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12 June 2009

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**Re: Reissued Advice Note 15.**

I see that, consequent upon my previous correspondence with your 'Quality Assurance' section, Advice Note 15 has been rewritten. With respect, I think that it still misses the point and is wrong (or at least not quite right) as a consequence.

The key issue here is 'interruption' to a period of qualifying use for a claim under s.31(1) of the Highways Act. The issue of 'requisitioning of land' (paragraph 4) is a different issue altogether: one that goes to the question of 'capacity to dedicate', and in this context is a red herring.

S.31(1) states: "Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

So, before the issue of a 'bringing into question' arises, the Act requires that there is 'actual use by the public' (i.e. the public were using the way), 'without interruption for a full period of 20 years.' 'Without interruption' means that the years of the 20-year period must be contiguous – you could not have, e.g., a period of thirteen years, then a break of two years, followed by further use for seven years, to accrue twenty years. This rule arises elsewhere in law, e.g. the acquisition of easements, and the proof of a 'lawful use' in planning, and seems to me to be a well-settled point.

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What the Act does not require is 'actual use by the public, 24/7/12' for twenty years.' In a twenty-year period, use can be patchy to a degree. As a reasonably typical example, in one year of twenty, there may only be evidence of half a dozen 'actual uses' of the way, with more use in the bracketing years, but this 'lean year' is sufficient to keep continuity of actual use throughout the period.

Paragraph 8 is, I think, close to correct (and is the 'key' to this issue), but the final paragraph alluding to 'several months' of non-use is not expressed correctly. I cannot find any authority to say that a break of 'several months' is not a fatal interruption. Can you please point me to the authority on which you base your view?

If this paragraph said, *'use of a way by the public is often intermittent and variable in quantity through the claimed period of use. What period of non use of a way amounts to an interruption in the essential 20-year period is a question of fact and degree for the Inspector in any case'*, then that would be both true and helpful. In specifying "several months" you need to be able to say how and why you make this specification.

Paragraph 9 is where the hard error arises. A temporary cessation of use due to F&MD is an interruption in the 20-year period if people stop using the way. The fact that the interruption is due to a F&MD notice or order is not material to the bite of the cessation on s.31(1) user. The crucial issue is the *duration* of the interruption. If an interruption (not being a bringing into question) is of short duration, then your paragraph 8 (within the caveats above) already correctly states that this might not be fatal to a s.31(1) case. If the interruption is of a long(er) duration, then again, per your paragraph 8 (particularly with my suggested amendment) this is a question of fact for the Inspector.

Whatever changes might be needed for paragraph 8, paragraph 9 is wrong and misleading as a consequence.

And, as a supplementary on a slightly different slant, in the facts of a typical F&MD area restriction, it is the ministry that makes the control order, but the landowner or occupier that blocks the ways/gaps, and puts up the 'keep out' signs, which are intended for, and visible to, the public. So … on the facts, surely such an action amounts, or could amount, to a 'bringing into question' for s.31(2)?

Yours sincerely,