The Secretary of State for
Environment, Food & Rural Affairs
Litigation & Prosecution Division
DEFRA
Area 3E, Ergon House
Horseferry Road
London
SW1P 2AL

20 July 2010

Our ref:
JP/NG

SPECIAL DELIVERY

& BY E-MAIL: james.turnill@defra.gsi.gov.uk

For the urgent attention of Mr James Turnill

Dear Madam

Mr Graham Plumbe
Application under Schedule 15 Wildlife and Countryside Act 1981 against Secretary of State for the Environment, Food & Rural Affairs

A. Introduction

1. This is a letter of claim within the meaning of the Civil Procedure Rules. It anticipates an application/appeal under Schedule 15, para.12(1) Wildlife and Countryside Act ("WCA") 1981 to the Administrative Court.

2. The decision of which our client complains is that contained in an Order Decision (ref: FPS/Q9495/7/21) of Alan Beckett BA, MSc, MIPROW, acting as an Inspector on your behalf. The Order Decision is dated 15 June 2010. It was published on 1 July 2010.

3. Objections were made, *inter alios* by our client, to a proposal to modify the Lake District National Park Authority (Right of Way 512064/576018/521058, Walna Scar Road, Parishes of Coniston, Torver and Dunnerdale-with-Seathwaite) Definitive Map Modification Order 2007 ("the DMMO") and were not withdrawn. In consequence and pursuant to Schedule 15, para.8(1) WCA 1981, the DMMO was submitted to you for confirmation as modified. Mr Beckett was appointed by you pursuant to Schedule 15, para.10(1) WCA 1981 and the matter was considered by way of written representations.

B. Claimant

4. We act for Mr Graham Plumbe FRICS, FCIArb of Crondall House, Crondall Road, Crookham Village, Fleet, Hampshire GU51 5SY. Our client, as a representative of the Green Lanes Protection Group ("GLPG"), was an objector to the DMMO and participated in the written representations process in that capacity. In this statutory appeal, he acts in a wholly personal capacity and not as a representative of any particular organisation.

5. Please correspond with us, rather than with Mr Plumbe direct. Our address for service is below. The fee-earner with the conduct of this matter is our Mr Pavey, whose e-mail address is: james.pavey@knights-solicitors.co.uk . For the avoidance of doubt, we will accept service by e-mail.

C. Documents

6. We enclose (by post only) copies of the following documents, which are material to this matter:

(1) Plan showing the DMMO route.
(2) Statement of case and supporting documents of Alan Kind, Cumbria Trail Riders Fellowship ("CTRF"), 6 January 2009.
(3) Rebuttal of Late Submissions – by Alan Kind, 22 April 2009.
(4) Interim Order Decision of Mr Beckett – 29 June 2009.
(5) Statement of Alastair Cameron – 5 November 2009.
(6) Representation of Graham Plumbe on behalf of GLPG – 10 January 2010.
(7) Appendix 7 to (3): "The law of public nuisance – an appreciation by GLPG."
(8) Representation of Diana Mallinson (the other objector) – 16 January 2010.
(9) Rebuttal of Objections to the Inspector's Proposed Modification to the Order – by Alan Kind, CTRF – 31 January 2010.
(10) Order Decision of Mr Beckett – 15 June 2010.
(11) Lake District National Park Authority ("LDNPA") Notice of Order Decision, published on 1 July 2010.
(12) Correspondence between Mrs Mallinson, our client and the Planning Inspectorate.
(13) Note of Graham Plumbe setting out points in reply – 17 July 2010.

7. In the interests of proportionality, we have sought to limit the number of documents appended to this letter of claim. The Planning Inspectorate, of course, has copies of the further documents that were before the Inspector.

8. As to legal and other materials, we suggest that you have available to you when reading this letter of claim:

- Section 53 and Schedule 15 WCA 1981.
- Part 6 Natural Environment and Rural Communities Act ("NERCA") 2006.
- The Planning Inspectorate's "Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England" ("the Guidance").

D. Chronology

9. For convenience, the material sequence of events in this matter is as follows:

- 21 September 2005: Application by Alan Kind for the CTRF for DMMO to upgrade Walna Scar Road from a bridleway to a byway open to all traffic ("BOAT").
- 3 December 2007: LDNPA makes a DMMO upgrading the bridleway to a restricted byway.
- 29 June 2009: Inspector's (interim) Order Decision proposing to confirm the DMMO with modifications (ie, upgrading the bridleway to a BOAT).
- 15 June 2010: Inspector's Order Decision confirming the DMMO with modifications – ie, upgrading the bridleway to a BOAT.

- 1 July 2010: Notice of Order Decision published.
- 12 August 2010: expiry of period for application under Schedule 15, para.12(1) WCA 1981.

E. Legal background

10. LDNPA took the view and proceeded on the basis that there had historically been vehicular use of Walna Scar Road in carts, which had established public vehicular rights of way. However, s.67(1) NERCA 2006 extinguished such existing public rights to use MPVs over Walna Scar Road on commencement on 2 May 2006 because the public rights were shown in the Definitive Map and Statement ("DMS") as only bridleway rights.

11. Sections 67(2) and 67(3) NERCA 2006 contain exceptions to that extinguishing power. It was common ground that there was only one such exception in contention: s67(2)(e) - whether the way "was created by virtue of use by [MPVs] during a period ending before 1st December 1930".

12. Against that background, the proper determination of this matter depended on the Inspector addressing the following questions in the following sequence:

> *Question 1*: Did public rights of way to use vehicles over Walna Scar Road already subsist by the time that the public began to use the Road with MPVs before December 1930? Or, alternatively, was it only a route over which the public had only accrued rights of way on foot and on horseback through long use?

13. If the former, then the public rights of way to use vehicles pre-existed any rights that might otherwise have been created by MPVs before December 1930 – and s.67(2)(e) did not engage. If the latter, it was then necessary for the Inspector to consider:

> *Question 2*: Was the use of Walna Scar Road by MPVs prior to 1 December 1930 of sufficient quality and extent so as to sustain an inference of dedication at common law that the public had acquired such rights?

14. The Inspector found that no public vehicular rights subsisted before the 1910s (Question 1) and that there had been sufficient use by MPVs in the 1910s and 1920s to sustain an inference of dedication.

F. Grounds of challenge

15. Our client's grounds of challenge fall very broadly within three categories: errors of fact and law; want of fairness; and *Wednesbury* unreasonableness. We, nevertheless, draw to your attention that there is some overlap between the grounds of challenge.

Ground 1 – error of law: burden of proof of permissive use and its implications (Question 1)

16. As Mr Kind asserted in his January 2009 Legal Submission and as the Court made clear in *R* v *Petrie* (1855) 4 Ellis and Blackburn 737, once there is a clear pattern of public use, that public use raises a rebuttable presumption of dedication. (This language is synonymous with the more usual *inference* of dedication at common law.) That presumption or inference can be rebutted, for example, by permission. Mr Kind advanced this argument in support of his contention that Walna Scar Road was dedicated through use by MPVs between 1917 and 1930 and in support of the proposition that the burden was not on him, as the

applicant, to prove the absence of permission: ie, in the context of Question 2. This was common ground between the parties. The Inspector did not demur from his analysis.

17. The same principles, of course, apply to Question 1. It was accepted by the Inspector that there was cart use of Walna Scar Road prior to 1917: the material issue, at least as far as the Inspector was concerned, was whether such use was as of right or permissive. Although the Inspector persisted in a view that such use was permissive, he made a significant admission in his fact-finding at para.16 of the 15 June 2010 Order Decision:

> *"I accept that there is some evidence that proposals to create new inter-estate roads was [sic] resisted and that there is no evidence that the quarry operators on one estate obtained permission to travel over the land of the neighbouring estate."* (Emphasis added)

18. Such a finding of fact does not admit of evidence or of persuasive evidence to rebut the presumption or inference of dedication of public vehicular rights. In that light, the Inspector erred in law: he should have found that the answer to Question 1 was that public vehicular rights were established prior to any inferred dedication by MPV-use between 1917 and 1930.

19. Further or alternatively, if your position is that the Inspector's finding of fact, quoted at para.17 above, was that there was no *express* permission to travel over the land of the neighbouring estate, but that there was, nevertheless, *implied* permission from the leases, then we submit that the Inspector proceeded on an unreasonable finding of fact. See Ground 9, in relation to para.16 of the Order Decision below. On this alternative basis, the Inspector likewise erred in his answer to Question 1.

Ground 2 - error of fact: speculation as to evidence of greater use by MPVs than demonstrated by the evidence (Question 2)

20. At paras.38-39 of his Interim Order Decision, the Inspector recorded his conclusions, from the evidence then before him, as to the extent of use by MPVs in the period immediately before 1930:

> *"38. It was CTRF's case that use by the public of Walna Scar Road with motorcycles between 1917 and 1930 gave rise to a public right of way for MPVs. Photographic evidence of the use of motorcycles and a sidecar combination on the Order route in 1917 and other photographs of use during the 1920s were submitted, along with references to the organisation by a local motor club of social motorcycle outings over Walna Scar for munitions workers from Kendal during the Great War, and personal recollections of a the use of the whole route as part of a trials event in 1930. Although some of the records suggest that the Order route was used as part of an endurance event in 1913, the credible documentary evidence relating to public MPV use of Walna Scar Road dates from 1917.*
>
> *39. There is clear evidence that the public used Walna Scar Road with MPVs in the period between 1917 and 1930. The evidence put forward is limited in quantity and there is some doubt as to the precise dates on which the photographs were taken; as a result the record is incomplete as to whether use occurred in each of the years between 1917 and 1930, and nothing to demonstrate the frequency of such use. Whilst there is reference in the documents to "social" motoring continuing through the*

1920s, there is no specific reference to the timing of such activities." (Emphasis added)

21. At para.40, he went on to say that he did not agree with the CTRF "that the available evidence demonstrates that use between 1917 and 1930 was regular as the documentary and photographic evidence relates to individual recorded instances of use *and there is no indication of the pattern or frequency of MPV use outside of those recorded events.*" (Emphasis added) So far, so consistent with the evidence.

22. The Inspector, nevertheless, went on at para.40 to "consider the likelihood of these events being wholly isolated and unrelated or whether they can be regarded as evidence of much greater use in the period between 1917 and 1930." His conclusion at para.43 that, "on a balance of probabilities, it is unlikely that the MPV use documented by the photographs and published recollections of local residents was the only MPV use that occurred on Walna Scar Road between 1917 and 1930", was rational.

23. However, it was pure speculation on his part that, "There is a *high likelihood* that local competitors would have used the road for training purposes to give an advantage over others in competitive events. I also consider it likely that and that there would have been some use by motorcycle owners who, having read of the exploits of others in *The Motor Cycle* would have been tempted to ride along Walna Scar Road themselves." (Our emphasis) At para.47, he went on to say that:

> *"As stated above, I consider that it is improbable that public MPV use of Walna Scar Road between 1917 and 1930 was limited to the half-dozen or so occasions demonstrated in the photographic and documentary evidence, and that use was likely to have <u>been much greater and more frequent</u> throughout that period. There exists a period of 13 yeas during which use <u>may have been so open and notorious</u> from which an inference of dedication at common law could be drawn."* (Our emphases underlined.)

24. He concluded that there had been a sufficiency of user from which to draw an inference of common law (see Ground 3 below). These findings were challenged by our client on behalf of GLPG in his 10 January 2010 submissions – at para.52 as to fact and probability, and at paras.53-54 as a matter of law.

25. The Inspector's Order Decision of 15 June 2010 did not address this question, as a matter of evidence of the extent of user by MPVs between 1917 and 1930: ie, paras.38-45 of his Interim Order Decision stand as his findings in this regard.

26. In this exercise in evidential speculation, on the basis of which he reached a conclusion as to there having been inferred dedication, the Inspector acted *ultra vires*: he offended against the "no evidence" rule and/or made an error of material fact, acting, as he did, on an incorrect basis of fact.

Ground 3 - error of law: application of incorrect legal test for common law inferred dedication (Question 2)

27. Linked to Ground 2 and as suggested at E above, the Inspector erred in law when reaching the following conclusion at para.54 of his Interim Order Decision:

> *"In my view, the use of Walna Scar Road by motorcyclists during the 13 years prior to December 1930 was sufficiently open and notorious to raise an inference of dedication at common law of the road as a public carriageway. It seems that once motorcycles which were capable of tackling the surface conditions of the road and its gradients had become available, adventurous men and women took to the road with them. There is no evidence to suggest that the relevant owners took any action to prevent public MPV use from occurring; that is, the evidence when taken as a whole suggests that the owners accepted and acquiesced in such use. I conclude that an inference of dedication of Walna Scar Road as a public carriageway in 1917 can be drawn."*

28. For clarity, the Inspector effectively limited his Order Decision of 15 June 2010 to consideration of new evidence that went to Question 1: ie, no further consideration was given by the Inspector to Question 2 in his 2010 Order Decision and he acknowledges at para.3 of that Order Decision that he had already reached a conclusion on Question 2 in his Interim Order Decision. As to the propriety of this approach, see Ground 8 below.

29. The Inspector's summary of the legal basis of common law dedication was, as set out at para.47 of his Interim Order Decision:

> "*At common law there is no fixed minimum period of user required to raise an inference of dedication. Where use is frequent and notorious, a period of time shorter than the 20-year period required for statutory dedication can suffice, and the more open and notorious the user, the shorter the period of use will be from which an inference of dedication can be drawn. The 13-year period of MPV use prior to 1 December 1930 is insufficient to raise a presumption of dedication under the provisions of section 31 of the Highways Act 1980, but may be sufficient for an inference of dedication of a vehicular right to be drawn at common law*."

30. In this summary and, by implication, elsewhere the Inspector made the following legal errors:

- Principally, in reaching his conclusion he failed to address the necessary degree of continuity of user or, to put it another way, of frequency and regularity of user to raise an inference of dedication. Put simply, he placed the threshold for drawing an inference of dedication too low. (It is worth noting that the full extent of the evidence was summarised by our client on behalf of GLPG at paras.47-54 of his 10 January 2010 submissions.)
- Further, his conclusion was inconsistent with his finding at para.40 of his Interim Order Decision that the available evidence did not demonstrate that use between 1917 and 1930 was regular. Properly applying the law to that finding, no inference of dedication should have been drawn by him.

31. We note that, although he acknowledges their existence at para.33 of his June 2010 Order Decision, the Inspector appears effectively to have ignored significant further analysis and representations on the evidence of user in our client's 10 January 2010 representations on behalf of GLPG. See, in particular, paragraphs 45-73 of that document.

Ground 4 – error of law: public nuisance (Question 2)

32. At paras.52 and 53 of his Interim Order Decision, the Inspector drew attention to CTRF submissions as to the noise made by exhaust systems of early twentieth century motorbikes and came to certain factual conclusions:

> "*52. On this point the CTRF submits that the noise emitted by the exhaust systems on early twentieth century motorcycles would have been a factor in landowners being aware that MPV use was occurring. CTRF submit that early sporting motorcycles had inefficient silencers and the presence of a motorcycle on the open fell would have been apparent to anyone working on the land or otherwise present.*
>
> *53. It seems to me that if modern motorcycles create sufficient disturbance through noise when used in the countryside to cause annoyance and irritation to other users, then it is highly likely that those machines manufactured 90 years ago would have been significantly more intrusive. That being the case any owner, or his agent or occupier who was present in the vicinity of Walna Scar Road when MPVs were travelling along it is likely to have been made aware that such use was taking place. Using the road for competitive events which are likely to have been publicised in advance and, judging from the photographs submitted, attracted spectators on to the fell, is also likely to have brought such events to the attention of the owners; there is no evidence which suggests that measures were taken to prevent the road from being incorporated into those events or to prevent motorcycles from travelling along it.*"

33. Appended to our client's 10 January 2010 submissions was a summary of the law on public nuisance, which quoted extensively from the 2009 edition of "Archbold – Criminal pleading, Evidence and Practice", as well as referring to *Riddall & Trevelyan* on "Rights of Way" and the Inspectorate's consistency guidelines. Our client's submission was, in essence, that, based on the Inspector's 2009 findings in paras.52 and 53 above, user of Walna Scar Road by MPVs in the period 1917 to 1930 constituted a public nuisance; and, as a public nuisance is a criminal offence, such user was not as of right, so as to form the basis of a common law inference of dedication.

34. At para.34 of his June 2010 Order Decision, the Inspector appears to have been de-emphasising his findings quoted at para.53 above as to noise – as to which see Ground 5 below. At para.35 of the June 2010 Order Decision, he directly addressed the issue of nuisance:

> "*35. Mr Plumbe also suggested that motorcycle use would have been threatening to other users such as pedestrians or horseriders, and considered that motorcycle use would have been a nuisance to other users. In those locations where the usable track is narrow or otherwise confined or constrained then such an argument may be of some merit. In the case of Walna Scar Road however, the route is currently a wide and unfenced track where there is sufficient room for users to pass each other without one user being endangered or being put at risk by another. It is also likely that the physical conditions present on the route today are not significantly different to those present immediately after the Great War. I do not consider that non-motorised users of the Order route prior to 1930 would have been put at risk or had their safety threatened by motorcyclists.*"

35. At para.36 of this June 2010 Order Decision, the Inspector dismissed our client's arguments as to public nuisance:

> *"36. There is no evidence that any individual or class of user made complaint about the public's use of motorcycles on Walna Scar Road prior to 1930, whether such use was a result of a competitive event or otherwise, or that other users of the path were inconvenienced or obstructed by such use. Nor is there any evidence that motorcycle use resulted in damage to the surface of the road. On the particular facts of this case and on the limited evidence available to me I conclude that use of Walna Scar Road by motorcycles prior to 1930 did not give rise to a public nuisance."*

36. In so dismissing the arguments as to a public nuisance, the Inspector erred in law: it was not necessary for him to find evidence of any actual complaint of inconvenience or obstruction by a member of the public. Rather, it was material for him to consider whether there was MPV use which would or might have constituted a nuisance to other public users. Any evidence of actual complaint or inconvenience would, of course, have been relevant evidence – but was not a prerequisite of a finding that motorcycle use of Walna Scar Road constituted a public nuisance.

37. Further, the Inspector's conclusion that there was no public nuisance appears perverse in light of his own conclusions at paras.52 and 53 of his Interim Order Decision.

Ground 5 - error of fact: speculation as to other noise in the locality of Walna Scar Road (Question 2)

38. At para.34 of his 15 June 2010 Order Decision, the Inspector entered into the realms of speculation when addressing our client's submission as to public nuisance:

> *"34. In my interim decision I considered that the motor cycles being used in the 1920s were likely to be more intrusive in terms of their noise output in comparison with modern machines, and clearly that would be the case today where the environs of Walna Scar Road are relatively quite and peaceful. Although slate quarrying was in decline in the first part of the twentieth century, there remained an active slate industry which is likely to have contributed a not insignificant amount of industrial noise to the immediate environment of the Order route. In such circumstances, whilst motorcyclists would have drawn attention to themselves, the noise from such machines would have been heard amongst the other industrial noise present in the area."* (Emphasis added)

39. The implication of this assertion of fact is that use of Walna Scar Road with motorcycles would not have constituted a public nuisance.

40. As far as we are aware, there was no evidence of industrial noise before the Inspector, whether from those supporting a modification to a BOAT or from those opposing it, to sustain such a conclusion. Again, the Inspector offended against the "no evidence" rule and/or made an error of material fact, acting, as he did, on an incorrect basis of fact.

Ground 6 – breach of procedural legitimate expectation/fairness: failure to copy Mr Kind's submissions to Order Making Authority and objectors

41. Following the Inspector's Interim Order Decision, the expiry date for representations or objections was 4 September 2009. The expiry date for further Statements of Case was 20 January 2010.

42. Under cover of a letter dated 4 February 2010, Mr Kind, on behalf of the CTRF, submitted a document dated 31 January 2010 and entitled "Rebuttal of Objections" - ie, those of Mrs Mallinson, which the Planning Inspectorate had sent to Mr Kind under cover of a letter dated 26 January 2010. Mr Kind's "Rebuttal of Objections" was not copied to the LDNPA nor to Mrs Mallinson or our client, as objectors.

43. In e-mail correspondence with Mr Kozak and Mr Greenslade of the Planning Inspectorate on 29 and 30 April 2010, Mrs Mallinson sought to establish whether Mr Kind had submitted such a document under cover of a letter between 26 January and 10 February 2010. Mr Kozak's response of 30 April 2010 indicates that, "The Walna Scar file has been checked, and no other correspondence from Mr Kind between those dates appears to be on file". On reading the Inspector's Order Decision of 15 June 2010, it became clear to Mrs Mallinson that there had been such a letter from Mr Kind and an enclosure. Before continuing further, we suggest that you read Mrs Mallinson's 21 June 2010 letter of complaint to the Quality Assurance Unit of the Planning Inspectorate, at Annex 8, together with Bob Palmer of the Quality Assurance Unit's similar letters to her and to our client of 9 July 2010.

44. In Mr Palmer's 9 July 2010 letters, he confirms that it was the Inspectorate's intention to send Mrs Mallinson and our client copies of all comments, including Mr Kind's submission of 4 February 2010. However, "it has now become clear that Mr Kind's submission of 4 February 2010 was accidentally not copied to any of the parties. Please accept my sincere apologies for this administrative oversight and that it was not spotted when you raised concerns with the Rights of Way team."

45. This admission of an administrative oversight and apology should be viewed against the following factual and legal background:

45.1 As Mrs Mallinson records in her 21 June 2010 letter, the comments of other parties were copied to her on 25 March 2010; likewise, to our client. She, like our client, would have replied to Mr Kind's submissions, had she had sight of them (see below).

45.2 Our client, like Mrs Mallinson, had a procedural legitimate expectation that Mr Kind's submissions would be copied to him. This expectation derives not only from the fact that all other such comments were copied to him, but also from the Guidance, Annex B, in particular at para.5.2:

> ***"5. Commenting on statements of case***
> *5.1 The authority, the applicant and relevant persons shall ensure that within 14 weeks of the start date, the Secretary of State has received their comments on any or every other statement of case.*
> *5.2 As soon as practicable after receipt, the Secretary of State shall send a copy of these comments to the authority, the applicant and relevant persons."*

45.3 As to want of fairness, it is not enough for the Planning Inspectorate to say, by reference to para.2.7 of the Guidance, that, "Usually, there are no further exchanges of comments. If we need to, we ask the local authority, the applicant, relevant persons and anyone else who has made comments for further information about their statements or their comments. *However, from our experience, further exchanges do not usually add to the case for or against an order*." (Our emphasis) The Guidance does not preclude such further exchanges and this is an occasion on which further submissions would or might well have added to the case for or against an order (see below). Moreover, the usual forensic approach to rebuttal evidence, to guarantee fairness, is to allow a right of reply. By administrative oversight, our client was denied that right or opportunity reply.

45.4 Further or alternatively, it is always open to a party to complain that a representation is flawed legally, has disregarded plain evidence or seeks to mislead an Inspector. If the difficulty still remains, the disadvantaged party can apply to exercise the statutory right to be heard, which is afforded by Schedule 15, para. 8(2)(b) WCA 1981. As you will recall, para.2.8 of the Guidance provides that:

> *"We can change the procedure to decide an order at any time before the decision is issued. The other options are a hearing or an inquiry. If the local authority, the applicant or a relevant person thinks that the written representations procedure is no longer appropriate, they should let us know, with reasons why we should change the procedure. If, having consulted any other involved party we come to the view that the written procedure is not suitable, we will arrange for a hearing or inquiry to be held instead."*

45.5 Here, not only was our client denied a right or an opportunity to reply, but also an opportunity to seek to be heard.

46. In consequence, our client's position, together with that of Mrs Mallinson, has been severely prejudiced: our client was unable to reply to the document by submitting comments to the Inspectorate. We note that the Inspector relied heavily in his June 2010 Order Decision on Mr Kind's "Rebuttal" document: he adopted the legal proposition contained in para.1 of Mr Kind's document, which we believe to have been incorrect, and refers to its text at paras. 6, 11 (twice), 12, 13, 20 and 22.

47. In case there is any doubt as to prejudice, we enclose a short document outlining the points that our client would have made, had he known of the existence of Mr Kind's Rebuttal document and had he had sight of its contents.

Ground 7 – fairness: lack of reasons for decision

48. Whilst it is trite that there is no general requirement of reasons for public law decision-making, this is a situation where fairness obviously requires a reasoned decision: the Order Decision is akin to the judgment of a Court in that it is a reasoned document, canvassing the evidence and factual and legal submissions before the Inspector and recording his conclusions on them. It is equally trite here that our client does not criticise the Inspector for an Order Decision wholly unsupported by reasons.

49. Rather, we draw to your attention the following matters which were before the Inspector, but which, from the contents of his Order Decision of 15 June 2010, he appears not to have engaged with fully or at all:

- The need for MPV rights to be proved over the entire route (see paras.6-8 of our client's 10 January 2010 representations).
- Previous inquiries under the Countryside Act 1968 (see para.31 of our client's 10 January 2010 representations).
- Mixed use of Walna Scar Road – ie, going to the question whether dedication between 1917 and 1930 was not due alone to user as of right by MPVs, in which case s.67(2)(e) could not engage (see para.73 of our client's 10 January 2010 representations).

50. Fairness demands that, if, as we infer, the Inspector considered those issues and the submissions on them as immaterial or irrelevant to his decision-making, he should say so and why. He has not done so.

Ground 8 – error of law/fairness: Inspector unlawfully limiting scope of further submissions

51. At para.4 of his 15 June 2010 Order Decision, the Inspector indicated that, "The main issue from the objections to my proposed modifications is whether any new evidence has been discovered that Walna Scar Road was a public carriageway prior to 1917." Ie, he would be addressing Question 1, not Question 2. This echoes para.1 of Mr Kind's Rebuttal submissions, but was, in our view, an unnecessarily restrictive approach, which was wrong in law. Again, through the failure to publish Mr Kind's Rebuttal document to him, our client was not afforded an opportunity to make representations on this point.

52. In its terms, Schedule 15, para.8(2) WCA 1981 allows for the proposed modification of the Order to be subjected to representations and objections and, if they are not withdrawn, to be tested before an inquiry or hearing – or, in practice, by written representations. The Inspector must consider those representations and objections with an open mind and it is, of course, trite that the proposed modifications to the Order are not irrevocable. Notwithstanding the Inspector's attempts to limit the scope of the exercise, it appears to us that submissions relating to Question 2, such as our client's representations on public nuisance, also fell to be considered by him: they related directly to the proposal to modify the DMMO to record a BOAT.

53. Further or alternatively, we note that the Guidance provides at para.7.9 that:

> *"If we receive representations or objections to the proposed modifications, we may arrange a hearing, inquiry or exchange of written representations. Where a hearing or inquiry is held, the Inspector will only be able to consider new evidence which relates to their proposed modifications. <u>The Inspector cannot re-consider evidence which has already been heard or presented</u>, nor can he/she consider evidence which is not related to the proposed modifications (see paragraphs 7.14 and 8.4 below)."* (Emphasis added)

54. The passage emphasised appears to underpin the Inspector's approach and Mr Kind's submissions. In the Guidance, there is a footnote explaining that:

> *"The procedures for dealing with representations and objections following the advertisement of proposed modifications are based on the principles established in the High Court judgment Marriott v Secretary of State for the Environment, Transport and the Regions (2000). More information on this judgment can be found in Rights of*

Way Advice Note 10 which is available on the Inspectorate's website."

55. The judgment in that case, in fact, makes no such limitation. Although the theme of the judgment was whether unmodified parts of a DMMO could be considered in tandem with objections to modifications, the matter of revisiting previous evidence was canvassed at paras.99-105: at para.101, it was made clear that, "Some re-presentation of evidence previously considered was inevitable" and, at para.102, that "there was no reason why the claimant should not have been able to submit that conclusions in the 1998 decision letter were erroneous in law".

56. Moreover, although Rights of Way Advice Note 10 specifies that new evidence must relate to the proposed modification, nowhere does it say that representations must be confined to new evidence. Indeed, para.9 suggests the opposite: "At each type of inquiry, an Inspector was obliged to consider any relevant evidence unconstrained by the terms of the objection or representations which triggered the need for the inquiry."

57. In short, the Inspector misdirected himself by limiting the scope of the exercise of considering representations as to the proposed modifications. If your response is to place emphasis on "the *main* issue", implying that Question 1 was not the *only* issue that was considered, then it is instructive to note that, apart from four paragraphs limited to the issue of noise (paras.33-36), the Inspector at para.32 of his 15 June 2010 Order Decision dealt with our client's extensive further submission in just a single sentence, noting that, "No new evidence was submitted by the Green Lanes Protection Group." In fact, this demonstrates an obvious failure to engage with our client's further submission, which contained a substantial quantity of new evidence, as well as new analysis.

Ground 9 – *Wednesbury* unreasonableness: various

General

58. A number of the Inspector's factual conclusions appear to us to be unreasonable, in the sense that they are logically contrary to the evidence before him.

Order Decision, para.15

59. In para.15 of his Order Decision, the Inspector characterises Mr Cameron's 5 November 2009 Statement as simply "reiterating the pattern of transportation of slate from the quarries". However, in his statement Mr Cameron, a very experienced local historian, not only corrected the evidence given in the first inquiry as to use of the pass itself (para.6 of that statement re Goldscope and Walna Scar quarries), he also gave significant further evidence as to:

- The pattern of use confirming that quarry traffic crossed land which on the evidence was known to have been in different ownership (para.6).
- The manner of transport (para.7).
- Cart use (para.8).
- Public rights (paras.11 and 12).

Order Decision, para.16

60. It is common ground that there was extensive cart use historically and the central issue between the parties was whether such use was private. See:

- Mr Kind's Rebuttal submission of 16 April 2009, para.11 and 12.

- Mr Kind's Rebuttal submission of 26 January 2010, para.2.
- Our client's submission of 10 January 2010, at paras.2-21.
- Mrs Mallinson's submission of 16 January 2010, at paras.16-23.
- Mr Cameron's Statement of 5 November 2009, at paras.11-12.

61. At para.16 of his Order Decision, the Inspector notes that:

> "*In paragraph 35 of the interim decision, I concluded that as the quarry workings and that section of road used to transport the slate were in the same ownership, it was likely that the quarry operators would have taken their access by some form of permission. I accept that there is some evidence that proposals to create new inter-estate roads was resisted and that there is no evidence that the quarry operators on one estate obtained permission to travel over the land of the neighbouring estate. However, the evidence submitted remains that slate quarried on one estate was transported over tracks within that estate as noted in paragraph 32 of the interim decision."*

62. Quite apart from the evidence of resistance to new inter-estate roads being a small part of the evidential picture as a whole, this position appears to be unsustainable in light of the further evidence that quarry traffic ran over land that was in different ownerships. See:

- Our client's submission of 10 January 2010, at paras.12-21.
- Mrs Mallinson's submission of 16 January 2010, at paras.16-23.
- Mr Cameron's Statement of 5 November 2009, at para.6.

63. In particular, at para.13 of his 10 January 2010 submission, our client drew to the Inspector's attention that:

> "*If W[alna]S[car]R[oad] was private, then every quarry operator would have had to obtain express consent in perpetuity (leases were commonly for 14 years or more) from all owners over whose land it might have to travel before it could enter into a legal commitment to carry out quarrying and pay rent/royalties. If it did not, it could be partly or wholly landlocked. If there was a risk that such consent might be limited in duration, it could be prevented from renewing its lease, entailing loss of investment"*.

64. Moreover, our client added at para.16:

> *"The fact that permissive access as a proposition is almost inconceivable is underlined by the fact of four separate landowners on WSR alone, the number of quarries involved* [6 groups were identified by Mr Cameron]*, the number of different operators, the various dates of operation and the number of different carriage route."*

65. Against the background of this further evidence, it was not reasonable (in the *Wednesbury* sense) for the Inspector to say at para.16 that "evidence submitted remains that slate quarried on one estate was transported over tracks within that estate as noted in paragraph 32 of the interim decision".

66. This issue of fact, of course, combines with Ground 1. In light of the Inspector's Interim Order Decision to upgrade the bridleway to a BOAT, the onus was on those

contending for a BOAT to prove permissive use by quarry operators prior to 1917: ie, consistent with their case that MPV dedication from 1917 to 1930 was effective and engaged s.67(2)(e) NERCA 2006. The onus was not, in fact, for our client to prove that Walna Scar Road had been used as a public carriageway prior to 1917. However, the Inspector not only appears to have disregarded weighty new evidence without apparently engaging with it, but also to have omitted to engage with the shift in the onus of proof.

Order Decision, para.17

67. At para.17, the Inspector found that, "Contrary to the suggestion that there is no reference in the quarrying records of an express permission to use Walna Scar Road, the leases referred to appear to provide such permission." Again, this appears to us to be misconceived and illogical.

68. There is no dispute that there was consent within leases to use roads within the land demised by those particular leases. The point at issue is whether quarry operators had permission from <u>other</u> landowners to use Walna Scar Road in respect of parts of that road which the quarry operators neither owned nor leased. From the last sentence of para.30 of his 15 June 2010 Order Decision, the Inspector appears not to have been alive to that distinction, despite it being pointed out at para.35 of our client's 10 January 2010 submissions.

Order Decision, para.25

69. At para.25, the Inspector dismissed Mrs Mallinson's submissions as to a December 1894 Minute among the highway maintenance records that she had examined. The Minute referred to a complaint about the "bad state" of Walna Scar Road by a representative of one of the quarrying companies and that the High Furness Highway Board noted that the complaint was asked "to contribute towards the maintenance on the grounds that it was extraordinary traffic". So, at para.25, the Inspector wrote:

> *"Generally speaking, "extraordinary traffic" is that which is over and above the type of traffic for which the highway authority has to maintain a way and which has a negative impact upon the public's ability to use the way. From the little that is known regarding this complaint, the "extraordinary traffic" referred to in the 1894 minute which damaged the road <u>is likely to have been quarry cart traffic, which suggests that wheeled traffic along Walna Scar Road was not considered to be the norm</u>. In my view, the minute supports the remainder of the evidence that suggests that the public did not use the road with vehicles prior to the early part of the twentieth century."* (Emphasis added)

70. The Inspector here appears to be drawing the distinction, again, between quarry use and any public use, which we have criticised above. Moreover, he appears not to have addressed his mind to the central points: that the complaint came from the quarry manager himself; that there was a public liability to repair and a request for contribution; and that, together, these strongly indicated that public vehicular rights *per se* were not in question. The Inspector also had before him evidence from Mr Cameron, which suggested that damage may have been due to the *nature* of the traffic: the use of sledges dragged behind carts.

Order Decision, paras.28 and 29

71. In his 2009 Interim Order Decision, the Inspector considered Finance Act 1910 evidence very briefly as the evidence before him was scant, concluding that, "No claim was made for a reduction in site value due to the existence of a right of way". (See para.18 of the

Interim Order Decision.) He went on to mention a short section at one end wholly enclosed within private ownership which in his view was "not usually considered to be indicative of the existence of a public carriageway".

72. Mrs Mallinson, in response, produced complete Finance Act 1910 records with her 16 January 2010 submission, showing (i) that the majority of the route was covered by 6" maps which embrace public roads, including main roads, without distinguishing between them and private landholdings and (ii) that the larger maps used at the urban eastern end, combined with highway authority records, supported public vehicular status. Our client, at paras.76 - 79 of his 10 January 2010 submissions, carefully analysed the import of the Finance Act 1910 evidence and in particular as to why mention of "occupation road" in respect of one plot (relied on by the Inspector at para. 29) was very likely to have been wrong.

73. From the contents of paras.28-29, the Inspector appears simply not to have addressed his mind to these submissions.

G. Remedy

74. If our client requires to pursue his appeal under Schedule 15, para.12 to the Administrative Court, he will seek:

74.1 An Order quashing the DMMO as modified by the Inspector. (There is no separate power simply to quash the Order Decision.)

74.2 Declaratory relief as to the Inspector's errors in law and fact, in particular relating to common law inferred dedication; to public nuisance; and to the scope of further submissions pursuant to Schedule 15, para.8 and the Inspectorate's Guidance.

74.3 Costs.

75. To avoid the cost of proceedings, we invite you in your response to this letter to agree to the quashing of the DMMO – subject, of course, to the satisfaction of the Court as to reasons. We confirm that we are, in those circumstances, instructed to liaise with you in the production of a draft Order and a Statement of Matters justifying the making of that Order. In those circumstances, we will, of course, seek our client's costs on the standard basis.

H. Reply

76. Given that the limitation period for making an appeal under Schedule 15, para.12 WCA 1981 is only 42 days from the date of the notice given under Schedule 15, para.11, we invite your response by 4:30pm on 27 July 2010. The normal timeframe for response to a letter of claim under the Judicial Review Pre-action Protocol is 14 days. Given that a claimant has three months, rather than six weeks, within which to commence judicial review proceedings, the request for a response by 27 July 2010 is reasonable.

77. We put you on notice that we propose on 28 July 2010 to instruct Counsel to settle proceedings. This notice is intended to enable you to concede the claim promptly without incurring any additional adverse liability to pay our client's Counsel's costs.

78. When you respond, we invite your confirmation that you concur with our calculation that the latest date on which proceedings can be issued is 12 August 2010.

I. Nature of client retainer

79. Please note that we are instructed pursuant to a Conditional Fee Agreement, which, in the usual way, incorporates an uplift/success fee if our client succeeds in this matter.

80. Please acknowledge receipt by return and please identify the lawyer who will have the conduct of this matter on your behalf.

Yours faithfully