Public Rights of Way

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Review Changes: Paragraph 20 amended to clarify where advertisement of proposed modifications to an Order may be necessary. Paragraph 39 added to give advice on maintenance. Paragraphs 88 - 89 updated to reflect CoA judgment in The Open Spaces Society v SSEFRA [2021] EWCA Civ 241. Paragraph 167 added to give advice on severable orders. Appendix D: Case Law: note added to reflect status as under review. Other minor updates including correcting paragraph numbering.	

Key legislation and policy

Legislation **Primary**	• National Parks and Access to the Countryside Act 1949 • Countryside Act 1968 • Highways Act 1980 • Wildlife and Countryside Act 1981 • Town and Country Planning Act 1990 • Countryside and Rights of Way Act 2000 • Natural Environment and Rural Communities Act 2006 • Equality Act 2010 • Deregulation Act 2015 • Well-being of Future Generations (Wales) Act 2015
Secondary	• The Public Path Orders Regulations 1993 • The Rail Crossing Extinguishment and Diversion Orders Regulations 1993 • The Town and Country Planning (Public Path Orders) Regulations 1993 • The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 • The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 • Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007

National policy and guidance	• Welsh Government Guidance for Local Authorities on Public Rights of Way, August 2016 • Welsh Government Guidance for Local Authorities on Rights of Way Improvement Plans, July 2016
Judgments	• Referenced in chapter and see Appendix D
Other guidance  Rights of Way.obr  ROW guidance.obr	• PINS Guidance on procedures for considering objections to Definitive Map and Public Path Orders in Wales [available on gov.wales] • Authorising structures (gaps, gates & stiles) on rights of way: Good practice guidance for local authorities on compliance with the Equality Act 2010 (Defra, 2010) • PINS Rights of Way Advice Notes [withdrawn by PINS on 20 November 2024 but copies stored iShare] • PINS Definitive Map Orders: Consistency Guidelines [useful but not updated and withdrawn by PINS on 20 November 2024 but available on GOV.UK in iShare]

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Key Principles

Types of Public Right of Way

1. There is the maxim "once a highway, always a highway". Once a highway has come into being by whatever means it continues indefinitely no matter whether it is used or not. In the case of *Harvey v Truro RDC*[1] Mr Justice Joyce 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*".

2. There are four types of public right of way (PROW):

- Footpath – a way allowing people to pass and re-pass on foot with "normal accompaniments" which can include dogs, pushchairs, prams and wheelchairs but not bicycles (pushed or ridden).
- Bridleway – includes the rights of a footpath and the right to ride or lead a horse. A bicycle[2] can be ridden on a bridleway, subject to any order or byelaw restricting this right, provided that cyclists give way to walkers and horse riders[3].
- Restricted byway – (introduced by the Natural Environment and Rural Communities Act 2006 (NERCA06)) includes the rights above and a right to use non-mechanically propelled vehicles, e.g., a horse and carriage. *NB: Roads used as public paths (RUPPs) are now recorded as restricted byways or have otherwise been reclassified*[4].
- Byway open to all traffic (BOAT) – a right for all traffic, including vehicles, but used by the public mainly for the purpose for which footpaths and bridleways are so used. Caselaw[5] has resulted in some confusion over the meaning of

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[1] [1903] 2 Ch 638
[2] In highway terms a bicycle is classed as a vehicle
[3] Countryside Act 1968
[4] S47(2) of the CROWA00
[5] *R v Wiltshire County Council ex parte Nettlecombe Ltd* [1998] JPL 707; *Masters v SSETR* [2000] 2 All ER 788; and *Buckland and Capel v SSETR* [2000] 3 All ER 205

this phrase in relation to a carriageway. The effect of caselaw is that for a carriageway to be a BOAT it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test of a BOAT relates to its character or type

The Definitive Map and Statement

3. The Definitive Map and Statement (DMS) are the legal record of PROW. They were introduced by the National Parks and Access to the Countryside Act 1949 (NPACA49) and are held by the surveying authority, which is generally the Local Authority.

4. Section 53 of the Wildlife and Countryside Act 1981 (WCA81) imposes a duty on surveying authorities to keep the DMS under continuous review. The inclusion of a PROW on the DMS provides conclusive evidence as to its existence but does not prevent there being additional unrecorded rights over the route in question (WCA81 s56).

5. The Definitive Map (DM) is conclusive evidence of the status of the highway shown and the Definitive Statement (DS) provides evidence of the position, width, limitations or conditions affecting the right of way at the 'relevant date' recorded on the DMS. The records are without prejudice to any question whether there were other rights, limitations or conditions at the relevant date. The map is not evidence against the existence of rights not shown on it. 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 is modified following a review, the map takes precedence[6] unless it is possible to ascertain which document is correct through examination of the evidence.

6. The relevant date provides the date at which the evidence showed that the PROW subsisted. The DMS can be consolidated to include changes arising from legal events[7] and modification orders. Where not consolidated, modification orders with a later relevant date form part of the DMS. Most, if not all, authorities will have a *working copy* of the DMS showing all the changes made by orders.

An overview of Rights of Way casework

7. Alterations can be made to PROW by two different types of legal order:

   - Public Path Orders (PPOs) made under the Highways Act 1980 (HA80) or Town and Country Planning Act 1990 (TCPA90) alter the alignment and existence of PROW on the basis of merit, making changes to the network through diversion, extinguishment and creation; and

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[6] *R (oao) Norfolk County Council v SSEFRA* (QBD)[2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994

[7] see section 53(3)(a) of WCA81, for example a public path order is a legal event.

- Definitive Map Modification Orders (DMMOs) made under the WCA81 record changes in the alignment, existence and status of footpaths, bridleways, restricted byways and BOATs through addition, deletion, upgrading and downgrading, on the basis of evidence to show that the changes have already taken place and so should be recorded.

8. When making an order the Order Making Authority (OMA) is required to publicise the order to allow an opportunity for objections to be made. If no objections are received or objections made are subsequently withdrawn, the order may be confirmed by the OMA. Where there are outstanding objections, the order may be submitted to the Welsh Ministers (WM) for confirmation. Unopposed orders may also be submitted where the OMA requests modifications.

9. Whilst DMMOs must be submitted to WM, caselaw[8] related to an order made under s119 of the HA80 confirms that the OMA has the discretion to choose whether to make and/or confirm PPOs. This means that an OMA need not submit the PPO to Ministers for confirmation but could withdraw it. It also means that OMAs submitting orders may take a neutral stance with regard to confirmation. In such circumstances the case in support will often be led by the applicant for the order.

Approach to decision making

10. Although most documents will be submitted electronically, the submissions will include hard copies of the original order together with copies of it. The original is a legal document and it is VITAL that it is not marked in any way. For scanning purposes the order map marked 'not to original scale' should be used. Inspectors need only scan a copy of the order map (when sending in a decision) when modifications have been made to it.

11. Orders should always be determined in accordance with the relevant criteria set out in the respective part of the HA80, TCPA90 or WCA81 and any other relevant Acts. These should be the starting point for and provide the relevant statutory tests which set the framework for the decision, unless the particular circumstances of the case dictate otherwise.

12. Having started with the relevant statutory tests, it is necessary to consider the facts and submissions made by the parties. These can include representations on matters of merit in PPO casework or legal submissions, and/or user, landowner and/or documentary evidence in DMMO casework.

13. Submissions may also include Statements of Truth made by witnesses. Recent changes to the format of these submissions indicate that from 6 April 2020 a statement of truth must state the following: *'[I believe] [the (claimant or as may be) believes] that the facts stated in this [name document being verified] are*

[8] *R (Hargrave & Hargrave) v Stroud DC* [2002] EWCA Civ 1281

true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth'.[9]

14. There may be matters not raised by the parties which the Inspector considers relevant to the determination of the order. If such matters play a part in the decision, it is essential, in the interests of natural justice, that the parties are given the opportunity to comment. It was made clear in the case of *Todd & Bradley*[10] that there will be procedural unfairness, in breach of natural justice, if the decision turns on grounds that are not canvassed with the parties.

15. In each case it is for the Inspector to decide on the weight to be given to the various arguments for or against a proposed order, having established the facts and considered the submissions of those concerned. As with all other casework, the decision should be written with the losing party in mind. Notwithstanding this, it is necessary for Inspectors to be as consistent as possible in the interpretation of the statutory tests, case law, policies and legal advice.

16. On a general point the phrase 'the general public' not 'the public at large' should be used.

Modifying Orders

17. In coming to a decision it may be necessary to modify the order, for example, if no width is included it may be necessary to add one[11]. Also, during determination of the order the Inspector may be asked to make or find that other modifications are required, perhaps to the alignment, status or recording of limitations. The Inspector cannot use the power of modification to make good an order that is defective in a matter of substance. The Inspector cannot replace the Order map but can add a map for limited purposes in clarifying the existing Order map. For example if it is not possible to clearly show the width on the existing map. OMAs should be asked to provide a separate map that clarifies the modification and attach this to the original Order map. However, it would be inappropriate to propose modifications that could not be shown completely on the Order map, for example, to add an additional section.

18. If the 'relevant date' on a section 53 (of WCA81) order is earlier than 6 months before the date it is made, the order is invalid and will need to be returned to the Authority. The 6 months provision is to prevent landowners being prosecuted for obstructing a right of way which they may not have known existed. Where the 'relevant date' is later than the order, the order should be rejected and returned to the Authority.

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[9] 113th Update to the Practice Directions supplementing the Civil Procedure Rules 1998
[10] *Todd & Bradley v SSEFRA* [2004] EWHC 1450
[11] PINS Advice Notes 16 and 20

19. If an invalid 'relevant date' has arisen as a result of a clear typographical error, for example 30 February, it may be open to the Inspector to modify the order to correct the date. However, Inspectors should be wary of modifying an order where it is unclear whether the error is typographical. If the case is not clear-cut, the correct approach would be for the order to be rejected.

20. The modifications may or may not require further advertisement, depending upon their effect and the matters set out in the relevant Act (see para 27 below). Where modifications are proposed which would require further advertisement, the initial decision should be headed 'Interim Order Decision' to clarify that the process has yet to be finally concluded. With the exception of s247 of the HA80, no order can be confirmed with modification affecting land not affected by the order as made without giving notice of the proposed modification(s). Such matters would be where the alignment was altered or the width increased. Where the evidence demonstrates that the width specified in a DMMO order should be reduced, modifications to the order must be made. However, if the Inspector proposes modifications which would reduce a width, the modification would not affect land not affected by the order and there is no requirement for it to be advertised.

21. Minor modifications, where no new land is affected, would not need advertisement, e. g. correcting typographical errors or adding grid references. However, the power of modification is not intended to make good orders which would otherwise be incapable of confirmation. Further guidance can be found in Welsh Government Guidance for Local Authorities on Public Rights of Way, 2016; and para 2(3) of Schedule 6 of HA1980; para 8 of Schedule 15 of WCA1981 or para 3(6) of Schedule 14 of TCPA1990 as appropriate.

22. To make such modifications a **copy** of the order, including the order map where appropriate, should be marked up with red ink and 'red ink modifications' written on the front. Ensure the correct notation is being used[12]. Despite any changes the Inspector considers are required to the order there is no need to modify the citation "it appears to the authority" even if the authority is not in agreement with the Inspector. **DO NOT** mark up the legal order as further alterations may arise as a result of advertised modifications. The office team will make such changes as are required to the legal order once the final decision is made, whether following advertisement or from unadvertised modifications.

23. The Inspector will be making a final order decision at some stage, whether or not there are objections or representations to his/her proposed modifications. If there are objections or representations there may be the need to propose, or make, further modifications; confirm the Order as the Inspector proposed; or confirm the Order as originally made.

[12] PINS Advice Note 22: use of correct notation on order maps.

24. It is possible the OMA may request a modification in order to correct an error in the order title. The Inspector can only make the modification where it is possible to make sense of the order by means of the schedule and a clearly marked map. If the error also appears in the schedule and/or the order map, it would not be appropriate to modify the order as it could be argued that the order was misleading and to modify could lead to prejudice.

25. Where the Inspector proposes to modify an order which in itself would affect the title, then a modification to the title can be made. For example where a title of a DM order refers to a footpath but the Inspector intends to confirm the order as a bridleway. For the order to make sense the order title would need to be modified.

26. Inspectors should also consider any irregularities between the order map and statement and deal with them even if not raised by the parties. Not to do so could leave an order decision vulnerable to challenge and would result in inaccurate details being transferred onto the DMS. The Inspector should consider whether such irregularities can be cured by using their powers of modification.

27. Inspectors should also consider using their powers of modification if it emerges that limitations should be included in an order. For example, the existence of a gate referred to by users is confirmed at the site visit but is not recorded on the order. Such a flaw is not sufficient to warrant rejection of the order.

28. Before modification consideration must be given to the need to advertise the proposed modifications depending on the relevant schedule:

- Highways Act 1980 – Schedule 6, paragraph 2(3)
  - If it affects land not affected by the order as submitted;
- Wildlife and Countryside Act 1981 – Schedule 15, paragraph 8(1)
  - If it affects land not affected by the order as submitted;
  - If it does not show any way shown in the order or shows any way not so shown;
  - If it shows as a highway of one description a way which is shown in the order as a highway of another description;
- Town and Country Planning Act 1990 – Schedule 14, paragraph 3(6)
  - If it affects land not affected by the order as submitted.

29. When determining an order following objections to the proposed modifications the Inspector can consider any evidence which relates to the proposed modifications but in relation to the unmodified part of the order, the evidence to be considered is restricted to new evidence only.

Public Path Orders [PPOs]

General

30. PPOs can alter the alignment and existence of footpaths, bridleways and restricted byways. Changes cannot be made to BOATs by PPOs with the exception of s118B, 119B and 119D of HA80. **At present in Wales** only part of s118B and s119B and none of s119D apply.

31. The HA80 allows changes under the following sections:
    - *Section 26: Creation;*
    - *Section 118: Stopping up (extinguishment);*
    - *Section 118A: Stopping up of public paths crossing railway lines;*
    - *Section 118B: Stopping up of certain highways for purposes of crime prevention etc (**presently only enacted in Wales in respect of School Security Orders**);*
    - *Section 119: Diversion;*
    - *Section 119A: Diversion of public paths crossing railway lines;*
    - *Section 119B: Diversion of certain highways for purposes of crime prevention etc (**presently only enacted in Wales in respect of School Security Orders**);*
    - *Section 119D: Diversion of certain highways for protection of sites of special scientific interest (SSSI) (**not enacted in Wales at present**).*

32. The TCPA90 allows changes under the following sections:
    - *Section 247: Public paths affected by development: orders by WM;*
    - *Section 257: Public paths affected by development: order by other authorities;*
    - *Section 258: Extinguishment of public rights of way over land held for planning purposes;*
    - *Section 261: Temporary stopping up of highways for minerals working.*

Technical Matters

Order Route not Shown on the DMS or Claimed to Exist on the Proposed Line

33. A route does not have to be recorded on the DMS before a PPO can be made. A Highway Authority (HA) is entitled to treat a route as a highway and, when dealing with a PPO in respect of an unrecorded right of way, an Inspector should not unreasonably dismiss this claim. The Inspector should bear in mind that the HA may not be the OMA and ensure that appropriate evidence is taken into account.

34. If the status of the route is the main issue in dispute, a DMMO would be the appropriate mechanism to determine this. Even if there is very strong evidence that the route should be recorded with a different status, such arguments should be set aside as a PPO cannot change the recorded status of a public right of way.

35. An assertion that the route onto which it is proposed to divert another route is already subject to public rights cannot be dismissed, as otherwise the effect of the diversion order would be to extinguish a public right of way. However, sufficient evidence of the existence of the rights will be required. In such circumstances you may be referred to *R v Lake District Special Planning Board ex parte Bernstein (QBD)[1982] The Times, February 3*. but it is important to read this case carefully as it is often misquoted and misunderstood.

Form of Order

36. Under the various sections of the Acts and relevant Regulations, PPOs should be "in the form" or "a form substantially to the like effect" to that set out in the relevant Regulations. When preparing an order the OMA should ensure that the appropriate regulations are followed. PPOs are considered to be fatally flawed if the wrong notation or non-standard notation is used to depict the routes affected by the order [13]. Where work is required to bring the new route into a condition fit for use by the public, orders should specify a relative date (rather than an actual date) when the new route will come into effect. If none is given the order can be modified to insert a date, which would not require advertising.

37. If a PPO differs from the prescribed form, Inspectors will need to decide whether or not it is substantially the same and whether anyone may have been misled or prejudiced as a result. If an order is so badly drafted that a reasonable person would be likely to misunderstand its intention or effect, it should not be confirmed. In respect of the seal on an order, it is not considered that anyone would be prejudiced by a seal being placed in what some may consider to be the wrong place on an order. It would be more of an issue if, for example, there was no seal. The Welsh Government (WG) considers that it would be better if there was a consistent approach to the location of seals, the most appropriate place being between the main body of the order and its schedules.

38. All measurements given in Orders must be in metric. A PPO must specify a width for a new highway. If it does not the Inspector should invite comments from the parties on the appropriate width and, in the decision, propose that the order be modified to record a width. This will require further advertisement. If the width is given as a minimum or approximate width, the Inspector should modify the Order which may or may not require further advertisement. Further guidance can be found PINS Rights of Way Advice Note No 16 - Widths on Orders [withdrawn by PINS in November 2024 but copy stored on iShare].

39. *Maintenance (Highways maintainable at public expense)*

[13] PINS Advice Note 22: use of correct notation on order maps.

40. Note that HA1980, s36(2)ss(d), (e) and (f) may be relevant in respect of ongoing maintenance of created rights of way or sections thereof.

PPOs under the Highways Act 1980

Expediency

41. In determining orders made under s26, 118 and 119 of the HA80, there is an issue of 'expediency'. A definition provided by the Oxford English Dictionary is: "*convenient and practical although possibly improper or immoral*", "*suitable or appropriate*". In practice, expediency means wide discretion of the matters to be taken into consideration when deciding whether or not to confirm an order made under these sections.

42. *R (oao Manchester CC) v SSEFRA* [2007] EWHC 3167 (Admin) related to an Inspector's decision not to confirm a special extinguishment order for the reasons of crime prevention [s118B]. The decision turned on the issue of expediency. Sullivan J said the weight to be given to the evidence was entirely a matter for the Inspector.

43. The Inspector had been satisfied that the ss(1) and (3) conditions had been met, and it was expedient to make the order from the point of view of crime prevention, but they could still decide it was not expedient to confirm the order, having regard to wider considerations. Subsection (7) requires the decision maker to have regard to all of the circumstances. With regard to resolving detailed issues, for example, graffiti or rubbish, the issue for the Inspector was one of balance. It was held that:

    "*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 judgment. 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*".

    It is reasonable to assume that this judgment relates to other HA80 orders, where expediency is a relevant consideration.

44. Arguments that the landowner bought the property in full knowledge of the existence of a right of way, and so should not then be able to alter it, have been considered in *Ramblers' Association v SSEFRA, Oxfordshire CC & Weston* [2012] EWHC 3333 (Admin). It was set out that there was no statutory bar to a person making an application in such circumstances.

45. The case also referred to the concern of confirmation of a PPO setting a precedent for other such orders. Every order must be dealt with on its own merits, subject to the evidence presented and *Weston* indicated that this argument would need to be backed by evidence to show that an accumulation of such decisions could be seen to be harmful.

Landscape, Conservation and Biodiversity

46. Regard should be had to landscape, conservation and biodiversity matters, where relevant, in all casework relating to PPOs made under the HA80. Note that section 29 of HA80 refers to duties of the Council, not Inspectors. For general advice on biodiversity refer to the relevant chapter of the WITM.

47. S11 of the Countryside Act 1968 (CA68) requires: "*In the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside*". The s11 duty must be interpreted on the basis of s49(4) of the CA68, which states that "*references in this Act to the conservation of the natural beauty of an area shall be construed as including references to the conservation of its flora, fauna and geological and physiographical features*".

48. S6(1) of the Environment (Wales) Act 2016 (E(W)A16) places a duty on a public authority to "seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions. S6(4) states that in complying with subsection (1), the Welsh Ministers, the First Minister for Wales, the Counsel General to the WG, a Minister of the Crown and a government department must have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992; and any other public body must have regard to the guidance given to it by the Welsh Ministers (WM).[14]

49. If the route is within a National Park, s5, 11a and 114(2) of the NPACA49 apply. S11a incorporates the 'Sandford Principle'[15] that "*Where irreconcilable conflicts exist between conservation and public enjoyment, conservation interest should take priority*". This principle was updated in s62 of the Environment Act 1995 to say that:

"*In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in* [s5(1) of the NPACA49] *and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park*."

50. If within a National Nature Reserve (NNR) or Site of Special Scientific Interest (SSSI), s28(G) of the WCA81 applies. This imposes a duty on s28(G) authorities, which includes Inspectors carrying out their duties:

"*to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of Special Scientific Interest*".

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[14] This duty is similar to that set out in S40 of the NERC Act, 2006.
[15] Named after Lord Sandford, Chair of the National parks Policy Review Committee, 1974

51. If the route is within an Area of Outstanding Natural Beauty (AONB), s85 of the Countryside and Rights of Way Act 2000 (CROWA00) imposes a duty on the relevant body, which again will include Inspectors carrying out functions in relation to an AONB to: "*have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty*". This includes, by s92, the conservation of its flora, fauna or geological or physiographical features.

52. If the proposed route crosses a Scheduled Ancient Monument (SAM), consideration should be given to whether Cadw have given consent to the carrying out of any works to bring a path into a suitable condition for use.

53. Depending on the circumstances the Inspector may wish to ask for information available from, for example, surveys, and what mitigation may be proposed. Have regard to the qualifications of those providing the information and have consult relevant chapters of the WITM.

54. An order cannot be made conditional upon the outcome of investigatory or other measures to protect biodiversity.

Rights of Way Improvement Plan (ROWIP)

55. The CROWA00 introduced ROWIPs. These are intended to be the prime means by which a HA identifies the changes to be made, in respect of management and improvement, to their local rights of way network. ROWIPs should support the Government's well-being objectives and be integrated with Active Travel mapping. In determining orders made under s26, 118 and 119 of the HA80, it is necessary to have regard to any ROWIP relevant to the area.

56. When considering whether to confirm PPOs made under the HA80, the WM must give consideration to any material provision of a ROWIP prepared by any local HA whose area includes land affected by the order. Whilst the legislation gives no interpretation of the term 'material provision' it can be likened to a 'material consideration' in the planning sense. Essentially the decision maker is required to take into account anything provided for or planned for in a ROWIP that is relevant to the order under consideration. The weight which should be given to material provisions is not prescribed.

57. The CROWA00 also introduced Local Access Forums, which advise local authorities about improvements for public access.

Schedule 6 to the Highways Act 1980

58. The procedures relating to the making, confirmation, validity and date of operation of PPOs under the HA80 are set out in Schedule 6 to the Act. These matters are often raised by objectors in the belief that this will mean that an order is fatally flawed and will be thrown out.

59. Before making an order under s26 of HA80, an OMA is under a mandatory requirement to consult any other local authority in whose area the land concerned is situated. Similarly under s118 and s119 an order cannot be

made without prior consultation with other Councils where the footpath or bridleway is situated. If this requirement is not met the order cannot proceed.

60. If a failure to comply with the procedural requirements comes to light at any point before the determination of the order, Inspectors should seek to remedy this. The question must be whether anyone has, or is likely to have, suffered prejudice as a result of the failure to follow procedures and, if so, whether such prejudice can be avoided by requiring further work to meet the requirements of the procedures.

61. Such matters may include failure to serve notice on a party; to publicise the order on site; to publicise the order in the local newspaper; or giving less than 28 days' notice of the order for objections or representations to be made. In such cases, it would be possible for the determination of the order to be delayed whilst the appropriate notices are served, if necessary, by an adjournment of any hearing or inquiry being held into the order. Where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation. Further guidance can be found in PINS Advice Note 21: Procedural irregularities in respect of DMMOs and PPOs.

62. The notice should:
- state the general effect of the order;
- name a place in the area in which the land to which the order relates is situated where a copy of the order and map may be inspected and;
- specify the time (not be less than 28 days from the date of the first publication of the notice) within which, and the manner in which, representations or objections with respect to the order may be made.

63. The people on whom notice must be served are set out in paragraph (3) of Schedule 6, and in paragraph (3)(B) "prescribed" organisations are set out in the relevant Regulations. These are listed in Annex 1 of Welsh Government Guidance for Local Authorities on Public Rights of Way, 2016, which also sets out the extent of the consultation, and includes: Auto Cycle Union; British Driving Society; British Horse Society; Byways and Bridleways Trust; Cyclists Touring Club; Open Spaces Society; The Ramblers; Welsh Trail Riders Fellowship; and Network Rail (in respect of orders creating footpaths, bridleways and restricted byways on land adjacent to operational railway lines only)

64. A copy of the notice (not the order) has to be displayed in a prominent position at the ends of any right of way that is to be created, stopped up or diverted by the order; at council offices in the locality of the land to which the order relates; and at such other places as the authority may consider appropriate.

65. On making a decision, a confirmed order cannot affect land not affected by the order as submitted except after giving notice.

66. S26 of the HA80 enables the HA to compulsorily create a public right of way; it can also be used where a landowner supports a proposal. S58 of the CROWA00 provides for Natural Resources Wales (NRW) to apply to the WG for a public path creation order to create access to designated access land.

67. S26(1) sets out the criteria to be satisfied if an order is to be confirmed. The Inspector must consider:

26(1) "whether there is a need for a footpath, bridleway or restricted byway" along the line indicated on the plan attached to the order and whether "it is expedient" to create it having regard to:
(a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and
(b) the effect which the creation of the path or way would have on the rights of persons with an interest in the land, account being taken of the provisions as to compensation.

68. S28 provides that compensation will be payable if the order is confirmed. The amount is not a matter for the Inspector; it remains between the OMA and the relevant parties and may be defrayed to the applicant. If the question of compensation arises at an event, the Inspector should refer the matter to the OMA and indicate that if agreement cannot be reached it would be a matter for the Lands Tribunal. Inspectors should refrain from making firm statements on compensation i.e. that adjacent landowners are not entitled to apply for compensation, unless they have expertise on the issue of 'actionable at his suit' [see s121(2) HA80 applying s28(4)].

69. In deciding whether it is expedient to create a right of way, the factors to be considered are how much it would add to the convenience or enjoyment of a substantial section of the public or the convenience of persons resident in the area. This does not preclude the consideration of other matters.

70. *R (oao MJI (Farming) Ltd) v SSEFRA* [2009] EWHC 677 (Admin) concerned an order for a bridleway link on the South Downs Way. Objections resulted in modifications to record the disputed part as a 4m wide footpath. It was held that such width was not necessary or expedient to the creation of the footpath, as opposed to a bridleway, 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 creation and to the detail of its alignment, length and width.

Extinguishment Orders

71. When making an order under s118 of the HA80 to extinguish a public right of way, a HA must be satisfied that "*it is expedient that the path or way should be stopped up on the ground that it is not needed for public use*".

72. It is not for an Inspector to delve too deeply into the issue of 'need' for a path when dealing with an extinguishment order. The case of *R v Secretary of State for the Environment Ex parte Cheshire County Council [1990] Lexis Citation*

1910 deals with this point, and reference is made in this to the earlier case of *R v SSE ex parte Stewart* [1979]. When deciding whether or not an extinguishment order should be confirmed, the OMA or WM must apply a different test, with s118(2) stating the criteria on which to be satisfied as being:

"they are satisfied that it is expedient [to confirm a public path extinguishment order] having regard to the extent (if any) to which it appears…that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in s28 above as applied by section 121(2) below."

73. S118(6) of the HA80 requires any temporary circumstances preventing use of the paths in question to be disregarded when determining the likely use that might be made of them. The type of conditions that constitute temporary circumstances was also addressed in the *Stewart* case.

74. It appears that the Courts will, for example, regard trees or hedges or even an electricity sub-station as temporary, but not a path that has ceased to exist because it has been eroded or fallen down a cliff. The principle which appears to have been endorsed is that to accept the deliberate obstruction of a path as grounds for its closure would encourage those who improperly obstruct public rights of way and, as a matter of policy, should not be condoned. Where the order route is impassable, an Inspector will need to consider the likely use if the obstruction is removed.

75. *R v SSETR ex parte Gloucestershire CC* (QBD)[2001] ACD 34, [2001] JPL 1307 concerns an extinguishment order regarding a footpath which had in part fallen into the River Severn. The main issues were whether there was a right to deviate where a footpath had been destroyed by erosion; whether the path moved inland as the riverbank 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.

76. It was held that there was no general right to deviate other than in the usual case where a landowner had obstructed the way; there was no known law which provided for moving the footpath inland as a consequence of bank-side erosion. Dedication of a route was always possible, but in this case, there was no evidence of a defined line that could have been dedicated.

Diversion Orders

77. S119 of the HA80 enables the HA to divert a public right of way. The criteria to be satisfied before an order is confirmed are set out in several subsections. S119(6) requires that, before confirming the order, the WM must first be satisfied that:

(a) it is expedient, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public[16], that the right(s) of way in question should be diverted; what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained;

(b) the new route to be provided will not be substantially less convenient to the public;

(c) it is expedient to confirm the order having regard to the effect which:

(i) the diversion would have on public enjoyment of the path as a whole;

(ii) the coming into operation of the order would have as respects other land served by the existing path; and

(iii) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it; and

(d) the provisions as to compensation.

78. Whilst s118(6) of the HA80 states that "…*any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded*" s119 does not contain such wording. However, when considering matters in relation to s119(6), whether the right of way will or will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing public use of the existing route.

79. In terms of the expression 'substantially less convenient to the public' in the case of *R (on the application of Young) v Secretary of State for the Environment, Food and Rural Affairs and another [2002] EWHC 844 (Admin)* Turner J considered it referred to such matters as length, difficulty of walking and purpose of the path – features that fall within the natural and ordinary meaning of the word "convenient". Issues such as gradient, accessibility, numbers of stiles or gates, and width may be relevant depending on the context. The Oxford English Dictionary defines "substantially" as meaning 'to a great or significant extent'; 'for the most part; essentially'.

80. In considering the potential effect of the proposed diversion upon use of the order route by the public, the existing route should be assessed as if it was open and maintained to a standard suitable for those users who have the right to use it. That is not to say that the circumstances on the ground are irrelevant under other sections, for example in relation to 'expediency'.

81. *Doherty v SSEFRA & Bedfordshire CC* [2005] EWHC 3271 confirms that s119(1) refers to the interests of the owners, lessees or occupiers across

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[16] Whichever is specified in the order; note however that *Pearson v SSEFRA and Others (Pearson Consent Order)* (QBD)[2008] CO/1085/2008 was submitted to judgement on the grounds that where an order had been made in the interests of both the landowner and the public, an Inspector could consider confirmation of the Order even if it had been concluded that the interests of only one party were served by it.

whose land the existing route passes, and the diverted route will run. Where the path or way crosses land where no diversion is proposed, those landowners or occupiers will have an interest as members of the public under s119(1) and, where relevant, under the tests in s119(6)(a) to (c). An Inspector may modify an order to alter the party in whose interest it has been made. It is also possible to confirm an order stated to have been made in the interests of both parties if, in the Inspector's opinion, the diversion is expedient only in the interests of either the owner/lessee/occupier or the public.

82. S119(2) requires that a diversion order shall not alter a point of termination of the way if (a) that point is not on a highway or (b) where it is on a highway, otherwise than to another point which is on the same highway or another one connected with it, and which is substantially as convenient to the public. The case of *R (on the application of Connaughton) v West Dorset District Council [2002] EWHC 794 (Admin)* is helpful on this issue. There, the purpose of s119(2) was interpreted as ensuring "*that a walker between two points is not left unable to reach his destination*".

83. It is an established principle that a diversion cannot wholly follow an existing right of way; see *R v Lake District Special Planning Board, ex parte Bernstein* [1982] The Times, February 3.

84. It should be noted that s119(3), as inserted by paragraph 9(3) of Schedule 6 to the CROWA00, has a requirement that the extinguishment date should be tied to the date on which the authority certifies that any works required to make good the new path have been carried out. Orders should specify a date when the new route will come into effect (as required by s119(1)(a)), irrespective of works to be carried out. However, a relative date may be specified rather than an actual date[17]. The certification of works relates only to the date on which the old route would be extinguished. If certification is never given, the old route and the new route will continue to exist, although in practical terms only the old route will be able to be used. It is within an Inspector's powers of modification to insert a date for the coming into effect of the new route, and such a modification would not need to be advertised.

85. S119(5) permits the OMA to reach agreement with the applicant (owner, lessee or occupier of the land) to defray any claims for compensation or expenses that may follow or to cover the cost of bringing the new route into a fit condition for public use. The details are not a matter for the Inspector, but there is a need to be satisfied that it is physically possible to create a suitable path or way on the line shown in the order. It would be appropriate for the Inspector to take into account any effects on the land that cannot be remedied through financial compensation ,as referenced in paragraph 61.

86. The case of *Young*, referred to above, clarified that the relative convenience of the new route is to be addressed separately from enjoyment of the route. In

[17] For example, 28 days after the date of confirmation of the order

deciding whether to confirm an order, Inspectors are required to consider the criteria in s119(6) as three separate tests, two of which may be the subject of a balancing exercise.

87. Where the proposed diversion is considered expedient in terms of test (a), is not substantially less convenient in terms of (b), but would not be as enjoyable to the public, the Inspector is required to balance the interests raised in the two expediency tests – the interests of the applicant (a), and the criteria set out in s119(6) under (c) to determine whether it would be expedient to confirm the order.

88. The balancing exercise was approved by Ouseley J in *Ramblers Association v SSEFRA* [2012] EWHC 3333 (Admin) where a decrease in the enjoyment of the path by the public had been weighed against the benefit to the interests of the owner. The broad nature of the 'expediency' test has also been considered in R v SSE ex parte Stewart [1980] 39 P & CR 934, in R v Cheshire CC [1991] JPL 537 and in *R (aoa Manchester CC) v SSEFRA* [2007] EWHC 3167 (Admin).

89. The balancing of the two expediency tests was challenged in *The Open Spaces Society v SSEFRA* [2021] EWCA Civ 241. It was argued that, at the last stage of the confirmation process, the Inspector could only have regard to the specific matters in s119(6)(a) to (c) and could not balance those considerations against the interests of the landowner.

90. In rejecting those arguments, the Court of Appeal held that it is mandatory to have regard to the matters specified in subparagraphs (a) to (c) of s119(6) and any material provision in a rights of way improvement plan (s119(6A)), but the second expediency test is not limited to those matters. The decision-maker has a broad discretion to have regard to any other relevant matter including, if appropriate, the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest. The Court upheld the judgment of The High Court in which it was held that other factors raised could be an important element of the decision whether or not to confirm the order. The scale of benefits of the diversion to landowners and the public would also be relevant considerations under the balancing exercise. A s119 Order Decision template reflects this judgment and can be found at https://documents.hf.wales.gov.uk/documents/A56361253

91. Where the proposed diversion is seen as expedient in terms of (a) and (c) but would be substantially less convenient to the public, the order should not be confirmed. Whether the diverted route will be substantially less convenient or not is for the Inspector's judgment.

Rail Crossing Extinguishment and Diversion Orders

92. S118A and 119A of the HA80 provide for the stopping up or diversion of rights of way that cross a railway[18], other than by a bridge or tunnel. The provisions apply where it appears expedient to an authority in the interests of the safety of members of the public using it or likely to use it that the right of way should be stopped up or diverted.

93. The form of request for an order, set out under Schedule 1 of the 1993 Regulations, requires information to be provided to the authority at the application stage. This information may assist in informing the decision:

(a) the use currently made of the existing path, including numbers and types of users, and whether there are significant seasonal variations, giving the source for this information;
(b) the risk to the public of continuing to use the present crossing and the circumstances that have given rise to the need to make the proposed order;
(c) for 118B – extinguishment: the effect of the loss of the crossing on users, in particular whether there are alternative rights of way, the safety of these relative to the existing rail crossing, and the effect on any connecting rights of way and on the network as a whole;
(d) for 119B – diversion: the effect of the extinguishment of the crossing and the creation of the proposed new path(s) or way(s) having regard to the convenience to users and the effect on any connecting rights of way and on the network as a whole;
(e) the opportunity for taking alternative action to remedy the problem, such as a diversion (in the case of 118B), bridge or tunnel, or the carrying out of safety improvements to the existing crossing;
(f) the estimated cost of any practicable measures identified under (iv) above; and
(g) the barriers and/or signs that would need to be erected on the crossing or the point from which any path or way is to be extinguished, assuming an order is confirmed.

94. The WM shall not confirm a s118A or s119A order unless satisfied that it is expedient to do so having regard to all the circumstances, in particular to:

(a) whether it is reasonably practicable to make the crossing safe for use by the public; and
(b) what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.

[18] This includes a tramway but does not include any part of a system where rails are laid along a carriageway.

95. S119A(5) sets out that a rail crossing diversion order shall not alter a point of termination of a path or way diverted under the order:

(a) if that point is not on a highway over which there subsists a like right of way (whether or not other rights of way also subsist over it); or
(b) (where it is on such a highway) otherwise than to another point which is on the same highway, or another such highway connected with it.

96. The authority may enter into an agreement to defray costs, for example, on works to bring the new site of the right of way into a fit condition for use by the public, or compensation which may become payable under s28 of the HA80. In general it is not for the Inspector to be concerned as to these matters, which are to be agreed between the authority and the operator[19].

97. There are currently initiatives by Network Rail to divert or extinguish level crossings, although it appears many of these may now be dealt with under the provisions of the Transport and Works Act 1992 (TWA92) on a region-by-region basis rather than the HA80 which may still be used for individual crossings. If Network Rail pursues crossings by means of Orders under TWA92 they may well still be referred to PINS.

98. If an Inspector concludes that it is expedient that the route in question be diverted but not expedient that the order be confirmed, for example, if the alternative route is unsuitable for some reason, a procedure exists under s48 of the TWA92 for the Welsh Ministers to consider making a 'bridge or tunnel order' (BOTO).

99. The guidance on this procedure is contained in the Department of Transport Circular 1/94. There is a time limit of two years between the application for the Rail Crossing Diversion Order and the making of any BOTO. If the Inspector concludes that the current route is unsafe but the alternative route is not suitable, a report will have to be prepared. This will be the case even if the 2-year period for a BOTO has elapsed and so it cannot be made. In these circumstances it would not be appropriate to simply 'not confirm' the order.

100. In 2019 a Memorandum of Understanding (MOU) was published between Network Rail, ADEPT[20], Local Government Association and Institute of Public Rights of Way and Management. The aim of the document is to improve working practices between Network Rail and Local Highway Authorities where rights of way use level crossings on the rail network. Inspectors may find MOUs presented in evidence primarily in relation to PPOs but also in respect of DMMOs.

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[19] "operator", in relation to a railway, means any person carrying on an undertaking which includes maintaining the permanent way;
[20] Association of Directors of Environment, Economy, Planning & transport – Rights of Way Management Group

Extinguishment and Diversion Orders for the Purposes of Crime

101. Currently in Wales s118B and 119B of the HA80 only apply insofar as they relate to Schools Protection Special Orders. The provision under these sections does not extend to the making of Crime Prevention Special Orders for the closure or diversion of rights of way on the grounds of crime prevention in designated areas.

School Security Orders

102. S118B and 119B(1)(b) of the HA80 relate to school security, where the right of way crosses land occupied for the purposes of a school. Advice has been given that the definition of a school for the purpose of s329 of the HA80 is the same as that in section 4(1) of the Education Act 1996:

"*an educational institution which is outside the further education sector and the higher education sector and is an institution for providing primary or secondary education or both whether or not the institution also provides further education*".

103. A primary school includes a nursery school if used wholly or mainly for the purposes of providing education for children between the ages of 2 and 5. Where a path crosses school playing fields but is fenced on both sides it can still be described as crossing land occupied for the purposes of a school.

104. It must be expedient that the highway be stopped up for the purpose of protecting the pupils or staff from: *violence or the threat of violence; harassment; alarm or distress arising from unlawful activity; or any other risk to their health or safety arising from such activity.*

105. The Inspector does not need to establish that the unlawful activity takes place on the highway to be stopped up, but that there is a causal link between the highway and the unlawful activity. The question for the Inspector is whether the relationship between the order route and the unlawful activity can be shown. If so, the next question is whether in order to protect pupils and staff from violence etc it is expedient to stop up the highway.

106. Confirmation of a school security order requires an Inspector to be satisfied that it is expedient to confirm the order having regard to all the circumstances, and in particular:

(a) *any other measures that have been or could be taken for improving or maintaining the security of the school;*
(b) *whether it is likely that the coming into operation of the order will result in a substantial improvement in that security;*
(c) *the availability of a reasonably convenient alternative route or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the highway under s119B below rather than stopping it up; and*
(d) *the effect which the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation contained in s28.*

107. As with s119 generally, a special diversion order shall not alter a point of termination of the highway:

(a) if that point is not on a highway, or
(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it.

108. Additionally a right of way created by a special diversion order may be unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.

SSSI Diversion Orders

109. S119D and 119E are **not currently in force in Wales**. These sections would otherwise enable an Authority, at the request of Natural Resources Wales to make an order to divert a PROW where the public use of the highway is causing, or continued public use would be likely to cause significant damage to a Site of Special Scientific Interest (SSSI). The damage must be connected to the actual reason that the site is designated as a SSSI.

Concurrent Orders

110. Creation and Diversion Orders can be made concurrently with Extinguishment Orders to provide alternative routes to those being stopped up. Whilst care must be taken to deal with each order individually and on its own merits, even where these are put forward as a package by the council and/or the applicant, s118(5) of the HA80 allows the new routes contained within Creation or Diversion Order(s) to be taken into account when determining whether or not to confirm the Extinguishment.

111. Where a s118 or 118A extinguishment order is concurrent with a s26(1) creation, or a s119 or s119B diversion order, it is necessary to consider the creation and/or diversion order first[21]. Having considered that order on its own merits and reached a conclusion, the extinguishment order can be addressed. The Inspector should consider the extent to which the creation, diversion or rail crossing diversion order would provide an alternative path or way; s118(5)(b), then go on to consider the s118 or s118A criteria.

112. Where an authority makes a number of creation orders (each providing a different alternative solution) and the authority only wishes the Inspector to confirm one, the authority's reasons for making the order in the first place can be a material consideration to balance against any other considerations in coming to the decision.

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[21] Although the Act does not expressly provide for orders made under section 118B and 119B to be considered concurrently with other orders, there does not appear to be anything in legislation to prevent them from being so. The same consideration may also apply to s119D but advice should be sought on this point.

113. Therefore an Inspector may confirm one of the orders and decide not to confirm the remainder. This appears to be supported by Schiemann LJ in *R (oao) Hargrave & Hargrave v Stroud DC* [2001] EWCA Civ 1281. In referring to paragraph 2(2) of Schedule 6 to HA80, he commented: "…*there is no duty imposed upon the Secretary of State to confirm the order….I would hold that as a matter of construction of the Statute it is open to the Secretary of State on receiving the order …to decide that he will not confirm the order*".

114. It is the word 'may' in paragraph 2(2) which seems to give the WM (or Inspector on their behalf) the discretion whether to confirm the order.

115. These schemes may be referred to as 'rationalisation' and can lead to unhappiness about what may be seen as large-scale changes to the network. The Inspector should ensure that each order can stand on its own merits but it is not unreasonable, when considering expediency matters, to take account of the overall intention and outcome.

Creation Agreements

116. S25 of the HA80 allows HAs to enter into agreements with landowners to create new public footpaths, bridleways and restricted byways. These agreements are essentially a matter for the parties concerned and do not necessarily involve public consultation in any form. They do not require confirmation and do not come to the WM for determination. Although they are sometimes linked to diversion or extinguishment orders, there was no express provision, until recently, for such agreements to be taken into consideration when determining orders.

117. In a Court of Appeal (CoA) judgment, *Hertfordshire CC v SSEFRA* [2006] EWCA Civ 1718, it was held that creation agreements which are conditional and rely on the confirmation of another order cannot be taken into account when determining orders. However, a sealed unconditional creation agreement already in force can be considered.

PPOs made under the Town and Country Planning Act 1990

118. For orders made under s257, 258 or 261 of the TCPA90 there is no statutory requirement for an OMA to consult with other local authorities.

Section 257

119. The granting of planning permission does not authorise any obstruction of a right of way. However, s257 of the TCPA90 empowers an LPA to authorise the stopping up or diversion of any footpath, bridleway or restricted byway, if satisfied that it is necessary to do so in order to enable development to be carried out in accordance with a planning permission granted under Part III of the Act or by a government department. It includes works classed as permitted development.

120. In relation to s257(1) orders, the Inspector will need to be satisfied that there is a valid planning permission; that it is not, for example, expired by the passage of time or invalid on some other ground. Although the existence of the permission may not be in dispute, its merits may still be.

121. The Inspector must be satisfied that the stopping up or diversion is necessary in order to enable the development to be carried out. It is not enough that it is desirable, for example, because it would make the implementation of the planning permission more convenient. Objectors may put forward alternative proposals which, in their view, would make the stopping up or diversion unnecessary. However, the Inspector does not have the power to amend the planning permission. It is important to note that there is no reason why any PPO has to refer to the entire width of a route. This is more commonly seen in relation to seeking extinguishment of a strip of land forming one side of a public right of way to allow development.

122. If minded to propose a modification to an order the Inspector must be sure that it is wholly consistent with the planning permission, including any conditions attached to it. If a condition cannot be met by the alternative proposal, then the development could not be carried out "in accordance with the planning permission" as required.

123. The assessment of whether the stopping up or diversion is necessary can sometimes involve striking a fine balance. The need to stop up or divert rights of way through industrial developments, for example, will depend on the nature of the activities proposed and the relationship between the way and the proposed industrial facilities. Health and safety should have been in the mind of the LPA at the time of considering the planning application and, again, the position may well have been regulated by conditions.

124. If the planning permission is in "outline" only, it may be premature to confirm the order. For example, if the access, layout or landscaping of a new housing estate are matters reserved for later approval, it would be difficult to establish from the information available that it is necessary to stop up or divert the right of way.

125. Another important question is whether works have already been carried out such that an order under s257 cannot be made or confirmed "*to enable development to be carried out*". In *Ashby & Dalby v SSE & Kirklees MBC* [1978] 40 P & CR 362, (CA) [1980] 1 WLR 673, [1980] 1 All ER 508, a builder obstructed a path and started development before seeking a TCPA diversion order. The issue was whether it could be made where much of the development had been completed but some work remained to be done.

126. It was held in *Hall v SSE* [1998] EWHC 330 (Admin) that the matter 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. At the time of the inquiry, the planning permission was spent in so far as the highway was concerned.

127. *Sage v SSETR* [2003] UKHL 22 related to a planning enforcement notice but is considered relevant to TCPA public path orders. The Court of Appeal had sought to define *"substantially completed*" by reference to other provisions of the TCPA but the House of Lords restored the previously held view that the issue is to be approached holistically. The question of whether a development is substantially complete is a matter of fact and degree to be determined in each case on the evidence.

128. If development has been undertaken which precludes the making or confirmation of the order, s257 cannot be engaged by demolishing part of the works already carried out. An order will need to be obtained under the HA80.

129. *Vasiliou v SST* [1991] 2 All ER 77 means that the above criteria are not the only matters to be considered. Where the order may impact on access to premises then this must be taken into account. The disadvantages or loss likely to arise as a result of the stopping up or diversion, either to members of the public generally, or to persons whose properties adjoin, or are near to the existing highway, should be weighed against the advantages to be conferred by the proposed order.

130. *KC Holdings (Rhyl) Ltd v Secretary of State for Wales and another [1989] Lexis Citation 2687* sets out that an order will not automatically be confirmed even where it is established that it is necessary to stop up a path for development to take place:

"*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*."

131. If the proposal would cause disadvantage or loss to the public or owners of nearby property, the Inspector may decide not to confirm the order, even when the statutory criteria are met. It is necessary to strike a balance between the public and private benefit intrinsic in the development for which permission is granted, and any detriment arising from the stopping up or diversion. The Inspector would need to weigh any disadvantage or loss against the identified benefits before deciding not to confirm the order, and carefully justify any such decision – possibly with reference to the Human Rights Act 1998 (HRA98), Article 8 and/or Article 1 of the First Protocol, as discussed below.

132. There is no provision for compensation. Diversion across land owned by a third party requires the latter's express agreement; it is common sense to insist on this agreement being evidenced in writing.

133. Objectors to such orders may be opposed to the planning permission. The Inspector will need to make it clear in opening that the inquiry or hearing is not an opportunity to revisit the planning permission. It may also be necessary to intervene later in the proceedings to remind parties that the merits of the planning permission are not before the Inspector.

Section 258

132. Orders under s258 are rare. They seek to extinguish a public path where land has been acquired or appropriated for planning purposes by a local authority. The Inspector will need to be satisfied that this is the case and an alternative right of way has been or will be provided, or that no alternative is required.

Section 261

133. Orders under s261 are more frequent and relate to the temporary stopping up or diversion of highways for mineral working. The criteria to be met are that the stopping up or diversion is required for the purpose of enabling minerals to be worked by surface working, and that the public right of way can be restored, after the minerals have been worked, to a condition not substantially less convenient to the public.

134. While it is essential to refer to and apply the "required" test under s261, and "necessary" test in s257, the approach is fundamentally the same. Also note that "temporary" does not necessarily imply "short-term". A stopping up or diversion planned to last for 30 years may be temporary if 30 years is the period during which the extraction of the minerals is to continue, and the stopping up or diversion is to be reversed at the end of that period.

Section 247

135. Orders may also be made under s247 in relation to "highways", including both vehicular highways and rights of way. Such orders are not common. The matters to consider are as with s257 except that they are not subject to the provisions of Schedule 6 regarding the advertisement of modifications which would affect land not affected by the order as drafted.

Variation and Revocation Orders

136. PPOs already made and confirmed can be varied or revoked under HA80 s326 and TCPA90 s333(7). These are rarely used and would be likely to arise where an error was subsequently noted (for example a route shown on the original order was found to be incorrect) or if the proposed change was not required (for example the planning permission had lapsed). The same rights to object apply as to any order made under the relevant Act.

Joint and Combined Orders

137. At present there are no Regulations in force in Wales which allow s53A of the WCA81 to become operative. As a result, provisions to enable authorities to include directions to modify DMS in certain Orders are unavailable and separate Orders have to be made.

Definitive Map Modification Orders

Provisions of the WCA81

138. S53(2) of the WCA81 states:

"*As regards every definitive map and statement, the surveying authority shall— (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3)…* "

139. The key events set out in s53(3) in relation to DMMOs are:

(b) 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 or restricted byway ***(addition to the DMS)***

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic ***(addition)***

*(ii) that 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 (****up or downgrade)***

*(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any or any other particulars contained in the map and statement require modification (****deletion and alterations to particulars)***

Approach to DMMO Casework

140. The general approach to DMMO casework is set out above. In each case it is for the Inspector to decide on the weight to be given to the various arguments for or against a proposed modification, having established the facts and considered the submissions of those concerned. However, it must be remembered that the case 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[22].

141. When confirming an order to add a PROW to the DMS the Inspector must be satisfied that the right of way subsists. 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

[22] *Burrows v SSEFRA* (QBD) [2004] EWHC 132 (Admin)

assessment of the relative values of the individual pieces of evidence and the evidence taken together.

142. The Guidance on procedures for considering objections to Definitive Map and Public Path Orders in Wales seeks to support a consistent approach to the common types of evidence referred to in DMMO cases. Whilst written for England and not having been updated for some time, the PINS Definitive Map Orders Consistency Guidelines [now withdrawn] is a useful document.

Form of the Order

143. The DMMO should be in the form or *"a form substantially to the like effect*" to that set out in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. If a DMMO differs from the prescribed form, Inspectors will need to decide whether or not it is substantially the same and whether anyone may have been misled or prejudiced as a result. If an order is so badly drafted that a reasonable person would be likely to misunderstand its intention or effect, it should not be confirmed. PINS Advice Note 20 gives guidance regarding the Inspector's powers to modify DMMOs.

144. A DMMO must specify a width for a new highway. If it does not, the Inspector should invite comments from the parties on the appropriate width and, in the decision, propose that the order be modified to record a width. This will require further advertisement. If the width is given as a minimum or approximate width then the Inspector should modify the Order. This may or may not require further advertisement. Although rarely necessary an Inspector may add an additional plan to an order where it is considered necessary to ensure the width(s) of the path(s) can be properly reflected (and it is not possible to add this clarity to the Order map as drafted. Further guidance regarding widths on orders is found in PINS Advice Note No. 16.

Schedule 14

Directions

145. S53(5) of the WCA81 allows applications to be made for DMMOs, to add, upgrade, downgrade or delete routes. Schedule 14 of the WCA81 makes provision for and sets out the procedures to be followed in making applications for orders under s53, with paragraph 3 relating to the determination by the authority. According to paragraph 3(1):

"As *soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall:*

(a) investigate the matters stated in the application; and

(b) decide whether to make or not to make the order to which the application relates.

146. If the authority has not determined the application within twelve months of receiving a certificate and following representations from the applicant the WM may, after consulting with the authority, direct the authority to determine the application before the expiration of such time period as may be specified in the direction.

147. Applications to direct the authority to determine the application are normally dealt with by way of written representation. The main issue that arises is as set out in paragraph 3(1): have the authority done what they should "*as soon as reasonably practicable…"*. The decision may be to direct the authority to determine the application within a specified timescale or to not direct the authority, if there is no case for prescribing the timescale. If matters are raised in relation to HRA refer to the information below.

148. The WCA81 provides that applications for directions can only be made once an authority has exceeded a 12-month period to determine a modification application. Whilst it is usual for Inspectors to direct that a determination be made within 6 months of the direction, if the Inspector is convinced there are exceptional circumstances to be taken into consideration, then an alternative date may be used. A relative rather than an actual date should be specified.

149. Paragraph 5.26 of the Welsh Government Guidance for Local Authorities on Public Rights of Way states that in response to a request from an applicant for the WM to direct an authority to make a decision the WM:

"…*will take into account: any statement made by the authority setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the authority or expressed intentions of further action on the application in question, the circumstances of the case and any views expressed by the applicant."*

Appeals

150. These arise where an authority has decided not to make an order in relation to an application under Schedule 14. The Inspector has to decide whether the evidence is sufficient for an order to be made and, if so, direct the authority to make an order.

151. The determination of the evidence under Schedule 14 relies on the same rules as set out in relation to DMMOs under Schedule 15. There may be user, landowner and/or documentary evidence, and consideration must be given to any evidence submitted in addition to that taken into account by the authority in their determination of the application. The weight to be given to the evidence for or against an application is for the Inspector.

S53(3)(c)(i) - Tests A and B

152. There is an important difference between determining a DMMO and a Schedule 14 appeal where the application is made under s53(3)(c)(i); it sets out two tests:

"*that a right of way which is not shown in the map and statement subsists*
Or
is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies".

153. The tests were described as "A" and "B" in *R v SSE ex parte Norton & Bagshaw* [1994] 68 P&CR 402:

A: does a right of way subsist on the balance of probabilities?
B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

154. It was also held in *Norton & Bagshaw* that an Order should be **made** where **either** of the tests is met. The evidence to establish Test B will be less than that necessary to establish Test A.

155. Where Test A is not satisfied in a Schedule 14 appeal, perhaps because it is found that the balance between the evidence for and against the claim is a fine one, with a conflict of credible evidence, the Inspector can still conclude that it is reasonable to allege that a right of way subsists and Test B is met. The Inspector would go on to direct the authority to make an order.

156. For DMMO casework, it was held in *Todd & Bradley*[23] that, in **confirmation** of an order, the Inspector will **only** consider Test A and make a finding as to whether a right of way subsists on the balance of probabilities.

157. It was noted by the CoA in the leading judgment of *R v SSW ex parte Emery (1997) QBCOF 96/0872/D*:

"…*The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"

158. In a Schedule 14 appeal, the Inspector should decline to direct that an order is made if he/she is satisfied that it is not reasonable to allege that a right of way subsists (Tests A and B are not met) having considered all the evidence available and without seeing the need for that evidence to be tested by cross examination. Occasionally a Schedule 14 appeal is dealt with by means of a non-statutory inquiry where the Inspector, having reviewed all the evidence submitted, considers it necessary to ensure procedural fairness, or where the conflict of evidence cannot be fairly resolved on consideration of the written submissions alone. In such circumstances there is no specific provision under the WCA81 for an Inspector to make a decision for costs in the event that a costs application is made by any of the parties.

159. Where, for instance, a way cannot reasonably be alleged to subsist because there is incontrovertible evidence to the contrary, it would not be appropriate to direct that an order be made. Such an example may be where a landowner has made statutory declarations under s31(6) of the Highways Act 1980 such that there is no uninterrupted period of use. As s31(6) refers to declaration by

[23] *Todd & Bradley v SSEFRA* [2004] EWHC 1450 (Admin)

the owner or his successors in title a change in land ownership does not interrupt protection unless the new owner (the successor) fails to lodge a declaration at the appropriate time. A deposit made under s31(6) could be taken as a date that the public use was called into question and it remains possible that there would be sufficient evidence of public use prior to that date for deemed dedication to have occurred. Similarly, public rights could be acquired if the owner fails to make subsequent statutory declarations and the protection under s31(6) has expired. Whilst the period of protection was extended in 2013 to 20 years in England it is currently 10 years in Wales.

160. All applications under s53(3)(c)(ii) and 53(3)(c)(iii) are simply determined on the balance of probabilities, as there is no 'reasonable allegation' test.

Technical Matters

161. Following *R (oao Warden and Fellows of Winchester College & Humphrey Feeds Ltd) v Hampshire CC & SSEFRA* [2007] EWHC 2786 (Admin), [2008] EWCA Civ 431, an application for a route to be shown as a BOAT, which was made before 19 May 2005 in Wales[24], must have been made strictly in accordance with paragraph 1 of Schedule 14.

162. To be compliant and engage the exemption under s67(3) for public vehicular rights to be preserved from extinguishment under s67(1), the application must be accompanied by copies of all the documents relied on together with a map of the correct scale. *Maroudas v SSEFRA* [2009] EWHC 628 (Admin), [2010] EWCA Civ 280 sets out the requirements for the validity of an application and the limited circumstances of providing additional information.

163. The matter of the map scale was considered in *Trail Riders Fellowship & Tilbury v Dorset CC & SSEFRA* [2013] EWCA Civ 553 and *R (oao Trail Riders Fellowship & Another) v Dorset CC* [2015] UKSC 18. 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 of being "drawn to the prescribed scale" where it has been "digitally derived from an original map with a scale of 1:50,000", provided that the application map identifies the way or ways to which the application relates. Importantly, the requirement of strict compliance need not apply to applications that do not come under s67(6) of the NERCA06.

164. The right of appeal under Schedule 14 only applies where the authority has decided not to make an order. The right of appeal does not exist if the authority issues a refusal notice to make an order for the status applied for but resolves to make an order for a different status or an order which differs from the application in some other way. There is no right of appeal against an authority's failure to determine an application deemed to be invalid. These matters should normally be dealt with in the office before reaching the Inspector.

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[24] The relevant date for s67(3) of the NERCA06

165. Evidence not previously considered by the authority may be submitted as part of an appeal. The Inspector should consider any relevant evidence submitted by interested third parties along with any subsequent comments made by either or both the appellant and the authority on that third party evidence.

166. Following an Ombudsman decision[25] in respect of a Schedule 14 appeal, if the Inspector determines in favour of the appeal, the decision should direct the authority to make an Order within 6 months[26]. However, as in the case of Schedule 14 Directions, the matter of exceptional circumstances may need to be taken into account and time scales extended. It must be remembered that as the authority is required to make the order only, the time afforded need not be so long as that potentially required to determine a modification application where, for instance, research is required.

167. When more than one route is included in a DMMO order, this may in some situations lead to the order being severed. Paragraph 5(1) of Schedule 15 of the WCA81 states that in circumstances where there are unwithdrawn objections that "relate to some but not all of the modifications made by the order", then the OMA may elect to sever the order. This causes the order to "have effect as two separate orders", the first "comprising the modifications to which the objections or representations relate" and a second "comprising the remaining modifications". The OMA should submit a notice confirming their decision to sever the order. This notice will indicate those sections of the original order that have been confirmed as unopposed. Although all routes will remain within one physical document, such documents will be approached as two separate orders. Inspectors should make clear in their decisions that the order has been severed under paragraph 5(1) of Schedule 15 and that their decision relates only to those routes that have not been confirmed by the order making authority prior to submission to the Welsh Ministers.

Schedule 15

168. In making an order under S53 or 54 of the WCA81, an OMA is required to consult with every local authority whose area includes the land to which the order relates. If this requirement has not been met, the order cannot proceed.

169. Schedule 15 to the WCA81 sets out the procedures relating to the making, confirmation, validity and date of operation of DMMOs. These matters may be raised by objectors in the belief that this will mean that an order is fatally flawed and will be thrown out.

170. If a failure to comply with the procedural requirements comes to light at any point before the determination of the order, Inspectors should seek to remedy this. The question is whether anyone has, or is likely to have, suffered prejudice as a result of the failure to follow procedures and, if so, whether such prejudice can be avoided by requiring further work to meet the requirements of

[25] City of York (18 0108 41)
[26] Timescale specified by Welsh Government in letter dated 14 November 2019

the procedures. An Inspector appointed under s15 of WCA81 is not appointed to determine whether all or any of the statutory requirements set out in Schedule 14 have been complied with. The Inspector is appointed to determine only the merits of the order itself. Any failure by the OMA to meet any requirements under Schedule 14 is subject to judicial review at the time that the order is made.

171. Such matters may include failure to serve notice on a party; to publicise the order on site; to publicise the order in the local newspaper; or giving less than 42 days' notice of the order for objections or representations to be made. In such cases, it would be possible for the determination of the order to be delayed whilst the appropriate notices are served, if necessary by an adjournment of any hearing or inquiry being held into the order. Whilst the formal definition of 'owner/occupier' on whom notice should be served does not include a person with only rights to that land, it is for the applicant to ensure, as far as possible, that every owner and occupier and person with an interest in the land has been notified.

172. Where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation [see PINS Advice Note 21].

173. The notice should state the general effect of the order; name a place in the area in which the land to which the order relates is situated; where a copy of the order and map may be inspected; and specifying the time (which shall not be less than 42 days from the date of the first publication of the notice) within which, and the manner in which, representations or objections with respect to the order may be made.

174. The people on whom notice must be served are set out in paragraph (3) of Schedule 15, with the paragraph 3(2)(b)(iv) "prescribed" organisations being set out in the relevant regulations. These are listed in Annex 1 of Welsh Government Guidance for Local Authorities on Public Rights of Way, 2016 and include: Auto Cycle Union; British Driving Society; British Horse Society; Byways and Bridleways Trust; Cyclists Touring Club; Open Spaces Society; The Ramblers; and Welsh Trail Riders Fellowship.

175. A copy of the notice is to be displayed in a prominent position at the ends of any way as is affected by the order; at council offices in the locality of the land to which the order relates; and at such other places as the authority may consider appropriate.

176. A confirmed order cannot affect land not affected by the order; not show any way shown in the order or show any way not so shown; or, show as a highway of one description a way which is shown in the order as a highway of another description, except after giving notice of such proposals.

177. OMAs have the power to sever an order where there have been objections to only part of the order. They can confirm as unopposed one part of the order and submit the other to WG.

Making changes to the Definitive Map and Statement

178. Changes to the recording of a route may arise under the statute by reference to s31 of the HA80 or common (or judge-made) law The evidence relied on may be from individuals, e.g., users or landowners, documents, or a mixture of both. The new evidence required to trigger a change should be that discovered since the relevant date of the DMS.

179. In relation to evidence of dedication of a way as a highway, s32 of the HA80 sets out that:

"*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced*."

180. There is a great deal of case law associated with various elements of DMMOs and a summary of cases is attached at Appendix D. It is important to read the entire judgment and not rely simply on the summary; there may be differences which distinguish the case from the evidence being dealt with in relation to a particular DMMO.

181. In relation to claims involving land forming part of a churchyard the General Synod Legal Advisory Commission opinion may be of assistance. It will be necessary to check the circumstances in which the rights are alleged to subsist, including evidence of consecration or, as the case may be, "removal of legal effects of consecration". A right of way cannot be dedicated over a churchyard at common law. It may be that statutory deemed dedication would arise under s31 HA80 but this will depend on the facts, including compatibility with public or statutory purposes set out in s31(8). It may be necessary to separately assess evidence for part of a claimed way on land alleged to be consecrated land, from that which is not. Entry to a churchyard can be an appropriate terminus for a right of way.

182. The 'presumption of regularity' can sometimes arise in casework, as discussed in *Calder Gravel Ltd v Kirklees Metropolitan Borough Council (1989) 60 P & CR 322, [1990] 2 PLR 26, (1989) Times, 16 October*. The presumption operates where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. It presumes the authority acted lawfully and in accordance with its duty.

Addition of a Route

183. Addition may arise under s53(3)(b) of WCA81 which sets out that:

"*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 or restricted byway."

This may overlap with reference to s53(3)(c)(i).

Statute (Highways Act 1980)

184. Under statute, a way is deemed to have been dedicated as a highway;

"*where a way over any land… has been actually enjoyed by the public as of right and without interruption for a full period of 20 years…The period of 20 years…is to be calculated retrospectively from the date when the right of the public to use the way is brought into question…*"

185. The evidence for this is most likely to be supplied initially in User Evidence Forms (UEFs). The Inspector needs to be satisfied, on the balance of probabilities, that there is sufficient evidence of use 'as of right' and 'without interruption' to raise the presumption of dedication. As of right means without force, without secrecy and without permission[27]. These matters may or may not be clear from the evidence as a whole. Whilst there may be a right to deviation in relation to a recorded public right of way, the evidence required by the Inspector is that the claimed right of way has been used. A change of route would not support the use of a single alignment. Advice on user and landowner evidence is given in Appendix C.

186. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice or otherwise. The Inspector may need to consider several events to identify the relevant twenty-year period or periods and take account of several matters in reaching a conclusion on it.

187. Questions should include whether the notice was sufficient to have called use into question; and whether people were being physically stopped from using the claimed route by someone turning them off or by physical barriers, such as a locked gate; or whether it was simply the application to record the route which brought the 20-year period of use to an end [s31(7A) and 31(7B) of the HA80 as introduced by s69 of the NERCA06].

188. Once satisfied that the way is deemed to have been dedicated as a highway, consideration needs to be given to the 'proviso' set out in s31(1) of the HA80 as to whether "…*there is sufficient evidence that there was no intention during that* [20 year] *period to dedicate* [a public right of way]."

189. Based on the wording of s31(6) of the HA80, an owner can deposit with the local authority a statement and then once the land has been sold to a new owner, the new owner (as the successor in title) can continue to make declarations to maintain the presumption that no additional rights of way have been dedicated since the last declaration. Therefore the change of ownership has no direct impact on the process

[27] *Nec vi, nec clam, nec precario*

provided that the new owner ensures a declaration is lodged within the relevant number of years from the date on which any previous declaration was last lodged under this section.

190. Following *Godmanchester & Drain v SSEFRA* [2007] UKHL 28, there will ordinarily be symmetry between the concepts of calling into question and a lack of intention to dedicate. The actions of the landowners, demonstrating a lack of intention to dedicate, may well demonstrate an earlier 20-year period for consideration.

Common Law

191. If a claim fails under statute, consideration should be given to the evidence at common law (or the case may be made under common law). The time period over which dedication of a public right of way can be shown may be longer or shorter than 20 years, depending upon the evidence as a whole. However, it is necessary to show dedication by the landowner and acceptance by the public of that dedication. This is a more onerous task than deemed dedication under statute.

192. The case of *Rowley and another v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1040 (Admin), [2003] P & CR 27* raised concerns regarding s31 of HA80 and whether a tenant's positive actions could be attributed to the landowner. If it is alleged that the freeholder has a different intention to the tenant, there should be evidence establishing this. In the context of whether or not permission has been granted, 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. Sometimes the evidence arises only or mainly from documents.

Deletion of a Route

196. This arises under s53(3)(c)(iii) of the WCA81 and will need to be considered at common law, by reference to the evidence as a whole and the relevant case law. Arguments are often made that the route could not possibly have been used by the public due to its physical condition. Bear in mind how quickly a garden gets overgrown and how instantaneously potholes seem to appear before giving great weight to a presumption that current conditions reflect those of one hundred years ago, or even ten.

Deletion and Addition

197. Sometimes an order seeks to alter the location of a route by, for example, moving it from one side of a boundary to another. In such situations both events, s53(3)(c)(i) and s53(3)(c)(iii), should be considered to see whether the evidence as a whole supports both addition and deletion. It remains open, on the evidence, to confirm one part of the order but not the other. However, in *R (oao Leicestershire CC) v SSEFRA [2003] EWHC 171 (Admin)* Collins J held that in positional correction cases it is not possible to look at (i) and (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. 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 that a change should take place. The presumption is against change, rather than the other way around.

Alteration of the Status of a Route

198. Evidence may be presented to say that a route has higher or lesser rights than are recorded on the DMS, for example that a footpath should be recorded as a restricted byway or a bridleway as a footpath. Such orders arise under s53(3)(c)(ii). The evidence presented may include user, landowner and/or documentary evidence.

Reclassification of Roads Used as Public Paths (RUPPs)

199. Section 54 of WCA81 placed a duty on authorities to review the DMS and reclassify all RUPPs as footways, bridleways or BOATs by way of reclassification orders. S54 ceased to have general effect after the commencement of s47 of CROWA00 (on 11 May 2006) but any undetermined reclassification orders made prior to that must proceed to a conclusion.

200. The Wildlife and Countryside (Definitive Maps and Statement) Regulations 1983 did not require a width to be recorded for a reclassification order whereas the revised 1993 regulations specified that widths should be shown. In determining a pre-1993 reclassification order the Inspector is not obliged to add a width but may consider it requisite to do so subject to the usual requirements of evidence and advertisement.

201. Where the width of a RUPP is recorded in a DS, there is no need to re-state it in the schedule of a pre-1993 re-classification order, although it is open to the Inspector to do so. Since this is conclusive evidence by virtue of its inclusion in the DS, there would be no need to advertise its addition to the order.

Deregulation Act 2015

202. The relevant sections of the Deregulation Act 2015 (DA15) are sections 20 to 26 inclusive and Schedule 7. They are not yet in force but when they become law this chapter will be updated.

The Human Rights Act 1998 and Equality Act 2010

203. Where relevant, regard must be had to the provisions of the HRA98 and the Equality Act 2010 (EA10). The primary source of advice is the WITM chapter on Human Rights and the Public Sector Equality Duty, although that is written primarily with planning casework in mind.

204. Article 6(1) states that "*in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*" The application of Article 6(1) to the choice of procedure and conduct of hearings and inquiries is explained in the relevant chapter of the WITM.

205. In Schedule 14 direction decisions, the WM is required to consider what period of time would be “as soon as reasonably practicable” for the authority to investigate and determine the application. However, the decision does not amount to a determination of the applicant’s civil rights and obligations, so Article 6(1) is not applicable to Schedule 14 directions.

206. Inspectors should make decisions in Schedule 14 direction cases on the meaning of “reasonably practicable” as set out in the WCA81 and avoid making any reference to Article 6(1) or the concept of “within a reasonable time”. If the applicant has raised the question of Article 6(1) rights, such that the matter has to be addressed, the following text should be set out at the end of the decision – following your conclusion on the WCA81:

Representations were made to the effect that Mr/Ms # rights under Article 6(1) of the Human Rights Act 1998 would be violated if the authority is not directed to determine the application.

Article 6(1) provides that in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. However, my decision as to whether the authority has investigated and determined the application as soon as reasonably practicable in accordance with paragraph 3(1) of Schedule 14 of the WCA81 does not amount to a determination of the applicant’s civil rights and obligations. Article 6(1) is not applicable to this decision.

207. Article 8(1) confers the right to respect for private and family life, home and correspondence. Article 1 of the First Protocol confers rights for the peaceful enjoyment of possessions, non-deprivation of possessions and control of the use of property in the general interest. The relevant chapter of the WITM gives further guidance on Article 1 of the First Protocol and Article 8(1) and, in particular, how the rights thus conferred are ‘qualified’ such that in certain circumstances they may be interfered with provided the interference is proportionate having balanced competing interests.

208. PPO decisions are made on their merits and the decision-maker has some discretion. Accordingly, the Inspector will need to address any claim by the parties, particularly losing parties, in PPO casework that a right under Article 8 and/or Article 1 of the First Protocol would be violated or interfered with, perhaps because a route that is proposed to be created or diverted would cross or adjoin their property. Account should also be taken of the provisions for compensation under s28 HA80, which sets out under ss4 that where a person does not have an interest in the land held therewith, the right to compensation is available for those where the effect of the order would have been “actionable at his suit”. This matter is for the authority to determine.

209. There will be a need to address human rights issues in PPO cases where the Inspector considers that there is a reasonable prospect that a right could be violated or interfered with, even if the parties have not done so.

210. Considerations relating to Article 8 and/or Article 1 of the First Protocol may be raised but will not be engaged in DMMO casework where the only matter to be determined is whether public rights exist in law. The criteria which may be taken into account in DMMOs under WCA81 are strictly limited, such that personal considerations are not relevant. It is not possible to interpret the legislation in such a way that it is compatible with the Convention rights.

211. A DMMO seeks to record a public right of way which already exists under the law; there is no consideration of the effect of the public right of way on individuals and their human rights, and no determination of any private, human or civil rights. A decision to confirm or not confirm a DMMO is lawful under s6(2) of the HRA98. It remains an option for the HA to take account of such issues by, for example, diverting a newly recorded route but these are not matters for the Inspector.

212. Similarly, the rights under Article 8 and/or Article 1 of the First Protocol will not be engaged in Schedule 14 direction decisions, even if the DMMO applied for would have personal or property implications for the applicant. The effect on the applicant of any delay in determining the application may be relevant to a Schedule 14 direction decision, but there would be no consideration of any effects of the public right of way subject to the application itself on the personal or property rights of the applicant.

Public Sector Equality Duty

213. Similarly, and again in accordance with the relevant chapter of the WITM, regard must be had to the PSED in procedural decisions and PPO casework, but not in DMMO determinations of public rights in law, or in Schedule 14 direction decisions which relate to the time for determination of DMMO applications.

214. The most commonly raised equality matter in PPO casework relates to the protected characteristics of disability and/or age in relation to furniture, for example: stiles or gates, on a public right of way, particularly in relation to a diversion order and whether the proposed route is substantially as convenient as the existing route. This could relate to gradients or whether the proposed route means that there are no stiles.

215. The accessibility of a proposed route is one factor to be taken into account when considering whether the PSED will be discharged.

216. According to the British Standard 5709:2018, the least restrictive option should be sought and the ascending scales of restriction are: gap; gate; kissing gate; and stile. Useful references include Good Practice Guidance for Local Authorities on the Authorising of Structures and 'Understanding the British Standard for Gaps Gates and Stiles BS5709:2018 explained' published by the Pittecroft Trust.

217. It is considered, by virtue of s328(2) of HA80, that a bridge is part of the highway rather than a limitation upon it. Where the bridge is of a different width to the right of way at either end this should be seen as a variation in the width, rather than a limitation, and shown as such on the DMS. A narrow gap

in a fence, wall or comparable physical structure across a right of way is not, of itself, a limitation, but should be regarded as a variation in the width of the right of way. Clearly this is a matter of fact and degree.

The Well-being of Future Generations (Wales) Act 2015

218. The Well-being of Future Generations (Wales) Act 2015 may be relevant to PPO cases, which are likely to cover some of the Act's objectives. Welsh PPO decisions should thus contain the following standard text:

    I have considered the duty to improve the economic, social, environmental and cultural well-being of Wales, in accordance with the sustainable development principle, under s3 of the Well-being of Future Generations (Wales) Act 2015 ("the WBFG Act").

    In reaching this decision, I have taken into account the ways of working set out at s5 of the WBFG Act and I consider that this decision is in accordance with the sustainable development principle through its contribution towards one or more of the Welsh Ministers well-being objectives set out as required by s8 of the WBFG Act.

219. The location of this paragraph in decisions should be properly added to and integrated with the "Conclusions".

220. For orders which are solely based on legal matters/facts/certain tests and not merits, such as the majority of DMMOs, it is unlikely that reference to the 2015 Act will be required.

Rights of Way Events

221. In general the procedures relating to rights of way events are run in a similar manner to other events covered in other chapters of the WITM.

222. In respect of all site visits, the questionnaire submitted by the OMA regarding health and safety at the site is a useful source of information regarding what the Inspector can expect to encounter. In addition, the usual precautions should be taken in order to prevent the spread of animal diseases irrespective of measures and exclusions issued appropriate to a specific situation, for example foot and mouth.

223. Whilst the *Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007* are only in force in England, Wales works to the spirit of the rules. It is expected that the parties will provide statements of case and proofs of evidence within the stated timescales. It is often the case that the parties are not legally represented and are unfamiliar with what events entail. This is particularly so with inquiries when the giving of evidence and cross examination are alien to many. An information note explaining what happens and what is expected of the parties is provided at an early stage in the proceedings.

224. There are some ways in which rights of way events can vary from events an Inspector may be familiar with in other areas of work, as set out below. Whilst opening announcements will follow a similar pattern to the examples given in the hearing and inquiries chapters of the WITM some adjustments will need to be made to take these differences into account. Suggestions can be found in Annex B.

Position of the Order-making Authority

225. Generally the OMA supports the Order but there are circumstances in which they may object to the Order or take a neutral stance, for example: where they have been directed to make a DMMO following a Schedule 14 appeal; or where a PPO has been made in the interests of the landowner.

226. In general the authority will identify someone to take the matter forward, often the applicant for the Order. It is helpful to have someone from the authority to assist with technical queries and this usually happens.

227. Further guidance can be found in *PINS Advice Note 1 - Conduct of Inquiries and Hearings into Rights of Way Orders where the Order Making Authorities do not actively support an Order.*

Position of Parties in relation to the Order

228. It is possible that there may be more than one strand of objection arising in relation to DMMOs. For example, an Order is made to record a footpath and the landowner objects to it on the basis that there are no public rights over the route, whilst the British Horse Society object on the basis that it should instead be recorded as a bridleway. Another possibility is where there is agreement between some that there is a right of way on the land but disagreement as to alignment, along with objection to any route being recorded at all.

229. These 'three-way' events require particularly careful management, for example, to ensure at the inquiry that cross-examination between parties in support of a right of way is limited to matters of disagreement, such as status or alignment. It may be appropriate for questions to be directed through the Inspector.

230. In addition to objections, there may be statutory representations in support of an Order. These parties may be called by the OMA or other supporting party or may give evidence and cross-examine opposing parties separately.

231. Where there is a request for a modification to the Order, The Inspector should ask for a marked up copy of the Order to be provided to the Inquiry. If necessary, an adjournment should be taken to facilitate this.

One-sided events

232. As a statutory party has the right to be heard, it is possible that they may be the only party at an event, if no-one else wishes to speak. In such cases the Inspector may need to take a more active role in questioning evidence, making it clear that the questions do not reflect a personal view, simply an exploration of relevant matters.

Inquiries and Hearings into Modified Orders

233. When making decisions on Orders a modification may be proposed, which leads to further objections. In such cases PINS Advice Note 10 provides the appropriate information on procedures to be followed.

Inquiries and Hearings for Local Authorities

234. In relation to HA80 Orders, an objection from a Parish, Town or Community Council is an objection by a 'local authority' with regard to paragraph 3(3) of Schedule 6 to the HA80 as amended. This takes precedence over s329 and, therefore, an inquiry should be held under paragraph 2(2) of Schedule 6 to the HA80.

Applications for awards of costs

235. Whilst all parties are expected to cover their own costs, an award can be made where it is shown that a party has incurred unnecessary or wasted expense because another party has acted unreasonably. The general principles on costs covered in the relevant chapter of the WITM apply to rights of way casework including the ability for Inspectors to initiate an award of costs. However, costs may be awarded only in cases where an inquiry or hearing is held and do not extend to those determined on written representations. Further advice can be found in Guidance for Local Authorities on Public Rights of Way, 2016.

236. Where an interim decision is to be issued, the Inspector should prepare a draft costs decision. This information will be used to write the final costs decision at the same time as the final order decision.

APPENDIX A: Glossary of abbreviations

AONB	Area of Outstanding Natural Beauty
BOAT	Byway Open to all Traffic
BOTO	Bridge or Tunnel Order
CA68	Countryside Act 1968
CoA	Court of Appeal
CROWA00	Countryside and Rights of Way Act 2000
DA15	Deregulation Act 2015
DMMO	Definitive Map Modification Order
DMS	Definitive Map and Statement
DM	Definitive Map
DS	Definitive Statement
E(W)A16	Environment (Wales) Act 2016
EA10	Equality Act 2010
FP	Footpath
HA	Highway Authority
HA80	Highways Act 1980
HRA98	Human Rights Act 1998
ILEMO	Integrated Legal Event Modification Order
LAF	Local Access Forum
LEMO	Legal Event Modification Order
LPA	Local Planning Authority
NERCA06	Natural Environment and Rural Communities Act 2006
NNR	National Nature Reserve
NP	National Park
NPACA49	National Parks and Access to the Countryside Act 1949
NRW	Natural Resources Wales
OMA	Order Making Authority

PPO	Public Path Order
PROW	Public Right of Way
PSED	Public Sector Equality Duty
RB	Restricted Byway
ROW	Right of Way
ROWIP	Rights of Way Improvement Plan
RUPP	Road Used as a Public Path
SAM	Scheduled Ancient Monument
SSSI	Site of Special Scientific Interest
TCPA90	Town and Country Planning Act 1990
TWA92	Transport and Works Act 1992
UEF	User Evidence Form
WCA81	Wildlife and Countryside Act 1981
WG	Welsh Government
WM	Welsh Ministers

APPENDIX B: Opening and other announcements for PROW inquiry

1. In common with other casework there are specific points which must be covered in opening a hearing or inquiry which are addressed in the chapters of the WITM relating to these events. However, adjustments will need to be made to opening announcements in order to suit a PROW event. Whilst how the openings are phrased and delivered, and even the order in which they are dealt with, are matters of personal style and expression, the following will need to be considered in an inquiry and where appropriate at a hearing. Aspects may need to be adjusted if the event is held virtually.

Introduction:

2. The purpose of the event is to decide whether or not the Order should be confirmed.
   The Order was made under (*section and Act*) ----by (*Order Making Authority*) --- on (*date of Order*) ---.
   The Order relates to/is named [route]. Full details of the route are given in the Order and map.

Appearances:

3. Ask for the names of all those who wish to speak and their interest in the case in the following order:
   - Order Making Authority (OMA)
   - Anyone else who wishes to speak in support of the Order.
   - Objector
   - Interested persons who wish to speak – clarify if they are speaking for or against the Order or taking a neutral stance.

Statutory Formalities:

4. Seek confirmation from the OMA that the relevant statutory requirements have been met with in full.

Subject of the inquiry:

5. Set out the effect if the Order is confirmed without modification.

6. Indicate that the purpose of the inquiry is to determine whether the criteria set out in (the appropriate section and Act) have been met and the OMA has relied upon (relevant criteria in Act relied upon); and therefore the matters before the Inspector for consideration are .....

7. Indicate that the decision made on the evidence before the Inspector will be to either confirm the Order; propose that the Order be confirmed subject to modifications; or not to confirm the Order.

8. Confirm the number of objections/representations received following the advertisement of the Order which have not been withdrawn.

9. If there are a lot of irrelevant representations it can be useful to set out the matters (give appropriate examples) which are not before the Inspector. Explain that whilst this might be a disappointment to some people, the law is quite clear

that determination of the Order must be based upon the evidence relating to a claim for a public right of way (or otherwise as appropriate).

10. Confirm the Statements of Case, Proofs of Evidence and other documentation received from the OMA and other parties and ensure the parties have copies. Ask if there are spare copies for circulation or deposit at a central point.

11. Inquire if there are any other documents anyone wishes to submit.

Document table and "the huddle":

12. Some of the points raised at the inquiry may involve detailed examination of historical evidence and the Inspector alongside participants from the main parties may have to closely scrutinise the original maps and other documents in order to fully appreciate points being put made in evidence. This is usually done around a central table to ensure neutrality.

13. It is necessary that those present are made aware that this is an important part of the inquiry process as it ensures the Inspector has seen, understood and noted the content of the relevant documents. This can either be done in openings or if/when a huddle becomes necessary.

14. The merits of the evidence and any discussion of matters arising from inspection of the documents must only take place in open inquiry sessions.

15. It might be useful to request those not actively involved to refrain from noisy or distracting conversation in the body of the room.

Procedure

16. Order in which the evidence usually heard:
    - OMA
    - Supporters
    - Principal or statutory Objectors
    - Objectors
    - Interested parties

17. If the OMA are taking a neutral stance it is necessary to confirm this, ask if they wish to make an opening statement and, if not, move on to the supporter's case.

18. Since many of those present will be unfamiliar with the procedures and will not have legal representation, it might be useful to stress that witnesses should be asked questions. People should not use an opportunity to question a witness as a pretext to make statements that should rightly be given as their own evidence.

19. If large numbers are present can be helpful if interested parties are asked to stand when addressing the Inspector from the body of the room. This makes it clear who is speaking and what is being said.

20. Closing submissions are made firstly by the objectors before the supporters and the OMA is entitled to the last word, even if taking a neutral stance.

Site visit

21. Confirm the extent of the pre-event site visit (how much of the route was walked or seen from public vantage points). If access/views are restricted explore alternative vantage points with the parties and if private land is involved ask for necessary arrangements to be made.

APPENDIX C: User & landowner evidence

1. Claims for dedication having occurred under s31 HA80 will usually be supported by user evidence forms (UEFs). Whilst UEFs are not standardised and pose differing questions of varying pertinence and precision, analysis of them will identify omissions, lack of clarity, inconsistencies and possible collusion, although the completion of common parts of the form by someone organising collection of the evidence is not necessarily indicative of collusion.

2. Analysis also allows the rejection of invalid UEFs (e.g. no signature, no clear description of the way or how it was being used) and to note the questions to raise at the hearing or inquiry. A similar analysis should be made of other types of user evidence, such as sworn statements, letters and evidence of the landowners.

3. However, UEFs and other types of user evidence may include sensitive information and regard should be had to GDPR.

Value of UEFs

4. UEFs may form the backbone of an applicant's case for a modification order. They may have been gathered over several years and although they will usually support a claim of 20 years of uninterrupted use, they may alternatively seek to support a Common Law claim.

5. The evidence contained in UEFs will usually be important to the applicant but may not have been properly analysed. As a result an Inspector may have a case where after analysis a large number of the UEFs are found to be invalid for one reason or another, for example due to not being signed.

6. Frequently the bulk of the forms will not be supported by witnesses who can be questioned. Therefore following analysis the Inspector may accept the contents of the UEFs at face value. The verbal evidence arising from cross examination may allow weight to be placed on the untested UEFs or show such discrepancies that the untested evidence must be disregarded.

Analysis of UEFs

7. In analysing the UEFs it must be decided which are valid, which are questionable and which are invalid. Questions should be prepared for whoever is relying on the forms to substantiate their case.

8. Excel is a useful tool in the analysis of the 20-year period claimed in the UEFs. If each year of the 20-year period is allocated a column and each UEF a row and each year of claimed use is highlighted, when completed any gaps or weak areas within the period will stand out. A weak area is one where perhaps only one or two users claim to have walked the path but it is for the Inspector to decide whether or not there has been sufficient use by the public, uninterrupted, over a period of 20 years or more.

9. It must be borne in mind that it is not necessary for everyone to have used the route for the full period of 20 years. People naturally move into and out of areas,

use a route when they have a dog to walk and not when they don't etc. Also bear in mind that frequency or use, or number of users, may be a reflection of the locality. For example, few but very regular in an urban cut through; large numbers irregularly in a suburban link path; or, few regularly or irregularly in a rural area.

Landowner Evidence Forms

10. In addition to UEFs, some authorities have a landowner version. Inspectors should be as rigorous in the analysis of these as UEFs. The information may assist in confirming evidence given in UEFs, for example the date of notices, which may then clarify the date that use was brought into question. On the other hand, they may provide entirely different information such that there is a conflict of evidence which the Inspector will need to explore at the Inquiry. If dealing with this by written representations, a conclusion will have to be reached as to the reliability of each set of evidence.

Scrutinising the contents of the UEFs

11. Although it is not the number of forms but the quality of the evidence contained in the form which is important to the Inspector it is seldom that all the questions on the UEFs are answered. It is therefore essential that every form is scrutinised in detail to ensure that the vital questions have been clearly and accurately answered. This does not matter so much if the author of the form appears as a witness at an event where they can be questioned. When there is no opportunity for questioning, the form must be clear and unequivocal if the Inspector is going to attach great weight to what it purports to say.

12. Often UEFs are completed by an applicant for an order, not by the actual user, so many may be in the same handwriting but signed by different individuals. Occasionally it occurs that a form is completed and signed, but the alleged signatory denies all knowledge of it. Whilst this is rare, it is less rare for opponents of an applicant to question the validity of forms because they are all in the same handwriting and it might be alleged that the details are not authentic. It will be for the Inspector to make a judgment based on the circumstances.

13. Sometimes two UEFS will be filled in by the same person several years apart and it is not uncommon to find a difference in the evidence. The ability to question this at Inquiry may clarify matters. If not, then, bearing in mind the reliability of memory[28], the Inspector may decide either to take the information from the earliest UEF, which will be closest to the event that has led to the Order, or the lowest level of use, as that should reflect the minimum. It may be necessary to explain the reasoning in the decision.

14. Specific comments on questions posed in UEFs:

    Age: often left blank but can be useful in confirming periods of claimed use.

    Occupation: often left blank but might be useful in ascertaining private rights, for example, where a farm worker may have had such rights. Be prepared for

[28] see *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)*

the argument where a farm worker used the path at weekends when he was off duty and was therefore exercising public rights as opposed to the private rights he enjoyed as a worker when working.

Description: Often very sketchy, but it needs to be sufficient for the Inspector to be satisfied that it refers to the path in question.

Status: Frequently left blank when the forms are filled in individually, because the average person does not understand the difference. Believing the way to be public is not evidence of use but if the belief is based on something concrete it helps to build confidence in the validity of the form.

Have you used the above way: Often do not get unequivocal answers. It is common for age to be omitted and "*all my life"* to be inserted here. This is of little assistance unless there is the opportunity of hearing the evidence at Inquiry.

The number of times during the year assists in determining overall frequency of use. Ten people using the route once a year is unlikely to be as visible to a landowner as six people who use it once a week.

The start and finish points, if completed, should tie up with the description. The Inspector needs to be satisfied that the same path is being referred to.

The purpose of use is important insofar as it can be consistent with occupation and belief of the status, or can demonstrate private right, albeit unintentionally. It is more of a verifying factor.

The means of use needs careful scrutiny; if the claim is for a BOAT and the witness has merely claimed use on foot, the form is of little value on its own. However, do not forget that the lower rights are included within the higher status and it is the evidence as a whole that needs to be considered.

Obstructions

Stiles – The presence of stiles would suggest that only a footpath exists.

Gates – If there is evidence that a gate or gates have been kept locked, this would suggest that no right of way exists or else there is an obstruction which has not been removed. It can be important with regard to proving the lack of intention to dedicate.

Notices – can be very important, particularly what they say. It has been argued at inquiry that a notice which stated *Private No Through Road – Access to Frontages Only – No Parking or Turning – Beware of Ramps* with a number 15 in the middle indicating a speed limit, applied only to vehicles and did not show a lack of intention by the residents to dedicate the said road. Whatever the signs say, there will always be scope for argument.

Other Obstructions – usually fallen trees but sometimes a deliberate obstruction placed across a track by a landowner calling into question the right of the public to use it.

If there is a natural obstruction, it can be important if it has made the way impossible for use by the method claimed in the order. If, for example, a tree prevented possibility of use by a vehicle for several years, but the way could still be used by foot or on horseback, this might be inconsistent with a claim for a BOAT. Such evidence can be innocently slipped in and unnoticed until the Inspector scrutinises the form and asks the question.

Did the signatory work for the landowner: If the answer is yes, then almost certainly he would have a permissive right and the UEF could not count towards the 20-year period.

Have you been a tenant or owned any of the land: Usually simple, but often the question remains unanswered or the answer is no. The person gathering UEFs is unlikely to obtain one from the landowner or tenant.

Are you related to the landowner: Again, normally left blank but important; unless there are very unusual circumstances, which would have to be justified, it must be assumed that 'family' have permissive rights.

Permission: Often answered by "*Didn't think I needed it"*. If the signatory has obtained permission, the UEF will not support 20 years of use.

Stopped or turned back: This is often blank, but it is important if filled in as it would be evidence of no intention to dedicate and might be used to establish the later date of the 20-year period.

Did you enjoy a private right: Usually there are mixed answers to this question, often because the signatory does not understand the differences between a public and private right.

Route and additional information: This question can be important in ensuring that the correct path has been properly described, but more often than not this question and the last are not completed.

Signature and Date: These are both important. If the form is not signed, it is not valid. If the form is not dated it could still be valid, depending on how accurately the rest of the form had been completed. If no date throws doubt on the accuracy of the other information, particularly dates, then the Inspector should be careful as to the amount of weight placed on the form.

APPENDIX D: Case Law

These summaries of important judgements should be used with caution; they do not purport to provide more than a brief outline of key points as a quick reference. The facts of the individual cases vary, and the transcript of the judgement should be consulted if it is to be relied on in a decision.

Please also note:

- This Appendix does not provide a conclusive or exhaustive list of all case law on public rights of way;
- Care should be exercised in relying on older judgements since there may be more recent case law, legislation and/or policy;
- A court is bound by the decisions of the court above it, and so a House of Lords or Supreme Court decision on a given issue has more status than a High Court or Court of Appeal decision on the same point; and
- If judgements are to be cited in decisions, they should not come as a surprise to the parties.

TO BE TAKEN FROM LATEST VERSION OF PINS ITM PROW CHAPTER
[Appendix D is currently under review by PINS]