Making Authority
P & CR	Property and Compensation Reports (published by Butterworths)
PP	Public Path
QBD	Queen's Bench Division (High Court)
ROWA	Rights of Way Act
RTA	Road Traffic Act
RTR	Road Traffic Reports
RUPP	Road Used as a Public Path
RWLR	Rights of Way Law Review
SS	Secretary of State
SSE	Secretary of State for the Environment
SSEFRA	Secretary of State for Environment, Food and Rural Affairs
SSETR	Secretary of State for Environment, Transport and the Regions
SST	Secretary of State for Transport
SSTLR	Secretary of State for Transport, Local Government and the Regions
SSW	Secretary of State for Wales
SC	Supreme Court
TCPA	Town & Country Planning Act
UKHL	
WCA	Wildlife & Countryside Act
WLR	The Weekly Law Reports

Latin terms	
de minimus/de minimus non curat lex	the law does not concern itself with small things
ejusdem generis	of the same kind
ex parte	by a party
obiter dicta	judicial opinion and comment incidental to but not part of the principle or principles upon which a case is decided
per se	by itself
precario	by permission
prima facie	at first sight
terminus ad quem	the finishing point
ultra vires	beyond the authority confirmed by law
usque ad medium filum	up to the centre line