

## SECTION 4 WILDLIFE AND COUNTRYSIDE ACT 1981 AND THE DEFINITIVE MAP AND STATEMENT

### REFERENCE MATERIAL

#### Statutes and Regulations

National Parks and Access to the Countryside Act 1949

Countryside Act 1968

Highways Act 1980, section 31 (HA 80)

Wildlife and Countryside Act 1981, sections 53, 54 and 66 and Schedules 14 and 15 (WCA 81)

SI 1993 No.12 – The Wildlife and Countryside (Definitive Map and Statement) Regulations 1993

Countryside and Rights of Way Act 2000, sections 47, 48 and 49 (CROW)

Natural Environment and Rural Communities Act 2006, sections 66, 67 and 71 (NERC)

#### Case Law

*Canon v Villars* [1878] 8 ChD 415 – private easements

*Eyre v New Forest Highway Board* (1892) 56 JP 517 – meaning of ‘highway’ at common law, culs-de-sac, dedication and maintenance

*R v SSE ex parte Kent County Council* CO/2605/93 – not appropriate to use s53(3)(c)(iii) to delete a way which is known to exist but the line is uncertain

*R v Isle of Wight ex parte O’Keefe* [1989] JPEL 934– s53 and s54 ‘interpreted’ and OMA’s pre-Order making responsibilities (“O’Keefe 1”)

*O’Keefe v SSE and Isle of Wight Council (QBD)* (1994) [1996] JPEL 42 (“O’Keefe 2”)

*O’Keefe v SSE and Isle of Wight Council (CA)* (1997) EWCA Civ 2219, [1998] JPEL 468 (“O’Keefe 3”)

*R v SSE ex parte Riley* (1989) 59 P & CR 1 – reclassification to bridleway and extinguishment of vehicular rights

*R v SSE ex parte Burrows and Simms* [1990] 3 All ER 490 [1991] 2 QB 354 – status of Definitive Map and modification thereof through ‘discovery’ of evidence

*Fowler v SSE and Devon County Council* [1992] JPEL 742 – recording at a particular status on the DMS does not mean that higher rights could not exist.

*Mayhew v SSE [1992] 65 P & CR 344* – status of Definitive Map and modification thereof through 'discovery' of evidence, suitability and traffic regulation orders

*Lasham Parish Meeting v Hampshire County Council and SSE [1993] JPEL 841* – duly made objections and 'relevance'

*R v SSE ex parte Bagshaw and Norton [1994] 68 P & CR 402* – Schedule 14 appeals - 'subsists or is reasonably alleged to subsist'

*R v SSW ex parte Emery (CA) [1998] 4 All ER 367* – continuation of the *Bagshaw* debate

*R v Oxfordshire CC ex parte Sunningwell PC [1999] 3 All ER 385* – belief element of 'as of right'.

*Masters v SSETR [2000] 4 All ER 458 (CA)* – statutory definition of BOAT

*Trevelyan v Secretary Of State For Environment, Transport & Regions [2001] EWCA Civ 266* – cogent evidence needed to modify definitive map and statement

*Leicestershire County Council v SSEFRA CO/4566/2002* – continuation of the *Bagshaw* debate and the test to be applied at the confirmation stage; presumption against change

*Todd and another v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 1450* - burden of proof 'on the balance of probabilities'. With reference to *Norton and Bagshaw* the decision at Schedule 15 is whether the route subsists. No significantly different view on interpretation or reference to new evidence without an opportunity to comment.

*Burrows v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 132 (Admin)* – 'discovery of evidence'; there must be some new evidence, which, when considered together with all the other evidence available, justifies modification of the Definitive Map and Statement.

*Norfolk County Council, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs [2005] EWHC 119 (Admin)* - under section 56, the definitive map is the primary document; if the statement cannot be reconciled to it then the position shown on the map prevails and a degree of tolerance is permissible. Neither the map nor statement is conclusive at review stage; there is no evidential presumption in favour of the map.

*Winchester College, Warden & Fellows Of & Anor R (on the application of) v Food & Rural Affairs [2007] EWHC 2786 (Admin)* – for an exception to apply under NERC in relation to an application to record a BOAT the application must comply with the requirements of Paragraph 1 to Schedule 14 of WCA 81.

**Circulars and other Departmental Guidance (available from Government bookshops or on-line)**

Defra Rights of Way Circular 1/09:

<https://www.gov.uk/government/publications/rights-of-way-circular-1-09>

General information on rights of way available at:

<https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs>

[www.nationalarchives.gov.uk](http://www.nationalarchives.gov.uk)

Welsh Office (WO) Circular 5/93: Public Rights of Way\*

WO Circular 45/90: Modifications to the Definitive Map: Wildlife and Countryside Act 1981\*

Ministry of Town and Country Planning Circular No.81 1950 covering the *Surveys and Maps of Public Rights of Way* produced by the Commons, Open Spaces and Footpaths Preservation Society in association with the Ramblers' Association (the Memorandum)

Ministry of Town and Country Planning Circular No. 91 1950 covering guidance to surveying authorities on action to be taken following completion of surveys

Ministry of Town and Country Planning Circular No. 53 1952 - Procedural guidance to surveying authorities on DMS preparation procedures

Ministry of Town and Country Planning Circular No. 58 1953 – Further procedural guidance to surveying authorities on DMS preparation procedures

## **Planning Inspectorate Guidance**

*Guidance booklet on Procedures for Considering Objections to Definitive Map and Public Path Orders:*

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance>

Planning Inspectorate Advice Notes:

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/advicenotes>

## **Other Publications**

'A guide to definitive maps and changes to public rights of way' - Countryside Agency, May 2003;

<http://publications.naturalengland.org.uk/publication/31038>

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association) – Section 4 in particular – and the on-line resource;

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\* applicable only to cases in Wales

Blue Book Extra; <http://www.ramblers.co.uk/rightsofwaybook/bbe>

‘Public Rights of Way and Access to Land’ by Angela Sydenham – Chapter 5 in particular

Articles in Section 8 (Recording of Highways) of the Rights of Way Law Review.

## GUIDANCE

### Introduction

- 4.1 Over the years, statutes on rights of way matters have frequently inter-related. Sections 53 and 54 WCA 81 and section 31 HA 80 do so today in relation to Definitive Map Orders. Guidance on the revision of the Definitive Map for England is in Circular 1/09, particularly section 4, and, for Wales, Annex B, WO Circular 5/93.

### Case Law

- 4.2 There are many judgments dealing with the interpretation of these statutes, most of which build on former judgments. The judgments in *R v SSE ex parte Burrows and Simms* (1990) and *R v Isle of Wight ex parte O'Keefe* (1994) provide an overview of the legislation.
- 4.3 The *Burrows and Simms* judgments can be read in conjunction with WO Circular 45/90, which succinctly deals with the reversal of the judgement in *Rubenstein*<sup>1</sup>. The Circular, however, does not mention two significant aspects of the judgment, namely confirmation that s53(c)(ii) permits both upgrading and downgrading of highways and that s53(3)(c)(iii) permits deletions from the Definitive Map.
- 4.4 *Mayhew* confirms that the discovery of evidence under S53(3)(c) does not have to be the discovery of fresh evidence. It held that the meaning of "to discover" is to find out or become aware. This implies a mental process of the discoverer applying their mind to something previously unknown to them.
- 4.5 *Lasham* amplifies the legal justification for the fact that Inspectors are not empowered to take amenity issues into account in determining definitive map orders.
- 4.6 *Bagshaw and Norton* arises from a Schedule 14 appeal. It addresses the 'subsists or is reasonably alleged to subsist' issue. The gist of the judgment is that the statutory test comprises two separate questions, one of which must be answered in the affirmative before an Order is made. The two questions are (1) whether a right of way subsists or (2) whether a right of way is reasonably alleged to subsist. The *Emery* judgment provides further clarification on the "reasonably alleged to exist" question at the Schedule 14 stage.
- 4.7 In the *Todd and another* judgment, Evans-Lombe J made it clear that only the first question is applicable at the Schedule 15 stage. He concluded that the confirming authority (whether the local authority confirming an unopposed order or the Secretary of State confirming an opposed order) must be satisfied on the balance of probabilities that the right of way subsists. This means that when considering the confirmation of an order, Inspectors are only able to consider whether on the balance of probabilities the right of way subsists.

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<sup>1</sup> Rubenstein v SSE [1989]

- 4.8 An article in Section 8 of the RWLR entitled 'ex parte Bagshaw ex parte Norton' addresses the question of whether an Order based on presumed dedication should be made under s53(3)(b) or s53(3)(c)(i). Normally this would only be of concern when considering whether an Order is properly made. However, by inference the *Bagshaw* judgment appears to accept that either sub-clause is an acceptable vehicle in these circumstances. Pill J in *O'Keefe No.2* appears to agree.
- 4.9 The *O'Keefe* judgments result from what was, in effect, an assault upon the legality of the Definitive Map process in general and sections 53 and 54 of WCA 81 in particular. They provide sound guidance on a range of issues, but comment on 'as of right' has been overtaken by *Sunningwell*. They also remind OMAs that they should make their own assessment of the evidence and not accept unquestioningly what their officers place before them.
- 4.10 The conclusion reached in the *Masters* appeal resolves previous uncertainty about the meaning of s66 (1) WCA 81 in respect of BOAT (see also Section 5 'Dedication'). It supersedes the *Nettlecombe*, original *Masters* and *Buckland and Capel* judgments on the matter.
- 4.11 In relation to BOATs the effect of NERC is to extinguish vehicular rights of way on commencement – 2 May 2006 for England and 11 May 2006 for Wales – subject to certain exceptions, including the date of application and the date of determination by the surveying authority. *Winchester* found that for such exceptions to be relevant the application must fully comply with the requirements of Paragraph 1 of Schedule 14 to WCA 81. It is appropriate firstly to determine whether or not the vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway.
- 4.12 There are many other judgments on matters which now fall within the scope of WCA 81. For the most part, the referenced judgments contain relevant extracts from these former leading cases (see Section 3 'Case Law').

## **RWLR Articles**

- 4.13 Many of the judgments have formed the background to articles in the RWLR. These articles are generally a reduction of the judgments to a form more readily understandable by the public at large.
- 4.14 Other RWLR articles cover various aspects of the Definitive Map itself. Largely, they address pre-inquiry matters, with emphasis on the OMA's order making role and responsibilities. Where they do include comment which affects the interpretation of case law or evidential values, it is important to note the date of the articles. Some of the articles advance opinions which have subsequently been discounted or overturned by the Courts.

## **The Definitive Map**

- 4.15 The Definitive Map and Statement are conclusive as to the status of the highways described, generally without prejudice to the possible existence of higher rights (defra Circular 1/09, WO Circular 5/93). This conclusivity is not, however, a permanent feature: as Lord Diplock put it in *Suffolk CC v Mason*

(1979) *The entry on the definitive map does not necessarily remain conclusive evidence forever*. It had been held, in the case of *Rubinstein v Secretary of State for the Environment* (1989), that once a right of way was shown on a definitive map, it could not be deleted, but the judgments in *Simms & Burrows* 1981 made it clear that s53 of WCA 81 allowed both for the addition or upgrading of rights of way on the discovery of new relevant evidence, and for their downgrading or deletion. In his judgment Purchas LJ stated that 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*. Parliament's purpose, expressed in WCA 81, he said, included the 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*.

- 4.16 Parish/community councils usually provided the information regarding the routes to be added to the Definitive Map and Statement and the status of those routes. It is not uncommon for witnesses (e.g. local inhabitants, parish/community councils or user organisations) to assert that the parish/community council's inputs to the Definitive Map process are not reliable. It is variously argued that they did not have the proper guidance, or that they misinterpreted it, and these assertions then form the basis of the case for the modification. The Memorandum attached to Circular No.81 was distributed down to parish council / parish meeting level and the legal 'presumption of regularity' applies. Unless claimants can demonstrate otherwise, it should be assumed that a parish/community council received this detailed guidance and complied with it. The diligence with which a parish/community council met the remit is a different question. The Council minutes can be a useful source of information on this procedure, and other local highway issues which have arisen since the relevant date. As the minutes are a public record of the perception of the parish/ community council at that time, and therefore probably also represent the perception of parishioners, they may carry significant evidential weight. Other procedural guidance was issued to surveying authorities in Circulars 91/1950, 53/1952 and 58/1953.
- 4.17 In *Burrows v Secretary of State for Environment, Food and Rural Affairs* [2004] the judge commented that modification of the definitive map requires the discovery of evidence. An inquiry cannot simply re-examine evidence considered when the way or ways in question were first entered on the Definitive Map; there must be some new evidence, which, when considered together with all the other evidence available, justifies the modification.

#### *Deletion and downgrading*

- 4.18 When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider

it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See Section 4 of Circular 1/09 and paragraphs 4 and 7 of WO Circular 45/90.

- 4.19 *Trevelyan* confirms that cogent evidence is needed before the Definitive Map and Statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of *Trevelyan* that:

*"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which 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 that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

- 4.20 In the *Leicestershire* case the Inspector refused to confirm an order which sought to modify the definitive map and statement to show a path which was shown on the map as running through the curtilage of one cottage, as running through the curtilage of another. Collins J held that in these circumstances, *"it is not possible to look at (i) [s53(3)(c)(i)] and (iii) [s53(3)(c)(iii)] in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed"* He went on *"If [the Inspector] is in doubt and is not persuaded that there is sufficient 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 the interests of everyone that the map is to be treated as definitive.....where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around"*.

- 4.21 Another case relevant to deletions is *Kent*. The Inspector refused to confirm an order under S53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position but not existence was in dispute. In upholding the decision, the judge stated that *it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind*

*mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt.*

- 4.22 The correct way to remove from the definitive map rights whose existence was not in doubt would have been to extinguish (or divert) them under the Highways Act 1980. As the judge continued: *one would expect to look elsewhere [than s53(3)(c)(iii)] for statutory provisions which were concerned with the question whether or not an established right of way (but not its route) should continue to exist.*
- 4.23 Previous guidance has indicated that, in the case of a way that had been incorrectly shown on the definitive map, a case for dedication could be established on the basis of use in the period between the first recording of the way and its subsequent removal. The current view of Defra (as stated in Circular 1/09 version 2) is that it is not possible for a right of way to be dedicated for the purposes of section 31 of HA 80 when use is by virtue of it already being shown on the definitive map; use in such circumstances cannot be 'as of right' as rights that cannot be prevented cannot be acquired.