



TRAINING NOTES SECTION 5

March 2016

WILDLIFE & COUNTRYSIDE ACT CASEWORK

BACKGROUND INFORMATION

Types of Right of Way

5.1 There are four types of right of way:-

- Footpath - a way allowing people to pass and re-pass on foot with "normal accompaniments" (dogs, pushchairs, prams and wheelchairs but not bicycles, whether pushed or ridden).
- Bridleway - which carries all the rights of a footpath, plus the right to ride or lead (but not drive) a horse. A bicycle may be ridden on a bridleway, subject to any order or byelaw restricting this right, provided that cyclists give way to walkers and horse riders.
- Byways open to all traffic (BOATs) carry a right for vehicular and all other kinds of traffic, but which is used by the public mainly as a footpath or bridleway
- Restricted byway – a right of way for the public with non-mechanically propelled vehicles which includes use on foot, horseback or leading a horse.

5.2 The right of way known as a road used as a public path no longer exists and as a consequence of Section 47 of the Countryside and Rights of Way Act 2000 all ways shown as such, at the commencement of that section, are now recorded as restricted byways; the term road used as a public path shall not be used.

DEFINITIVE MAP MODIFICATION ORDERS

Legislative Background

5.3 Part III of the Wildlife and Countryside Act 1981 sets out the provisions for recording public rights of way on definitive maps prepared by surveying

authorities (mostly county councils or unitary authorities). The 1981 Act is the successor to the Rights of Way Act 1932, the National Parks and Access to the Countryside Act 1949 (which first established "definitive maps") and the Countryside Act 1968.

Definitive Maps and Statements

- 5.4 The phrase "definitive map" is often taken to mean not only the map, but also the "definitive statement" that should accompany it. Statements give a textual description clarifying the map and may include particulars relating to the position and width of rights of way and limitations or conditions affecting the public's rights (see Advice Note 5 on status of statement).

The Wildlife and Countryside Act 1981

- 5.5 A full explanation of the intended effects and working of Part III of the Wildlife and Countryside Act 1981 is given in Defra's Rights of Way Circular 1/09 (version 2, October 2009). The main provisions can be summarised as follows: -

Section 53

- 5.6 Section 53(2) puts surveying authorities under a duty to keep their definitive maps under continuous review and to make modifications following certain events. These events are:
- The coming into operation of any enactment or instrument (known as "legal event orders") stopping up, altering, removing or creating a highway (see section 53(3)(a));
 - Presumed dedication of a right of way through public use for a period of time (section 53(3)(b) - see also section 31 of the Highways Act 1980);
 - The discovery by the surveying authority of evidence which, when considered with all other evidence, shows that a right of way should be added to the map, deleted from it, or its record on the map or statement should be otherwise amended (section 53(3)(c)).
- 5.7 Section 53(5) permits any person to apply to a surveying authority for a definitive map modification order (DMMO) if they believe they have evidence to show presumed dedication of a right of way, or that addition, deletion or amendment of a right of way is required.

Section 54

- 5.8 Section 47 of the Countryside and Rights of Way Act 2000 repeals section 54 of the Wildlife and Countryside Act 1981. However, the 2000 Act provides for the completion to determination of any order to reclassify a RUPP under section 54 made before the commencement date of 2 May 2006 (11 May 2006 in Wales), although such Orders remain subject to the provisions of s67

of the Natural Environment and Rural Communities Act 2006. Reclassification orders were previously made to address the uncertainty of rights which existed on roads used as public paths.

Section 55

- 5.9 This provides for completion or abandonment of reviews of definitive maps under the National Parks and Access to the Countryside Act 1949. This will not normally involve inspectors.

Section 56

- 5.10 This section provides that the recording of a way on a definitive map and statement as a footpath, bridleway, restricted byway or BOAT is conclusive proof of the rights carried by those rights of way. This section does not give the legal definitions of the different types of right of way; these appear in section 66.
- 5.11 The extent of the rights described for footpaths, bridleways and restricted byways also includes the words "so however that this paragraph shall be without prejudice to any question whether the public had ... any right of way other than those rights". Some people claim that this means these definitions must encompass "higher" rights but Defra's view, as explained quite clearly in paragraph 2.2 of Circular 1/09, is that the phrase "protects other rights, where they exist, against the conclusive evidential effect of the definitive map"..
- 5.12 So the map is conclusive proof of the rights that exist, unless other rights actually exist. In this case rights may be lawfully exercised even though they are not recorded, but users clearly risk a successful court action against them unless they can demonstrate the existence of those rights by obtaining modification of the definitive map.

Section 57

- 5.13 This section contains provisions on the scale, copies of and availability of definitive maps and will not normally involve inspectors.

Section 58

- 5.14 Section 58 makes Part III of the Wildlife and Countryside Act inapplicable to Inner London boroughs, unless a borough council adopts the provisions by resolution. In practice there is negligible rights of way activity in London under the 1981 Act.

Sections 59 to 65

- 5.15 These are provisions which will not normally involve Inspectors.

Section 66

- 5.16 Interpretations, including definitions of footpath, bridleway, restricted byway and BOAT.

Schedule 14

- 5.17 Schedule 14 sets out the detailed procedures for applications for DMMOs and provisions for determination of applications by surveying authorities.
- 5.18 The Schedule provides for applications to be made to the Secretary of State to direct an authority to determine an application where they have failed to do so within 12 months (commonly known as a "direction application"). It also provides for appeals to the Secretary of State where a surveying authority has refused to make an order (known as "an appeal" or "a Schedule 14 appeal").

Schedule 15

- 5.19 This Schedule sets out further detailed procedures to be followed once an order is made. Under paragraph 7 of Schedule 15, if a surveying authority receives any "duly made" representation or objection ("duly made" means those made within the deadline and other requirements set out in the public notice of the order) jurisdiction for deciding whether the order should be confirmed passes to the Secretary of State. It is this duty that Inspectors carry out under delegated power.
- 5.20 Paragraph 12(1) of Schedule 15 allows for challenge in the High Court of a confirmed order within 42 days of notice of confirmation. Any person may question the validity of a confirmed order on the grounds that it was not within the powers of section 53 or 54 (where applicable) of the Act, or that the requirements of Schedule 15 were not complied with. Under the terms of paragraph 12(3), this is the only way a confirmed order may be questioned.
- 5.21 Legal challenges to any other decision taken by a surveying authority or the Secretary of State under the Wildlife and Countryside Act may be done through Judicial Review. A potential challenger must seek leave to have a Judicial Review as quickly as possible after the decision complained of and, in any case, within 3 months.

Outline of Definitive Map Modification Orders

- 5.22 There are two main stages to modifying a definitive map or statement: firstly making and secondly confirming an order.
- 5.23 If a surveying authority discovers evidence that their map needs to be modified, either through their own investigations, or as a result of an application by someone else, they first **make** an order. This is advertised

locally and notices are served on interested parties and posted close to the way in question.

- 5.24 If there are no duly made objections and representations, the authority may themselves **confirm** the order. Where jurisdiction passes to the Secretary of State, he may confirm the order with or without modifications or decline to confirm it.

Assessing the evidence presented

- 5.25 Inspectors' reasoning in reports and decisions must be clear and cogent. In reports, all conclusions should stem from the facts by logical reasoning. In decisions, the reasoning may be significantly helped by first identifying the main issues on which the decision will turn.
- 5.26 These will be determined by the type of "event" which has triggered the DMMO, the section of the 1981 Act under which it has been made and the evidence that is presented. The cases that are submitted to the Secretary of State usually fall under subsections 53(3)(b), 53(3)(c) or, less frequently, section 54.
- 5.27 Subsection 53(3)(b) provides for the recording of a way on the definitive map following "the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path".
- 5.28 Subsection 53(3)(c) provides for the modification of the definitive map on "the discovery by the authority of evidence which (when considered with all the other relevant evidence available to them) shows that:
- (i) a right of way which is not shown in the map and statement subsists or, *is reasonably alleged to subsist*¹ over land in the area to which the map relates;
 - (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
 - (iii) there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

¹ This is the criteria to be applied by the surveying authority when deciding whether to make an order or by the Secretary of State when determining an appeal under Schedule 14 of the 1981 Act. It should not be confused with the more stringent test to be applied at the order confirmation stage. When determining DMMOs, Inspectors will therefore be required to consider whether, on the balance of probability, a right of way subsists see *Todd and another v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450.

- 5.29 Section 54, relevant only to those reclassification orders made before 2 May 2006 (11 May 2006 in Wales) which have not yet been determined, provides that a road used as a public path shall be shown in the definitive map and statement as follows:
- (a) if a public right of way for vehicular traffic has been shown to exist, as a byway open to all traffic²;
 - (b) if (a) does not apply, and if public bridleway rights have not been shown not to exist, as a bridleway; and if not (a) or (b), as a footpath.
- 5.30 To assist in the interpretation and weighing of evidence, Inspectors should refer to the **Consistency Guidelines**.
- 5.31 It is a matter of fact that the particular combination of evidence in each case may have similarities to that in other cases but nonetheless creates a unique situation for the decision-maker to consider. For this reason, to those without all the facts, an impression of inconsistency may be conveyed where two inspectors reach different conclusions on seemingly similar cases. The public availability of the Guidance seeks to demonstrate a consistent approach to the most common types of evidence referred to in DMMO cases. For this reason, an Inspector who finds it necessary to depart from the Guidance should include in the Order Decision an explanation of why the departure has been made.
- 5.32 Advice on analysing user evidence forms can be found in Annex 5.1.

Reaching conclusions

- 5.33 Once all the evidence has been individually assessed, the standard of proof to be applied in all DMMO cases is the 'balance of probability'. This demands a comparative assessment of the evidence on both sides, often a complex balancing act involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together.
- 5.34 Inspectors should take care not to make intuitive decisions backed up by rationalised argument. They should never use a line of argument to reach a

² Reclassification Orders made before 2 May 2006 (11 May 2006 in Wales) which remain to be determined under section 54 of the Wildlife and Countryside Act are subject to the provisions of Section 67 of NERC. Where it is concluded, on a balance of probabilities, that a vehicular right of way subsists, the Inspector must determine whether any of the exceptions found in s67 (2) or (3) of NERC are applicable. If so, the route can be reclassified as a BOAT. If the route at issue carries public vehicular rights and none of the exceptions apply, the route will be a Restricted Byway. Where the exceptions do not apply, the reclassification order should not be confirmed, as the coming into operation of s 47 of CROW on 2 May 2006 (11 May 2006 in Wales) has the effect of statutorily reclassifying all RUPPs shown in the definitive map and statement as Restricted Byways.

decision when the real reason for their decision is some other factor to which they do not wish to refer. Strict mental discipline is always needed.

- 5.35 Every decision or report should deal fully with each issue on which the decision will turn. Other issues which the Inspector considers are not central to the decision but which are considered important by the parties should be referred to, to the extent that the parties are left in no doubt that they have been taken into account in the process leading to the decision. Only in this way will the Inspector's decisions or recommendations be seen to be fair, impartial and arrived at openly.

SCHEDULE 14 APPEALS

- 5.36 The process of assessing the evidence submitted in an appeal case, and allocating evidential weight to the documents referred to, is similar to that where a DMMO has been made. However there is one important difference.
- 5.37 When a Schedule 14 appeal concerns an application made under section 53(3)(c)(i), it is necessary in the report to set out clearly the two tests involved in subsection (c)(i) cases, as underlined by the decision in *R v SSE ex parte Norton and Bagshaw* [1994] 68 P&CR 402, and then to assess the evidence against each of those tests. You must consider whether, on the balance of probability, a right of way subsists (Test A); but if in your view it does not, you must go on to consider whether, on the balance of probability, it is reasonable to allege that a right of way subsists (Test B).
- 5.38 You will be entitled to find that a right of way "subsists" where there is a clear case on the balance of probability in favour of the application and no credible evidence to the contrary. Where that test is not satisfied, however, if you find that the balance between the evidence for and against the claim is a fine one (for instance if you have a conflict of credible evidence) but you have no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then you will be entitled to conclude that it is reasonable to allege that a right of way subsists, and you would thus go on to direct the surveying authority to make an order.
- 5.39 You should decline to give a direction only when you are satisfied that it is not even reasonable to allege that a right of way subsists, having considered all the evidence available to you, and without seeing the need for that evidence to be tested by cross examination. Where, for instance, a way cannot reasonably be alleged to subsist because there is incontrovertible evidence to the contrary in that the landowner has made a statutory declaration under section 31(6) of the Highways Act 1980, it would not be appropriate to direct that an order be made.
- 5.40 Annex 5.2 comprises two reports in Schedule 14 cases. The front covers are incorrect, as is the room and telephone number shown at Temple Quay. Apart from these points, the two reports bear scrutiny.

- SW/THM/8529/14:1 was a case where even a direction from the Secretary of State to make an order had been ignored, necessitating a further appeal. It was a section 53(3)(c)(i) case. The case was based on both documentary and user evidence. The Inspector considered that the documentary evidence failed Test A, but passed Test B, and that the user evidence failed both tests. Nevertheless, the overall conclusion was to recommend that the surveying authority should be directed to make a modification order.
- GOSE/108/2/OXFO/3 was also made under section 53(3)(c)(i), this time based solely on user evidence. Unusually, the Inspector considered the evidence so weak that it failed both Test A and B, and therefore recommended that the decision not to make a modification should be upheld.

5.41 Further examples of Schedule 14 decisions issued before 1 August 2015 can be found on the Planning Portal at www.planningportal.gov.uk/planning/countryside/schedule14/schedule14decisions

5.42 For schedule 14 decisions issued after 1 August 2015 see www.gov.uk/guidance/schedule-14-decisions