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Highway Law, Sixth Edition

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Highway Law, Sixth Edition

12. Footpaths, Bridleways, and Byways

Mapping of Public Paths

Section 53(3)(c): The discovery by the authority of evidence

CHAPTER 12

Footpaths, Bridleways, and Byways

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INTRODUCTION

- 12-01** There are four types of public right of way that exist primarily to serve walkers and equestrians: footpaths, bridleways, restricted byways, and byways open to all traffic (BOATs). Such ways are usually less formally demarcated than ordinary roads. They are generally much narrower than full carriageway highways and are seldom made up. There may not even be a marked track. Although the inhabitants at large were liable at common law to repair footpaths and bridleways in the same way as they were required to maintain carriageway highways,¹ the degree of repair was, in practice, never as great. The duty to repair was always related to the kinds of traffic which a highway might carry, and there was, therefore, not the same need to undertake extensive maintenance work in those paths which carried no heavy traffic. A major problem with such public rights of way has therefore always been one of identification.
- 12-02** Footpaths and bridleways in particular have attained further significance over the last century, by providing access into the countryside for the increasing number of ramblers and leisure horse riders. A number of active pressure groups have become established whose aims include the preservation and improvement of the footpath and bridleway network. It was thus out of legislation aimed at improving the access of the city dweller to the countryside that the first attempt came to provide a comprehensive basis for the identification and mapping of the footpaths across the countryside. The Countryside and Rights of Way Act 2000 (the CROW Act 2000) has now established a more general right of access to some areas of open countryside and the Marine and Coastal Access Act 2009 is extending rights of access to coastal land. Access rights are considered in the following chapter. In relation to those areas where the new statutory “right to roam” exists, the importance of public paths as a means of ensuring access to the countryside may diminish.
- 12-03** The main statutory provisions governing these public rights of way are found in Part III of the Wildlife and Countryside Act 1981, as supplemented by the Countryside Act 1968 and Highways Act 1980. In more recent years, there have been changes to limit the use of the public rights of way by mechanically propelled vehicles, and proposals to reform and simplify the process of

modifying the definitive record of public paths. While vehicular rights have been limited, however, the provisions for more general reform are largely unimplemented. Given the complexity of the existing law and procedure, it is unfortunate that proposals for simplification and streamlining in the CROW Act 2000 and the Deregulation Act 2015 have not yet been brought into force.

MAPPING OF PUBLIC PATHS

National Parks and Access to the Countryside Act 1949

The purpose of the 1949 Act and its successors

- 12-04** The National Parks and Access to the Countryside Act 1949 required the councils of counties² to undertake a survey of the public paths within their area and to prepare a map, to be known as the “definitive map and statement”, of these public paths. There were initially three categories of public path to be recorded on the maps: footpaths, bridleway and “roads used as a public path” (RUPPs). In *R. v Secretary of State for the Environment Ex p. Hood*³ Lord Denning MR explained the purpose of the 1949 Act:

“The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: Once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.”

- 12-05** However, it was never the intention of the Act that all public highways in the country should be recorded on the definitive map. In *Suffolk CC v Mason*⁴ Lord Diplock gave his explanation of the purpose of the legislation as follows:

“1. The only classes of users of highways who are intended to be benefited by the recording of public rights of way are those who may conveniently be referred to as ramblers and riders; they go on foot or horseback. Motorists are not among the intended beneficiaries, nor are cattle drovers. 2. Consequently, the only kinds of highways with which the relevant provisions of the Act are concerned are those which are exclusively, or mainly, used either by ramblers alone or by both riders and ramblers. Footpaths are much commoner than bridleways and a much larger part of the electorate are ramblers than are riders. 3. The way in which ramblers and riders are to be benefited is by providing them with an easy and conclusive way of proving their rights to walk or ride on particular routes ...”

The same theme was echoed by Roche LJ in *Masters v Secretary of State for the Environment, Transport and the Region*:⁵

“The intention of Parliament in passing the 1949, 1968 and 1981 Acts is in my judgment clear. That purpose is that county councils should record in definitive

maps and statements ways, including what Lord Diplock (*in Suffolk County Council v Mason* [1979] AC 705, 710A) called ‘full highways or cartways’ for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that ‘full highways or cartways’ which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost.”

- 12-06** It is with these purposes in mind that the courts have approached the problems of interpreting the obscurely worded, often unhelpful and changing classification of public paths and byways recorded on the definitive map carrying, or possibly carrying, rights of way for vehicles: first the roads used as a public path (RUPP) and then byways open to all traffic (BOATs). A combination of the CROW Act 2000 and the Natural Environment and Rural Communities Act 2006 has now strictly limited the extent to which unrecorded public vehicular rights may be recorded in the definitive map. Ways which were formerly shown as RUPPs have been automatically reclassified as “restricted byways”, excluding mechanically propelled traffic. Equally, any rights for mechanically propelled vehicles that might have existed over footpaths and bridleways have been extinguished. Whilst this does not resolve all the problems relating to vehicular usage of those ways which have already been reclassified as BOATs, or even preclude the addition of BOATs to the definitive map where exemptions are met, it will reduce the level of physical damage to the public path network caused by recreational driving.

The preparation of the definitive map and statement

- 12-07** The procedure for preparation of these maps and statements was long and complex. First, the authority was required, in consultation with the councils of county districts and parishes, to prepare a draft map indicating all footpaths, bridleways and RUPPs which, in the authority’s opinion, subsisted or were reasonably alleged to have subsisted at a specified date.⁶ Notice of the preparation of the draft map was to be published. Provision was made for the lodging of objections. There then followed a hearing by a person appointed by the authority to determine those objections, often a somewhat cursory affair conducted by a local authority officer. Where, in response to objections, a modification was made to the draft map by the addition or the deletion of a path, a further publication, objection and hearing process was necessary in relation to each such modification. A person aggrieved by a decision taken after this stage of the process, involving the omission or deletion of an alleged

path from the map, then had a further right of appeal to the Minister.

12-08 Once the objection and appeal procedures belonging to this stage were completed, the authority was required to prepare a provisional map and statement, containing the particulars making up the draft map, together with any modifications made to it.⁷ A publication process was again prescribed. A right of

appeal to quarter sessions and subsequently to the Crown Court⁸ was available to a landowner who disputed the existence, extent or route of a path crossing his land.⁹ Only after the expiry of the time for an appeal, or the determination of such an appeal, could the authority finally prepare its definitive map and statement. A final right of challenge to the High Court, on the grounds that the map or statement was not within the powers of the Act, or that some procedural irregularity had occurred, was granted by Pt III of Sch.1 to the Act.¹⁰

12-09 The 1949 Act also required the authority to keep its definitive map under periodic revision, having regard to events that had occurred at any time between the date on which the definitive map was based and the date of the review.¹¹ The only events that justified such a review, however, were the creation or extinguishment of rights of way in the intervening period, and the discovery of new evidence which would have required the authority, had it then been preparing a draft map, to show a highway of a particular description on the map that was not in fact shown. The Act, therefore, allowed for the alteration of the map by the addition of paths mistakenly omitted or under-recorded, but not for the removal of paths wrongly recorded.¹² A similar process of hearing and determining objections was applicable to revisions in the same way as to the original map.¹³

Countryside Act 1968

12-10 The Countryside Act 1968 modified the procedure for the preparation and revision of definitive maps in a number of ways.¹⁴ The procedure for the revision of a map was amended to allow for a definitive map to be revised, on the discovery by an authority of new evidence, or of evidence not previously considered by the authority, that there was *no* public right of way of the sort shown on the definitive map or to change the particulars shown in the map or statement. The process of review was also simplified to avoid the three stages of draft, provisional and definitive map preparation, and the procedure for dealing with objections was itself streamlined.¹⁵ The 1968 Act also required a special review of all RUPPs to be carried out, with a view to reclassifying them as footpaths, bridleways or BOATs.

Local Government Act 1972

12-11 Schedule 17 to the Local Government Act 1972 extended the duty to prepare definitive maps to the councils of the new administrative counties. It followed, therefore, that these new councils inherited, within the new county boundaries, areas that might be in different stages of preparation or review of the definitive map. A chaotic situation, therefore, could potentially have

arisen, especially within the new metropolitan counties. The 1972 Act attempted to deal with this situation. Whilst the county councils were permitted to retain the adoptive nature of the 1949 Act in those parts of the county which formerly consisted of a county borough and which had not adopted the provisions of the 1949 Act, the county council was placed under a duty to concentrate on the preparation of the first definitive map or maps before continuing with any reviews that might already have been commenced within the county.¹⁶ Once the council's area was covered by a definitive map or maps, a review of the whole of the county was to be carried out. The county council was also permitted to abandon surveys that were in the earlier stages of preparation and to start again.¹⁷ Schedule 17, therefore, provided a way through the confusion faced by county councils that had inherited maps in varying stages of preparation. However, the process of bringing the whole of a county up to the same level remained cumbersome and time-consuming.¹⁸

Wildlife and Countryside Act 1981

- 12-12** Although the 1968 Act simplified the process by which a revision of the definitive map could be undertaken, the procedure for the preparation of draft, provisional and definitive maps was retained insofar as preparation had been commenced before the 1968 Act came into force. Reviews of the definitive map and, in some cases, the preparation of the map itself, still progressed very slowly in some areas. The response was to incorporate in the Wildlife and Countryside Act 1981 provisions to eliminate the need for formal "across the board" reviews, and to establish a more flexible system, whereby the definitive map was to be kept under continuous review with necessary changes being carried out incrementally. The Wildlife and Countryside Act 1981, therefore, repealed those parts of the National Parks and Access to the Countryside Act 1949 concerned with the preparation of definitive maps and replaced them with a much simpler procedure, involving continuous review of the definitive map.¹⁹ The 1981 Act did, however, retain the duty to reclassify RUPPs albeit on a path-by-path basis.²⁰

Countryside and Rights of Way Act 2000

- 12-13** Following the passing of the 1981 Act the performance of local authorities in keeping their maps under review, particularly in relation to reclassification of RUPPs, was uneven, with some authorities having to cope with very large numbers of applications for modification orders. In March 1999 the government published a document entitled "Framework for Action" which, in addition to announcing plans for the creation of a general right of access to open land, indicated an intention to strengthen and develop the system of public rights of way with a view to enabling a more ready response to the changing requirements of recreational use, the needs of land managers, and the development of more sustainable transport.²¹ The Countryside Commission (now Natural England) also produced a series of recommendations as to how the rights of way network might be improved: "Rights of Way in the 21st Century; Conclusions and recommendations (CCP

550)". This was followed by a government consultation paper, "Improving Rights of Way in England & Wales". From this emerged the Countryside and Rights of Way Act 2000 (the CROW Act 2000).

12-14 The CROW Act 2000 removed the duty on surveying authorities to reclassify RUPPs.²² The description "road used as a public path" is no longer used on definitive maps and such roads are now shown as restricted byways.²³ Immediately following the commencement of these provisions the Natural Environment and Rural Communities Act 2006 ss.66-71 came into force. Subject to certain specified exceptions,²⁴ all existing rights for mechanically propelled vehicles on ways not recorded on the definitive map or recorded as footpaths, bridleways or restricted byways were extinguished. All restricted byways have now become highways maintainable at the public expense²⁵ and any private liabilities to maintain them as highways have been extinguished.²⁶ Existing limitations and private vehicular rights over these ways were unaffected. Moreover, the Act creates a statutory right of access to land for the owners and occupiers of premises adjoining a highway.²⁷

12-15 The CROW Act 2000 also introduced a number of important new powers relating to the prevention of continuing obstructions to public paths and allowing for the stopping up and diversion of paths on a number of new grounds. These are discussed in Chapters 8 and 9. The Act places on local highway authorities a duty to prepare, publish and update rights of way improvement plans.²⁸

The proposed cut-off date

12-16 The CROW Act 2000 includes a cut-off date for the recording on definitive maps of certain unrecorded rights of way and for their extinguishment, if not claimed.²⁹ In effect, this means that historic footpaths and bridleways dating back to 1949 and not recorded under the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968 or the Wildlife and Countryside Act 1981 will cease to exist. Statutory extinguishment will also apply to unrecorded pre-1949 higher rights of way (such a bridleway, droveway or motorised vehicular rights) over lesser rights of way that are recorded in the definitive map (such footpaths, bridleways or restricted byways). This is an acknowledgement of the difficulty in establishing whether or not paths were used by the public as of right in the absence of evidence from persons who can claim to have used the paths during the relevant period. A number of claims to historic paths are made on the basis of map and other historical evidence alone even though there is no evidence of current usage of the path and, in some cases, even when there is no continuing physical evidence of the existence of the path. Claims to these historic paths will have to be made before the cut-off date and any existing right of way that was in existence before 1949 will be extinguished. There are a number of exceptions to these provisions.³⁰

12-17 Limited protection was also proposed in the CROW Act 2000 to prevent applications to downgrade to footpath status bridleways wrongly recorded in the definitive map on footpaths on the basis of historic (pre-1949) evidence. Under, the Deregulation Act 2015, the proposed protection was extended to

include any “protected right of way”—i.e. footpath, bridleway, restricted byway or BOAT—shown in the definitive map.³¹ Even were evidence to emerge that these rights of way were wrongly recorded, if that evidence relates to before 1949, their removal from the map by modification order after the cut-off date will no longer be possible.

12-18 The cut-off date is currently fixed as 1 January 2026, but this is subject to regulations.³² The prospect of it has already triggered an acceleration of modification applications to add historic rights of way to the definitive map by countryside amenity organisations. It is thought that there will be a large volume of further applications in the period immediately before the cut-off date. The Deregulation Act 2015 provides an alternative order-making power for historic evidence cases, founded upon the consent of landowners, which may simplify the processing of applications.³³ It also addresses the potential duplication in workload for surveying authorities by making provision for them to designate public rights of way for one year post-cut off and for such ways to cease to be regarded as extinguished pending a decision by the authority on whether or not to include them in the definitive map.³⁴ The 2015 amendments also provided safeguards from extinguishment for private rights of way where “reasonably necessary to enable a person with an interest in land to obtain access to it”.³⁵

12-19 It remains to be seen exactly when, and in what form, these measures will be brought into force, however while the short-term effect may be an influx in definitive map modification order applications, after the cut-off date (and subject to any transitional provisions) the number of applications should significantly reduce, and the need for historical and archival research in determining applications will be removed.

The definitive map and statement

12-20 The history of definitive map preparation, overlapping as it does with several stages of local government reorganisation in England and Wales, has resulted in the present surveying authorities having inherited several definitive maps and statements within their administrative areas, possibly at different stages of preparation and prepared under different statutory regimes. This is recognised in the definition of “definitive map and statement” which “in relation to any area” means:³⁶

- “(a) the latest revised map and statement prepared in definitive form for that area under s.33 of the 1949 Act; or
- (b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under s.32 of that Act; or
- (c) where no such map and statement have been so prepared, the map and statement prepared for that area under s.55(3).”

The definitive map and statement for “any area” could, therefore, fall into one of these three possible categories. Within any current administrative unit

there may be several definitive maps each relating to the different “areas” that have been combined into the present administrative unit during local government reorganisation. Thus, the definitive maps for which any surveying authority is responsible may have been prepared under the onerous provisions of the 1949 Act in its original form, under the modified procedures introduced by the 1968 Act or under the much shorter procedure contained in the 1981 Act. For the time being at least the “definitive map and statement” may in some areas, in practice, consist of a number of maps and statements prepared at different times under different regimes.

12-21 The CROW Act 2000 addressed this problem by allowing authorities to consolidate the information on the various maps and statements that relate to their present administrative area into a single map and statement. Section 57A of the Wildlife and Countryside Act 1981³⁷ provides that where different definitive maps and statements relate to different parts of a surveying authority’s area, the authority may, if it appears to it expedient to do so, prepare a map and statement

comprising copies of so much of each definitive map and statement as relates to the authority’s area. This map and statement will then become the definitive map and statement for its area for the purposes of the 1981 Act, with a new relevant date.³⁸ An authority will only be able to exercise this power where it has definitive maps and statements covering the whole of its area which have been prepared in compliance with the provisions of ss.53(2) and 55 of the 1981 Act. It cannot exercise this power where the definitive map and statement relating to any part of its area is the subject of a review under s.33 of the 1949 Act and which review has neither been abandoned in pursuance of a direction under s.55(1) nor been completed. Following the making of modification orders an authority may also prepare a copy of the map as modified which will then be treated as the definitive map and statement for that area.³⁹

12-22 The definitive map is required to be at a scale of not less than 1:25,000 but it may contain inset maps for particular areas at a larger scale.⁴⁰ The notation to be used for indicating different classes of paths is prescribed by regulations.⁴¹

12-23 The statement that accompanies the map is required to record the “relevant date”, for the purposes of the map, together with particulars as to the position and width of the path and any limitations or conditions affecting the public right of way. The “relevant date” is the base date of the survey from which the map has been prepared or modified, or in some cases, a date shortly before a consolidated map was prepared. This date must have been no earlier than six months before the date on which notice of the preparation of the draft map or review was published in the case of maps prepared under the 1949 Act provisions, not earlier than six months before the preparation of the map in those cases where the map is prepared under the provisions of the 1981 Act⁴² and not earlier than six months before the date of preparation of any consolidated map for the area.⁴³ Where the map is modified by an order under s.53(4), the order itself must prescribe the “relevant date”, which must not be earlier than six months prior to the making of the order.⁴⁴ So far as the other

details are concerned, there remain discrepancies between different authorities as to the amount of detail included in the statement. Little statutory guidance is provided on this matter. There is no requirement that the statement should be in any particular form so long as it contains the prescribed information.⁴⁵

Conflict between the map and the statement

12-24 Where there is a conflict between the statement and the map itself the Wildlife and Countryside Act 1981 provides no express guidance as to which is to prevail.

In *L.E. Walwin & Partners Ltd v West Sussex CC*⁴⁶ it was stressed that the map and the statement must be read together. In *Norfolk CC v Secretary of State for the Environment*⁴⁷ Pitchford J was faced with an inspector's decision on a modification order that had attempted to address a conflict between the definitive map, which showed the position of a path along one alignment, and the statement, which gave particulars indicating another alignment. The modification order had opted for the route as described in the statement but the inspector had refused to confirm the order on the grounds that the conflict between the map and the statement could not be resolved.⁴⁸ The first issue to be considered was which of these routes should be taken to be the route conclusively recorded by the definitive map and statement. Pitchford J took the view that:⁴⁹

“the correct approach to interpretation of the definitive map and statement must be a practical one. They should be examined together with a view to resolving the question whether they are truly in conflict or the statement can properly be read as describing the position of the right of way. If they are in conflict, then the map must take precedence since the discretionary particulars depend for their existence upon the conclusiveness of the obligatory map. Unless the statement can properly be interpreted as describing the same footpath as that shown on the map, then the statement cannot be regarded as conclusive evidence of the position of the footpath shown on the map. The question whether the statement does describe the position of a footpath shown on the map is, I accept, a matter of fact and degree. That the statement purports, by reference to the same footpath designation number, to specify the position of a footpath similarly designated on the map is some but, in my view, inconclusive evidence that it in fact does so.”

In considering whether there was an irreconcilable conflict between the map and the statement, however, Pitchford J cautioned:⁵⁰

“the judgment whether the statement was describing the position of the footpath marked on the map need not require the precision of a slide-rule.”

With this in mind it should be remembered that the position of paths on the definitive map is often marked by a thick line on a small-scale map. The

potential for inaccuracy in determining the precise line of the path is, therefore, significant.⁵¹

12-25 In the *Norfolk* case the court went on to hold, however, that when considering an application for a modification order seeking to resolve the conflict between the map and the statement there is no presumption that either should take precedence. All the evidence had to be looked at together:

“What is required at review is, in my judgment, simply a consideration which (or which other) route, on a balance of probability, is correct, if any, in the light of all the relevant evidence, including the terms of the map and statement.”

In *Kotarski v Secretary of State for the Environment, Food and Rural Affairs*⁵² this approach was applied to allow for a modification of the Definitive Map to show a short spur to a footpath described in the statement but omitted from the map itself.

12-26 The *Norfolk* case was concerned with the question whether the description in the statement could be said to refer to the same footpath shown on the map. In *Edgar Ernstbrunner v Manchester CC*⁵³ the issue was how to resolve an apparent conflict between the definitive map and statement in relation to what was agreed to be the same footpath, namely the omission from the definitive statement of any reference to the divergence of the footpath from a private road and over a line of setts on the edge of the landowner’s property when such a route was consistent with the line shown on the definitive map. The statement had also omitted to mention the agreed fact that the path also passed through a farm-yard which the evidence suggested was probably gated. Lloyd Jones J took the view that:⁵⁴

“These matters provide strong support for the view that the draughtsman of the definitive statement was highly selective in the information which he provided ... He has failed to describe or define in any way the position of the footpath as it crosses the farmyard. A definitive statement is conclusive evidence of the matters it positively states. However, it is possible for a definitive statement to omit information and therefore not to be comprehensive in describing the full route.”

No significance, therefore, could be ascribed to the omission of any mention of the line of setts and the presence of a stile and the Crown Court below had been entitled to find that the definitive map showed the path following the line of setts. Whilst this case establishes the obvious point that a definitive statement cannot be conclusive of matters that it omits to mention the fact that the statement omits to mention obstructions such as stiles and gates must nonetheless carry some evidential weight as to whether those obstructions existed at the time the path was surveyed and added to the definitive map. Unfortunately, however, the level of detail on definitive statements does vary greatly.

Copies of definitive map and modification applications

Copies⁵⁵ of the definitive map and statement for any area, together with all

relevant modification orders, must be kept available for inspection free of charge at all reasonable hours at one or more convenient places in each district,⁵⁶ and, so far as is practicable, within each parish, comprised in the area to which the map and statement relate.⁵⁷ Authorities now have a duty to keep a register, in both electronic and paper form, of modification order applications⁵⁸ containing, amongst other prescribed details, the name of the applicant,⁵⁹ the nature and subject of the application and information relating to the disposition of the application.⁶⁰

Duties of the surveying authority

- 12-28** The body with duties in relation to the definitive map and statement is the “surveying authority” for any area,⁶¹ although under the Wildlife and Countryside Act 1981, surveying authorities are not required to carry out any kind of systematic survey. The Act imposed three principal duties on these authorities. First, where there is no definitive map for any part of its area, the surveying authority is under a duty to prepare a definitive map and statement using the modification procedures in the Act that will then serve as the definitive map and statement for that area. Second, where there is a definitive map and statement for its area, the surveying authority is to make any requisite modifications as soon as practicable after the commencement date of the Act, and is thereafter to keep the definitive map and statement under continuous review. Finally, the surveying authority also had the duty to carry out a review “of such of the particulars contained in the map and statement as relate to roads used as public paths” and to make modifications reclassifying these paths—this duty has now been superseded.

To prepare a definitive map

- 12-29** Where, at the date of the commencement of the 1981 Act,⁶² no definitive map had been completed by an authority for any part of its area,⁶³ or where a review of the definitive map was still in preparation, the Secretary of State has power, after consultation with the surveying authority,⁶⁴ to direct the authority to complete the survey or to review or abandon it, either wholly or partially.⁶⁵ Where the authority is directed to abandon a survey or review, it is obliged to prepare a map and statement which is then to become the definitive map and statement for the area, by means of a modification order made under the Act. The authority is required to incorporate into that map and statement such work as had been completed prior to the commencement of the 1981 Act and which had not been objected to within the prescribed period, together with any determinations by the authority or the Secretary of State which had become final.⁶⁶

To keep the definitive map and statement under review

- 12-30** Section 53(2)(a) requires the surveying authority “as soon as practicable”

after the commencement date for the 1981 Act to make such modifications as appear to it to be requisite to the map and statement in consequence of the occurrence “before that date” of any of the events specified in s.53(3). The modifications are made by order and follow the procedures discussed below.⁶⁷ Essentially this provision was designed to allow the authority to bring the map and statement up to date using the new procedures introduced by the Act. It also has the effect, however, of allowing applications for modification orders to be made based upon events that have occurred before the commencement date of the Act.

12-31 The continuing duty imposed on the surveying authority by the 1981 Act, however, is to keep the map and statement under continuous review as from the commencement date of the Act. The authority is to achieve this by the making of modifications to the map as soon as is reasonably practicable after the occurrence of any of the events specified in s.53(3).⁶⁸ This requires the authority to make modifications on its own initiative in appropriate cases,⁶⁹ but in general, modifications will be made in response to applications from members of the public following the procedures set out in Sch.14 to the Act.⁷⁰

12-32 Basically the “events” set out in s.53(3) fall into five categories namely: (i) the stopping up, diversion, widening or extension of any existing path under statutory powers; (ii) the alteration of the status of any highway under statutory powers; (iii) the express creation of a new public path (for example, under a public path creation order or agreement or by simple dedication and acceptance); (iv) the expiration of such a period of public use of a way as would give rise to a presumption that a way has been dedicated as a highway (either under s.31 of the Highways Act 1980 or at common law); and (v) the discovery by the authority of evidence which, when considered with all other evidence available to it, shows that a right of way has been omitted from or included in the map in error or inaccurately. It is important, however, to look at each of the events as they are set out in the statutory provision separately. These various grounds are discussed in more detail below.⁷¹

The former duty to reclassify RUPPS

12-33 The Wildlife and Countryside Act 1981 initially required that surveying authorities carry out a review to reclassify those rights of way which were shown on the definitive map as roads used as a public path (RUPPS). This requirement has now been removed and replaced by the automatic reclassification of RUPPs as restricted byways.⁷² The Natural Environment and Rural Communities Act 2006 has largely extinguished rights of way for mechanically propelled vehicles over footpaths, bridleways and restricted byways.

12-34 It was the Countryside Act 1968 which had first required that this reclassification be carried out. The purpose of reclassification was to have these RUPPs described in the definitive map as footpaths, bridleways or byways open to all traffic.⁷³ The definition of “road used as a public path” in the National Parks and Access to the Countryside Act 1949 defined these ways as being:

“a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.”

The effect of this definition appeared to indicate that the road in question, being a *highway* other than a public path, must be a cartway (carriageway), since this was the other main classification of highway⁷⁴ (other than footpaths and bridleways) that was known to the law. Section 32(4)(b) of the 1949 Act, however, went on to say that the inclusion within the definitive map of a RUPP was to be conclusive proof:

“that there was at the said date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights as aforesaid.”

The other public right of way that could have existed would principally have been the public right of cart or carriageway. It seems, therefore, that whilst a surveying authority would have had to believe that the RUPP was a public carriageway highway in order to put it on the map in the first place, the map was not conclusive as to the existence of any greater rights over it, other than those of foot and bridleway. At the date of any reclassification, however, a road that had previously only carried footpath rights might have been used by horse riders in accordance with the designation on the definitive map for many years. To confuse matters further, some local authorities had included, as RUPPs, in their definitive maps, roads which were not public cartways or carriageways, but which were private roads carrying public rights of way by foot or on horse.

12-35 In *R. v Secretary of State for the Environment Ex p. Hood*⁷⁵ a RUPP was, as the result of a special review, downgraded to a footpath. This was challenged by the British Horse Society, which alleged that it should have been reclassified as a bridleway. The Court of Appeal held that since a RUPP would have been conclusively presumed to have carried rights of bridleway as well as on foot under the National Parks and Access to the Countryside Act 1949, it was necessary, on a special review, for there to be positive new evidence to the effect

that there was *no* public right of bridleway, before the path could be reclassified as footpath. Where the evidence was inconclusive as to the extent of the public right of way, the reclassification had to be as a bridleway. The view was expressed that the 1968 Act could, however, be construed as permitting the downgrading of a RUPP by the extinguishment of vehicular rights (in relation to which the map had never been conclusive) but not as involving the loss of the right of bridleway. This view did not take account of the provision in s.32(4) of the 1949 Act (and now in s.56 of the 1981 Act) that the designation on the definitive map was without prejudice to the existence of greater rights.⁷⁶

12-36 The 1981 Act also required that RUPPs be reclassified but, in the light of the *Hood* decision, it specified more precisely how the road is to be treated on

such a reclassification. Section 54(3) stated that a road used as a public path was to be shown on the definitive map after such a review:

- “(a) if a public right of way for vehicular traffic has been shown to exist, as a byway open to all traffic;
- (b) if paragraph (a) does not apply and public bridleway rights have not been shown not to exist, as a bridleway; and
- (c) if neither paragraph (a) nor paragraph (b) applies, as a footpath.”

The effect of para.(b), therefore, was to incorporate the decision in *Hood*, thereby requiring the authority to be convinced that the way is not a bridleway whilst the burden was otherwise on the person asserting the vehicular right to convince the authority that there are vehicular rights of way.

12-37 In *Masters v Secretary of State for the Environment, Transport and the Regions*⁷⁷ the issue arose as to what had to be established in order for a way to be shown on the map as a byway open to all traffic. The case involved a modification order. It was argued that for a path to fall within the definition:

“a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”

it must be possible to say of a given path at the time of its classification or reclassification that it is currently used on foot and on horseback and with vehicles and that the current pedestrian and equestrian use combined must be more than the current vehicular use.⁷⁸ The Court of Appeal, however, held that the definition was not so restrictive and had to be seen in the context of the purpose of the legislation as a whole and in the light of the fundamental principle of highway law that “once a highway always a highway”. Per Roche LJ:⁷⁹

“The definition in section 66(1) has to be read in its statutory context and in particular with the provisions of section 54 and section 56 of the Act in mind. The

whole purpose of Part III of the Act is the ascertainment of public rights of way ... If a public right of way for vehicular traffic has been shown to exist over the road used as a public path, then it is to be shown as a byway open to all traffic. Once that is done then under section 56(1)(c) the definitive map and statement shall be conclusive evidence that there was at the relevant date a highway as shown on the map and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic. It is, in my judgment, clear from those provisions that Parliament did not contemplate that ways shown in definitive maps and statements as roads used as public paths should disappear altogether from the definitive maps and statements simply because no current use could be shown or that such current use of the way as could be established by evidence did not meet the literal meaning of the definition in section 66(1). In my opinion it is much more likely that Parliament intended the way to be shown in the definitive map and statement

so that thereafter, if no current use was being made of the way, ramblers and horseriders would come to know the existence of the way and start to use it. This approach is consistent with the report of the Hobhouse Committee in 1947 on which the 1949 Act was based which in paragraph 21 stated 'in spite of the maxim "once a highway always a highway" it is a fact that a very large number of rights of way are being lost through disuse ... many have already disappeared. Others have become overgrown and are no longer passable; unless steps are taken before many more years elapse, these rights of way will be forgotten and lost for all time. We consider it essential that a complete survey should be put in hand forthwith so that an authoritative record of rights of way in this country may be prepared before it is too late'."

12-38 It has also been held that in carrying out a reclassification of RUPPs, a surveying authority, and the Secretary of State, should have been purely concerned with the legal status of the way as proven to the required standard by the evidence before them. The physical suitability of the way to accommodate modern vehicular traffic could not affect the decision.⁸⁰

12-39 Now that the CROW Act 2000 has been brought into force the duty on local authorities to reclassify RUPPs has disappeared and all existing RUPPs have automatically been converted into restricted byways.⁸¹ A restricted byway is essentially a bridleway over which rights to drive vehicles which are not mechanically propelled exist. This means that the definitive map will indicate that there is a right for horses and carts over the way but not for motor vehicles or other mechanically propelled vehicles. As a result of the Natural Environment and Rural Communities Act 2006, save where one or other the statutory exceptions exists, it will not now be possible for anyone to seek to establish that vehicular rights for mechanically propelled vehicles exist over these ways.⁸²

The evidential effect of the definitive map

12-40 The importance of the definitive map is not simply that it maps the footpath and bridleway rights which exist throughout the country, but that the inclusion of a path in the map and statement is deemed to be conclusive evidence of the minimum status⁸³ of the public right of way over that path at a particular date, and also of a number of other matters relating to the path.⁸⁴ The particular date is that specified in the statement to be the relevant date for this purpose or, where the way has been placed on the map by an order, the date specified in that order.⁸⁵

12-41 Where a footpath is shown, the map will be conclusive evidence that, at the relevant date, there was such a highway, as shown on the map, over which the public had a right of way on foot.⁸⁶ Where the map shows a bridleway then the map is conclusive evidence that there was, at the relevant date, a highway as shown on the map, and that the public had over it a right of way on foot and a right of way on horseback or leading a horse.⁸⁷ In both cases, the conclusive nature of these rights is expressed to be without prejudice to the question of whether the public had any greater rights of way over the path at that date.⁸⁸

Where the map shows a byway open to all traffic, the map is conclusive evidence that there was at the relevant date a highway, as shown on the map, and that the public had a right of way over it for vehicular and all other kinds of traffic at that date.⁸⁹ Where the map shows a restricted byway, the map is conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had at that date a right of way over it on foot and a right of way on horseback or leading a horse together with a right of way for vehicles other than mechanically propelled vehicles.⁹⁰ This is again expressed as being without prejudice to any question whether the public had at that date any right of way other than those rights, but following the Natural Environment and Rural Communities Act 2006 the only higher right to which this will generally apply is whether or not there is right to drive animals over the way.

12-42 The inclusion of a path on the map does not prevent the calling of evidence⁹¹ to establish that a path:

- (a) carried greater rights of way at the relevant date than are shown on the map;
- (b) now carries greater rights of way that have grown up since the relevant date;
- (c) no longer carries a particular right of way by reason of the legal extinguishment or diversion of the right of way since the relevant date;
- (d) was wrongly recorded on the map and should be deleted.

Where the map is conclusive evidence of any of the matters described above, then it is also conclusive evidence of any particulars contained in the statement as to the position or width of the way at that date, and as to any conditions or limitations on the right of way.⁹² However, this is again expressed to be without prejudice as to whether the right of way was subject to any other conditions or limitations.⁹³ It seems to follow, therefore, that neither the landowner, nor the user of the path, can dispute the particulars contained in the statement to the definitive map as to width and position (except through the modification order process), but that the landowner may claim that there are unrecorded limitations and restrictions that apply to the path.

The modification of the definitive map and statement

12-43 There has always been a tension between the conclusive effect of the definitive map and the need to ensure its accuracy. The legislative history of the process for altering a definitive map demonstrates a movement towards introducing the flexibility to correct the errors of inclusion as well as the errors of omission.⁹⁴ The tension has taxed the courts on several occasions.

12-44 Where the object of a modification is to remove a path from the map or to downgrade a bridleway to a footpath, a number of problems of interpretation have arisen. Section 53(2)(c) allows for “the discovery by the authority of evidence that there *is* no public right of way”. The Countryside Act 1968⁹⁵ had specifically required that the evidence required to justify a removal of a path should be “new evidence, or ... evidence not previously considered by the

authority concerned showing that there was no public right of way". In *Rubinstein v Secretary of State for the Environment*,⁹⁶ the court drew upon the difference in the tense used in the two statutes and held that, in view of the conclusive evidence provisions of s.56 and the apparent need to look at the situation as at the date of the review, the review procedure could not, therefore, be used to remove a path from the map unless the evidence which was discovered affected the status of the way *after* the original inclusion of the path in the map. The effect of this decision was that s.53(3)(c)(iii) would have had very little meaning or effect.⁹⁷

12-45 In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*⁹⁸ the matter was reconsidered by the Court of Appeal and the decision in *Rubinstein* was overruled. The Court of Appeal took the view that the conclusive nature of the definitive map had to be seen in the context of the mechanisms made available in the Act for its modification. The court drew on remarks of Lord Diplock in *Suffolk v Mason*⁹⁹ in dealing with the effect of the 1949 and 1968 Acts:¹⁰⁰

"The entry on the definitive map does not necessarily remain conclusive evidence for ever. Section 33¹⁰¹ makes provision for quinquennial revisions."

Purchas LJ emphasised that the 1981 Act was concerned with the ascertainment of rights of way rather than with their creation. The duty under s.53 was a continuous one to keep the map and statement up to date and where evidence became available which would indicate an error the surveying authority was under a duty to revise the map and statement accordingly. There was no difficulty in reconciling ss.53 and 56 of the Act once the purpose of the Act was properly understood:

"Parliament never removed the duty to revise and keep the record up to date so that not only changes of status caused by supervening events, e.g. the stopping up of a highway under statute or otherwise; or the creation of prescriptive rights, but also changes in the original status of highways or even their existence resulting from recent research or discovery of evidence should all be taken into account in order to produce the most reliable map and statement that could be achieved."

Evidence can, therefore, be introduced in support of a modification order to remove a path currently shown on the definitive map.¹⁰²

12-46 A similar argument to the effect that the inclusion of a public footpath in a definitive map and statement prepared under the National Parks and Access to the Countryside Act 1949 was conclusive for all time of the status of that path so as to prevent a modification under the 1981 Act based on evidence of prior bridleway use was rejected by the Court of Appeal in *Fowler v Secretary of State for the Environment and Devon CC*.¹⁰³ Farquharson LJ summarised the position as follows:

"While the relevant entry subsists on the definitive map it is conclusive

evidence of the nature of the highway there recorded. *Non constat* that where fresh evidence is later discovered which demonstrates that the record is inaccurate the right of way cannot be altered accordingly.”

The “events” requiring modification of the definitive map under the Wildlife and Countryside Act 1981

12-47 Section 53(3) sets out the “events” the occurrence of which requires a modification of the definitive map and statement. In view of the differences in language it is worth setting them out in full. They are:

- “(a) the coming into operation of any enactment or instrument, or any other event, whereby—
- (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
 - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
 - (iii) a new right of way has been created 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 or a restricted byway;
- (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;
- (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 s.54A,¹⁰⁴ a byway open to all traffic;
 - (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; or
 - (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 other particulars contained in the map and statement require modification.”

In each case the “event” in question is concerned with the status of the alleged public right of way. The modification procedure is not appropriate to test the desirability or suitability of a public right of way of a particular class being established or not established over a particular path.¹⁰⁵

12-48 The relationship of these different “events,” or grounds for a modification, was considered by Glidewell LJ in *R. v Secretary of State for the Environment Ex p. Simms and Burrows*:¹⁰⁶

“I agree with the suggestion made to us in argument, that s.53(3)(a) and (b) relate to events which have happened since the definitive map was prepared. These events may have resulted in a right of way coming into existence where none existed before, or the upgrading of an existing right of way to a right of a wider sort, e.g. by express dedication under paragraph (a) (iii) or by prescription under paragraph (b). Paragraph (a)(i) relates to the happening of an event which results in the extinguishment of a previously existing right of way, shown on the definitive map. Since the common law maxim is ‘once a highway, always a highway’, such a result can only be achieved by statute, and the events to which sub-paragraph (i) refers as authorising the stopping up or diversion of a highway can therefore only take place under statute.

On the other hand, s.53(3)(c) differs from the preceding sub- paragraphs in that the use of the word ‘discovery’ suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected. This information will normally, if not always, relate to a fact or situation that already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors.

If I am right in my view that paragraph (c) is concerned with the correction of mistakes as the result of newly discovered information, in order to be comprehensive, the power of correction must cover three different situations: (i) the addition of a right of way not shown on the definitive map: paragraph (c)(i) achieves this; (ii) the upgrading or downgrading of rights of way shown on the map, but so shown in a wrong category: sub-paragraph (c) (ii) covers both these situations; (iii) the deletion of a right of way which the latest information proves should not have appeared on the map at all: sub-paragraph (c)(iii) by its terms achieves this.”

Section 53(3)(a): The coming into operation of any enactment or instrument, or any other events stopping up, etc. highways—legal event orders

12-49 This part of s.53(3) addresses events which have occurred since the relevant date.¹⁰⁷ The grounds for a modification of the definitive map which are specified in s.53(3)(a) involve the coming into operation of any enactment or instrument, or any other event, with certain specified effects on a highway already shown in the map and statement. The first group of these effects is where a highway shown in the map and statement has been authorised to be stopped up, diverted, widened or extended.

12-50 As the effect of s.56 is to make the definitive map conclusive evidence of the existence and line of a path as at the “relevant date” it would seem that a modification order is not essential before a stopping up or diversion order made after that date under other statutory powers can have evidential effect.¹⁰⁸ The purpose of a modification order based on this “event” is to bring the definitive map into line with the legal change brought about by a stopping up or diversion order that has occurred since the map was prepared. To avoid

the delays and possible confusion where paths shown on the definitive map are subsequently altered by legal process the stopping up or diversion of a path under certain types of order and the consequent modification of the definitive map can, in England, be achieved in a single combined order.¹⁰⁹

12-51 The references in the section to cases where the path has been authorised to be widened or extended by “any enactment or instrument or any other event” are slightly more obscure. A widening of a public path under the powers of improvement in the Highways Act 1980 would not result in any formal order. However, widening will require the incorporation of other land into the highway and will take effect through agreement with the landowner or by some form of compulsory order: either a compulsory purchase order or a public path creation

order. The widening of a highway could have the indirect effect of making a description in the definitive map statement incorrect and so a modification might be desirable. It is suggested that an “extension” of a public path refers more to the status of a path than to its physical extent, as any physical extension would involve the creation of a new right of way under subs.(3)(a)(iii). The removal of a limitation or condition relating to a path might fall within this category. It is not clear whether an order designating a footpath as a cycle track under the Cycle Tracks Act 1984 s.3 could also be classed as an extension to an existing highway shown on the map.¹¹⁰ The map is not required to show cycle tracks but it might be desirable to indicate such a change in the statement.

12-52 The group of events under s.53(3)(a)(ii) is the coming into operation of any enactment or instrument or other event whereby a highway shown or required to be shown in the map or statement as a highway of a particular description has ceased to be a highway of that description. This would cover the cases where a bridleway, restricted byway or byway open to all traffic was the subject of a stopping up order but where lesser rights were either reserved¹¹¹ or created in its place.¹¹² It might also cover the situation where greater rights had been created over a footpath or bridleway by dedication, order or agreement.

12-53 The final group of events is the coming into operation of any enactment, instrument or other event whereby a new right of way has been created over land in the area to which the map relates “being a right of way such that the land over which the path subsists is a public path or a restricted byway”: s.53(3)(a)(iii). This deals with new ways that may have been created through public path creation orders and agreements or through diversion orders. The word “instrument” would also be capable of encompassing a dedication agreement whereby greater rights were created over the line of definitive path. Under the CROW Act 2000 s.47 every way that is presently shown on the definitive map as a RUPP will be treated instead as if it were a restricted byway.¹¹³ It seems, therefore, that when RUPPs were converted to restricted byways under the provisions in the CROW Act 2000 this could also have been an event for the purposes of s.53(3)(a)(iii) justifying a modification order. These provisions do not cover the creation of new rights of way that are not within the definition of a public path or restricted byway.

- 12-54** Where a definitive map or statement is to be modified under any of the grounds set out in s.53(3)(a) a simplified procedure is provided for these orders which are to come into effect on the date on which they are made without the necessity for any confirmation.¹¹⁴

Section 53(3)(b): The expiration of any period giving rise to a presumption that the way has been dedicated as a public path

- 12-55** This event again addresses a situation which will have occurred since the relevant date for the definitive map. Principally, this part of subs.(3) will be brought into play through 20 years' user of a way as of right thereby invoking the statutory presumption under s.31 of the Highways Act 1980. Section 31(9), however, makes it clear that a way may still be dedicated according to common law principles of implied dedication over a lesser period than 20 years. Presumed dedication of highways is discussed in Ch.2.¹¹⁵ Logically, s.53(3)(b) is the most apt "event" where a right of way has been created by dedication and should be used for that purpose. However, there is a potential overlap with s.53(3)(c)(i) as evidence that a public right of way has been created is also evidence that it subsists. The distinction is important as the test for making an order under the latter provision is lower—it suffices that the right of way "is reasonably alleged to subsist" whereas under subs.(b) there must be a period of enjoyment that raises the presumption "that the way has been dedicated". Perhaps for that reason, in practice it is common for authorities to rely upon s.53(3)(c)(i), it is suggested that the better approach is to limit s.53(3)(c) to evidence of mistakes based upon new evidence,¹¹⁶ which could include evidence that a recorded path was wrongly thought to have been dedicated by public use, but not that a new path has been dedicated by more recent use.

Section 53(3)(c): The discovery by the authority of evidence

- 12-56** This group of events has proved to be the most controversial and difficult to interpret. In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹¹⁷ it was confirmed that this part of s.53(3) is concerned with the correction of mistakes in the definitive map and statement and that it covers errors of inclusion of paths as well as errors of omission. A path may be "upgraded" from a path of lower status to one of higher status or "downgraded" from a path of higher status to one of lower status.¹¹⁸ In the case of restricted byways, s.53(4A) and (4B) states that evidence can be adduced to show that immediately before the commencement of s.47 of the CROW Act 2000 a byway open to all traffic existed over the path.¹¹⁹
- 12-57** This event is triggered by the "discovery of evidence". It is not apparent from this wording nor from its legislative history that s.53(3)(c) is intended to provide a belated appeal mechanism from earlier decisions taken when the map was originally prepared (or subsequently modified) and it might have been thought that the word "discovery" implied that evidence not available, or at least not considered, at the time of the preparation or earlier modification of the map

should now have come to light. The approach of the courts has, however, been to take a flexible view of what evidence may trigger the “event” contemplated by this subsection and as to the nature of the decision that has to be taken based upon such evidence.

12-58 In *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹²⁰ the three members of the Court of Appeal used different expressions to supplement the wording of s.53(3)(c). Glidewell LJ indicated his view that the use of the word “discovery” suggested “the finding of some information which was previously unknown”.¹²¹ Russell LJ referred to the “discovery of information which may or may not have existed at the time of the definitive map”.¹²² Purchas LJ simply used the expression “discovery of new evidence”.¹²³ In none of these judgments, however, was the precise quality of the evidence required to initiate a modification order in issue and the use of these different expressions was clearly obiter. In *R. v Secretary of State Ex p. Riley*¹²⁴ the quality of that evidence was in issue. Macpherson J accepted the argument put to him that the discovery of evidence meant:

“evidence ‘discovered’ or ‘produced and laid before the Council at the appropriate time’ which is different from the original evidence.”

Macpherson J also used the expressions “additional unused or ‘discovered’ evidence”. In *Fowler v Secretary of State for the Environment and Devon CC*¹²⁵ Farquharson LJ introduced the idea that evidence should be “fresh in the sense that it was not available at the date of the existing definitive map”. In all these decisions, therefore, whilst it appears to have been accepted that it was not necessary that the evidence had physically to have come into being since the original date of the map, there was a consistent view that the act of discovery should have occurred since the that date in the sense that something new should be brought to the deciding body’s attention which had not been considered before. This has been further clarified in *Mayhew v Secretary of State for the Environment*,¹²⁶ where the court emphasised that the comparison to be made in determining whether evidence had been “discovered”—thereby triggering the operation of s.53 of the 1981 Act—was between the evidence available at the time of the application for modification and the evidence available at the date of the preparation of the map. The fact that the surveying authority may have considered that evidence at some different point of time in the past does not prevent the use of that evidence in support of an application based on s.53(3)(c).¹²⁷

12-59 In *R. (on the application of Roxlena Ltd) v Cumbria CC*¹²⁸ the Court of Appeal revisited the authorities in response to the argument that evidence included in an earlier application that had not complied with procedural requirements could not be relied upon later as it could not be “discovered” again. Lindblom LJ rejected that argument, emphasising that “discovery” could not be seen in isolation, but requires consideration of the evidence, together with other relevant evidence, “in effect, therefore, a composite event.”¹²⁹ On that basis, he held that:

“evidence discovered by somebody once – in the sense of its being found for

the first time – cannot, in that sense, be discovered by that person on a second or subsequent occasion. But this is not to say that evidence, once discovered, but not so far considered by the surveying authority, cannot be considered on the second occasion when it is submitted. ‘discovered’ or ‘produced and laid before the Council at the appropriate time’ which is different from the original evidence.”¹³⁰

Discovery, therefore, entails consideration in substance. Otherwise procedural errors could have the arbitrary consequence of preventing the definitive map from being kept up-to-date unless further fresh evidence appeared justifying its modification. On the same basis, the courts have held that “discovery does not have to be new evidence – a long-standing discrepancy between the map and the statement may justify a modification order under s.53(3)(c) if it has not previously been addressed by a surveying authority.”¹³¹

12-60 Discovered evidence has to be considered together “with all other relevant evidence” available to the surveying authority. It is not necessary, therefore, that the new evidence alone should be capable of establishing the error on the map independently of evidence which may have already been considered at the time of preparation of the map nor, so long as it was not minimal, that it should be of any particular weight.¹³²

12-61 Under s.53(3)(c), the new evidence that triggers a modification can be evidence that points towards adding a right of way not shown in the map and statement, changing the description of a right of way already shown, removing a right of way shown on the basis that there is no recordable highway of any description or modifying any other particulars contained in the map and statement. The test to be applied by the surveying authority is not the same in each case.

12-62 For an order including a new path on the definitive map under s.53(3)(c)(i), the surveying authority has to be satisfied the path “subsists or is reasonably alleged to subsist”. That was the original test for inclusion of paths in the 1949 Act¹³³. The statutory addition of the words “or ... reasonably alleged to subsist” is a deliberately lesser test to whether, on the balance of probabilities, a way subsists. This lesser test is whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to exist.¹³⁴

12-63 Whilst this statutory wording prescribing two possible tests for the *making* of an order based on new evidence that a path should be added to the definitive map cannot be denied, it is not entirely clear from the statutory provisions whether the same two tests carry through to the confirmation stage. If the status of a path were to be determined through the court process then the appropriate test would be the normal civil test of a balance of probabilities. It is difficult to see why the inclusion of a path on the definitive map, with its conclusive evidential effect, should be subject to any lesser burden. In *R. v Secretary of State for Wales Ex p. Emery*¹³⁵ the Court of Appeal seems to have proceeded on the basis that the lower test was applicable only at the preliminary order-making stage, and therefore so long

as there was credible evidence of 20 years' use it would be appropriate to make the order and allow the matter to be tested at inquiry. In *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs*¹³⁶ Evans-Lombe J. held that the test at the confirmation stage should be the ordinary balance of probabilities. First, he looked at the procedures introduced by the National Parks and Access to the Countryside Act 1949 which resulted in paths being included on the definitive map:

"It seems to me that the pattern of the 1949 Act has been carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under section 31 at quarter sessions would be subject to the civil burden of proof ... In the absence of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for land owners and other users by a mere finding that it was reasonable to allege that such a right subsists seems to me to be counter-intuitive."

He also felt that it would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence

of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. That the confirmation stage involves a different, and more stringent, approach to the evidence has now been confirmed by the Court of Appeal in *R. (on the application of Roxlena Ltd) v Cumbria CC* where Lindblom LJ approved Evans-Lombe J's judgment in *Todd and Bradley*.¹³⁷ As a matter of principle, a more stringent approach to confirmation must be correct. To allow for the creation of public rights of way with their potentially serious effects on property rights based on an evidential standard less than a balance of probabilities would be a draconian measure which had escaped the attention of the courts in the 50 years or more since the legislation was first introduced.

12-64

The Deregulation Act 2015 proposes an amendment to s.53(3)(c)(i) so that modification orders will no longer be able to be made on the basis that a right of way is "is reasonably alleged to subsist". Once brought into force, along with the other proposed changes,¹³⁸ that will mean that the test at the order-

making and confirmation stages will be the same for all types of modification and for unrecorded rights of way orders will only be able to be made on the basis that the way subsists on the balance of probability.

12-65

Where the application for a modification order is seeking to remove or to record a lesser highway right over a public path than is shown on the map under s.53(3)(c)(ii) or (iii), it has been held that cogent evidence is required to establish on the balance or probabilities that the path was wrongly included.¹³⁹ However, the question also arises as to what *weight* should be given to the fact that the path was included on the map originally after following the relevant statutory processes. The decision in *R. v Secretary of State for the Environment Ex p. Simms and Burrows*¹⁴⁰ demonstrates that the fact that the path is included on the map is not determinative for all time. Equally, however, there must be some new evidence which, taken with the evidence that was originally available, triggers the “event” that justifies the modification. In *Trevelyan v Secretary of State for the Environment, Transport and the Regions*¹⁴¹ the Court of Appeal had to address this question. The court had regard to s.32 of the Highways Act 1980 which indicates that map evidence will carry such weight as a tribunal:

“considers justified by the circumstances, including the antiquity of the rendered 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.”

As the definitive map was expressly prepared to record rights believed to be in existence at the relevant date and provided procedures for the assertion of those rights to be challenged and tested then it must carry a certain degree of weight. Lord Phillips MR¹⁴² felt that the matter should be addressed in the following way:

“Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.”

In fact, the inspector in the decision under appeal had made a modification order removing the majority of the path from the map and his decision was

upheld notwithstanding the fact that the owners of the land crossed by the path had, during the original map preparation process, shown a willingness to challenge the route and existence of the path over their land but had apparently eventually accepted the status and line of the path as it was finally recorded.

12-66 Applications to modify the particulars in a definitive map and statement may be made to amend or add otherwise unrecorded widths, to add or remove limitations (such as gates) or to clarify the exact line of a way.¹⁴³

12-67 A limitation of the modification procedure in correcting some types of error in the definitive map has been highlighted in *R. v Secretary of State for the Environment Ex p. Kent CC*.¹⁴⁴ A footpath had been shown on the definitive map. The existence of a footpath was not in dispute. However, the route of a part of its length was alleged to have been incorrectly shown on the definitive map. The surveying authority made a modification order proposing the deletion of the whole path. The order was opposed and a public inquiry was held. The inspector concluded that the path had been shown to exist along the line shown on the map up to a certain point but that it had been wrongly recorded over the remainder of its length. Initially, the inspector concluded that the correct line was over another route and he proposed to modify the order to show the path over the supposedly correct line.¹⁴⁵ This modification required another public inquiry and, as a result of the evidence adduced to this inquiry, the same inspector concluded that the evidence did not support the existence of public rights over the proposed new line. He then refused not only to make the modification but also to make the original order, expressing the view that the council should look to other powers to deal with the disputed section of the path. The council sought to challenge this decision and Turner J, in dismissing the application, confirmed the unsuitability of the modification procedure to delete in its entirety the whole of a footpath where only the route of part of the path was in dispute. He also expressed the view that other statutory powers would have to be used to address this problem.

12-68 On its facts the *Kent* decision is undoubtedly correct. It would have been wrong to delete an undisputed path in its entirety simply because part of its route was incorrectly shown. The case does, however, hint at a pragmatic approach in favour of maintaining the integrity of the public path network as shown on the definitive map. The only alternative powers that the inspector and the court could have had in mind for dealing with the disputed section of the path must have been the diversion procedures under ss.116 and 119 of the Highways Act 1980.¹⁴⁶ An alternative approach, however, available to the inspector, would have been to have modified the original order to delete only the disputed section of the path without attempting to determine where the correct continuation route was situated. This approach would have left the footpath temporarily truncated and the continuity of the network disrupted pending either the identification of the correct line or the creation of a replacement route. The approach adopted left the existing line shown on the map intact whilst other procedures for its diversion were pursued.

12-69 The decision in the *Kent* case turned essentially on whether the inspector

had erred on the evidence and argument before him. However, Turner J also suggested:¹⁴⁷

“it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt ... one would expect to look elsewhere for statutory provisions which were concerned with the question whether or not an established right of way, but not its route, should continue to exist.”

One cannot, however, divorce a highway from its route. It either exists over a particular line or it does not. It is submitted that the *Kent* decision should not be considered as authority for the proposition that a dispute over the route of a section of the public path network cannot or should not be addressed by the modification procedure.¹⁴⁸

- 12-70** Where there is an undoubted conflict between the definitive map itself and the statement then it is the map that will prevail but, in considering a modification order that seeks to remedy the conflict the decision maker must look at all the evidence in order to determine which is correct and what form of modification is required.¹⁴⁹

The decision to make a modification order

The application for a modification order: Schedule 14

- 12-71** Whilst surveying authorities are under a free-standing duty to keep their definitive maps and statements under review—which may involve making orders on their own initiative¹⁵⁰—s.53(5) allows any person to apply to the authority for a modification order based on the occurrence of one or more of the events set out in s.53(3)(b) and (c). Schedule 14 sets out the procedure for making such orders. The form of an application is prescribed by regulations.¹⁵¹ The application must be accompanied by a map at a prescribed scale and by any documentary evidence, including the statements of any witnesses, which the applicant wishes to adduce in support of his application.¹⁵²

- 12-72** The extent of compliance required by Sch.14 has been examined by the courts in the context of the extinguishment of unrecorded rights for mechanically propelled vehicles under s.67 of the Natural Environment and Rural Communities Act 2006. One of the exceptions to extinguishment was where:

“... before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic.”

Section 67(6) made it clear that for the purposes of this exception an application under s.53(5) of the 1981 Act was made when it is made “in accordance with” para.1 of Sch.14 to that Act, i.e. accompanied by a map and

any documentary evidence. This gave rise to two issues: (i) what is necessary for an application to accord with para.1 of Sch.14; and (ii) what are the consequences if an application does not.

12-73 On the first issue, the courts have made clear that there must be strict compliance with the procedural requirements.¹⁵³ Omission in an application of a document upon which an applicant intends to rely will render the application invalid.¹⁵⁴ Only *de minimis* failures may be discounted. In *R. (on the application of Trail Riders Fellowship) v Dorset CC*¹⁵⁵ the question arose as to whether the map submitted with the application was at the prescribed scale. The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993¹⁵⁶ require that the scale of the map accompanying an application to modify should be not less than 1:25,000. The map which accompanied the relevant application had been originally produced at a scale of 1:50,000 but had been altered by digital

techniques (digital raster mapping) so that it presented at 1:25,000 scale. Evidence was produced that different information is shown on maps of different scale and at first instance Supperstone J held that the altered map did not meet the prescribed requirements as it had not been drawn to the required scale and, therefore, would not show all the information that might be expected from a larger scale map. This decision was reversed on appeal and that reversal was upheld in the Supreme Court, determining by a 3:2 majority that the digitally enlarged plan was drawn at a scale of 1:25,000 and so met the procedural requirements. A different majority of the Supreme Court also rejected the idea of “substantial compliance” preferred by Lord Carnwath who considered that the narrow approach of the courts moved from “proper strictness” into “unnecessary bureaucracy”. As Lord Neuberger said at [95]:

“If an application does not comply with that requirement, and the failure is not waived by the council, the application is invalid as it stands. Unless it can be said that the failure is *de minimis* (a suggestion that was rightly rejected by Supperstone J in this case), the court would not be giving effect to the statute if it simply overlooked the defect.”

12-74 On the second issue, there is a critical difference between applications to add public vehicular rights to the definitive map that do not comply with para.1 of Sch.14—and so engage s.67 of the Natural Environment and Rural Communities Act 2006—and other cases of non-compliance. Where s.67 is in play, the accordance or otherwise of an application with the procedural requirement falls to be assessed as at the relevant date under s.67(4), namely 20 January 2005. Any waiver of non-compliance by a surveying authority is irrelevant and the opportunity to correct defects in the application likely to have been lost. In *Trail Riders Fellowship* Lord Neuberger noted:

“While it may seem harsh, it seems to me quite consistent with the purpose of the section to exclude from that class of exemption cases where the application is defective (even though it might otherwise be saveable). I do

not consider the court would be performing its duty of reflecting the intention of Parliament as expressed in legislation if it effectively ignored or discarded a subsection because it did not like the consequences, or it considered that they were rather harsh.”¹⁵⁷

The strict approach accords with Parliament’s intention to extinguish vehicular rights on public rights of way. However, it should not be taken as supporting the outright rejection of general modification order applications that do not comply with procedural requirements (save, perhaps, in cases of serious non-compliance). The Supreme Court noted the ability of surveying authorities to waive procedural requirements; that facility was also emphasised by Dyson LJ in *R. (on the application of Warden and Fellows of Winchester College) v Hampshire CC*:¹⁵⁸

“I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to

decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the “trigger” for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3).”

Moreover, applicants should be given the opportunity to correct defects. Consistent with his (dissenting) view on non-compliance in the *Trail Riders Fellowship* case, Lord Neuberger considered that “subject to any special reason to the contrary (e.g. the claimants not having availed themselves of ample opportunity to do so after warnings), the claimants would have been entitled to remedy the defect on the applications by submitting maps which were properly compliant ...”.¹⁵⁹ Authorities must deal with applications in a way that is procedurally just.¹⁶⁰

12-75

The applicant for an order must serve notice of the application on the owners and occupiers of any land to which the application relates. In certain cases, the authority may authorise the service of the notice by addressing it to “the owner or occupier” and affixing it to some conspicuous object on the land. The applicant must supply a certificate to the authority to the effect that he has complied with these requirements.¹⁶¹ It does not appear from the wording of the Schedule that an incorrect certificate would deprive the authority of jurisdiction to entertain the application.¹⁶² However, the obligation of the authority to investigate and process the application depends on the receipt of such a certificate.¹⁶³ It is suggested that an authority is entitled to rely upon a certificate that appears on its face to be valid.¹⁶⁴ Consideration of an application without service of the required notices on landowners might, however, amount to a procedural error susceptible to judicial review, subject to the question as to whether the failure has caused prejudice.¹⁶⁵ In the *Winchester*¹⁶⁶ case the court went on to consider the question whether the determination of the local authority on one of the applications was invalid

because of a failure to comply with the requirements as to service; per Dyson LJ.¹⁶⁷

“... the correct approach is to apply ordinary public law principles. In so far as there is shown to have been a failure to comply with the procedural requirements of paragraph 2, it is necessary to ask whether and, if so, to what extent any substantial prejudice has been suffered as a result. On the facts of this case, the council was entitled to waive the failure to comply with the procedural requirements.”

12-76 After receipt of the certificate, the authority must, as soon as is practicable, investigate the matters stated in the application and must, after consulting with every local authority¹⁶⁸ whose area includes land affected by the application, decide whether to make the order.¹⁶⁹

12-77 In investigating applications, s.289(1) of the Highways Act 1980 give authorities the power to enter onto land to exercise any of their functions “in their capacity as a highway authority”. The extent to which this provision may be used by *surveying* authorities is open to question. However, at least in cases where there is a reasonable case that a highway exists on land, it is suggested that an authority ought to be able to rely upon s.289 to access land for the purpose of investigating an application.¹⁷⁰ There is otherwise an unfortunate statutory lacuna. It has been confirmed that a surveying authority is not under a duty to carry out a deep investigation or to follow up every line of inquiry before making an order,¹⁷¹ although a degree of rigour is good practice. Ultimately, an authority can only make a judgment on the basis of the best evidence that is reasonably available.¹⁷²

12-78 The decision that is to be made, although it will be subject to confirmation, is not just an interim or prima facie decision. In making that decision the authority must come to a careful and properly informed decision with a proper appreciation and weighing of the available evidence and of any legal principle that may have to be applied.¹⁷³ However, where the authority is considering an application to add a path to the definitive map it must be mindful of the fact that it should make an order where it is reasonably alleged that the claimed path subsists.¹⁷⁴ In *R. v Secretary of State for Wales Ex p. Emery*¹⁷⁵ the Court of Appeal pointed out that the combination of this lower test with the potential for evidence to be tested at the subsequent inquiry stage should lead authorities to make an order where there was credible evidence supporting the claim—notwithstanding the fact that there might also be credible evidence against it—unless there is documentary evidence that must inevitably defeat the claim either, for example, by establishing incontrovertibly that the landowner had no intention to dedicate, or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.¹⁷⁶

12-79 Where the authority fails to determine the application within 12 months of receipt of a certificate, the applicant may make representations to the Secretary of State, who may direct the authority to determine it within a specified time. The Secretary of State will consider, among other things, any statement of priorities

for determining applications adopted by the authority and the reasonableness of those priorities.¹⁷⁷ There is no further sanction provided against a dilatory authority, and the Secretary of State is not *required* to make a direction. Where an authority fails to determine an application after a direction from the Secretary of State, the direction ought to be capable of enforcement by him through an application of judicial review seeking an order of mandamus. It is less clear whether a similar remedy would be available to the applicant.

12-80 Before making such an order, the surveying authority must consult with every local authority whose area includes the land to which the order relates. Where, after considering the application, the authority decides not to make an order, the applicant may appeal to the Secretary of State within 28 days of the service on him of notice of the decision. The decision as to whether the modification order should be made then lies with the Secretary of State, who may issue directions to the authority concerned (including a direction as to the time within which an order is to be made).

12-81 The nature of the Secretary of State's decision at this stage, and the standard of proof required, is the same as that relating to the decision of the surveying authority.¹⁷⁸

Procedure following the making of an order: Schedule 15

12-82 Once the authority has decided to make an order, the procedure for modifying the definitive map is contained in the Wildlife and Countryside Act 1981 ss.53-57 and Sch.15. Before it can take effect the order has to be confirmed either by the authority itself (in the absence of objections) or by the Secretary of State. Before making an order the authority must first consult with every other local authority whose area includes the land to which the order relates.

12-83 On making the order, the authority must give notice, in the form prescribed by regulations,¹⁷⁹ to the owners and occupiers of the land affected,¹⁸⁰ to local authorities whose area includes the land, to any person who, on payment of a reasonable charge to the authority, has required the authority to give him notice of such orders, and to a number of organisations which are prescribed in the regulations. The notice must also be advertised in local papers and must be displayed at the ends of so much of any way as is affected by the order,¹⁸¹ in council offices in the locality of the affected land and at such other places as the authority considers appropriate. The notices must indicate the general effect of the order, that it has been made and that it requires confirmation. The notices must name a place where the order may be inspected free of charge, and must specify both the time (being not less than 42 days from the date of the first publication of the notice) and the manner in which representations may be made

with respect to the order. The notices given to landowners and occupiers and to local authorities must include a copy of the order itself, insofar as it relates to their land or area.¹⁸²

12-84 During the 42-day period for the making of representations, any person may require the authority to permit him to inspect and take copies of any documentary evidence that was taken into account by the authority in making the order. Where no representations or objections are "duly made" to the

authority within the prescribed period, or where all such objections or representations have been withdrawn, the authority may then confirm the order itself, without modification.¹⁸³ Otherwise, where the authority wishes to modify the order, or where there are unresolved representations or objections, the order must be submitted to the Secretary of State for confirmation. An objection is duly made when it is made within the relevant time limit and in accordance with the provisions of Sch.15.¹⁸⁴ In fact, there are no procedural requirements for the making of an objection, although the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993¹⁸⁵ indicate, in the prescribed form of notice of the making of an order, that representations and objections must be sent in writing to the appropriate officer of the authority. However, the authority must state in their notice how objections or representations should be made which must include particulars of the grounds on which the objection or representation is made.¹⁸⁶

12-85 Where there are outstanding representations or objections, the Secretary of State must, subject what is said below, either cause a local inquiry to be held or afford the person making the representation or objection the opportunity of being heard before a person appointed by him and who may be authorised to make the decision.¹⁸⁷ However, the Secretary of State is entitled, in deciding whether or not to hold an inquiry or hearing, to take the view that no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order, either with or without modifications.¹⁸⁸ In that case, whilst he would still be required to consider the objection, he may confirm the Order without holding an inquiry or hearing.

12-86 The appeal procedure is now governed in England by the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007.¹⁸⁹ There are no similar rules yet in Wales. Thereafter, the Secretary of State, after considering the representations and the report of his inspector, may confirm the order with or without modifications. In any case where the order is confirmed with modifications that involve land not affected by the order or where the modifications add or delete a highway or alter its status, the Secretary of State is first required to give at least 28 days' notice of his proposal to modify the order, permitting representations or objections to the modification.¹⁹⁰ Where relevant representations or objections are made and are not withdrawn, a further local inquiry must be held or a hearing afforded before the order is confirmed.¹⁹¹ In order to prevent all the modifications from being delayed by this lengthy process, the authority is permitted to give notice to the Secretary of State that it is severing the opposed modifications from those that are unopposed, so as to create two separate orders. The unopposed order could then be confirmed by the authority itself. Notice of a final decision on the confirmation of an order must be given by the authority.¹⁹²

Proposed changes: New Schedules 14A and 15A

12-87 The Deregulation Act 2015 posits substantial changes to the process for the making and confirmation of modification orders in England.¹⁹³ The overall

aim is simplification, but the proposals are significant and wide-reaching. They are not yet in force, and depend upon secondary legislation and/or guidance for their full articulation. They are nonetheless both significant and interesting. The main changes are outlined below.

12-88 New Schedule 13A will apply to applications for modification orders. Para.2 will introduce a new form of preliminary assessment—a basic evidential test—of applications under which surveying authorities will have to ask themselves within three months of receipt if there is a “reasonable basis for the applicant’s belief that a definitive map and statement should be modified in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c)”. Guidance will be produced to assist in this task. If the authority fails to complete the preliminary assessment within three months, the applicant can serve a notice on the authority and, after a further three months, seek an order that it comply with its duty from the Magistrates’ Court.¹⁹⁴ There is no statutory appeal against the preliminary rejection of an application, however the authority must inform the applicant of the decision and the reasons for it. Any challenge to a negative preliminary determination itself would have to be by way of judicial review. Presumably, the applicant will have an opportunity to reapply, but there is no express provision for this.

12-89 The duty to investigate and determine applications will begin once a positive preliminary determination has been made.¹⁹⁵ If an authority fails to determine the application within 12 months, an applicant’s only redress will again be to seek an order from the Magistrates’ Court.¹⁹⁶ Where an authority refuses an application, an applicant may give notice that they wish to appeal the decision to the Secretary of State and, save where the grounds of appeal are irrelevant, the authority must then submit the matter to the Secretary of State. Detailed provisions as to the management of such appeals are set out in paras 7-11 of Sch.13A and will be supplemented by guidance. There is no requirement that an inquiry must be held where relevant representations are received—the Secretary of State may decide to hold a hearing or to deal with the matter by written representations.¹⁹⁷ The Secretary of State’s decision (or that of an inspector appointed by them) may be to uphold the authority’s refusal, to direct the authority to make the order or to make the order directly.¹⁹⁸ Orders directed to be made or made by the Secretary of State under para.8 of Sch.13A must be confirmed without any further process.¹⁹⁹ This will remove a major inefficiency with the current system whereby modification proposals can be referred to the Secretary of State twice: first to direct the authority to make the order and second to consider outstanding objections.

12-90 The use of the Magistrates’ Court in the modification process is an innovation and will be one of the more challenging aspects for implementation. The advantage of the Magistrates’ Court is that it is equipped for, and used to, hearing small applications swiftly. The disadvantage is that it lacks expertise in the recording of public rights of way and can be overwhelmed by other business. The Magistrates’ Court will have a discretion rather than a duty to make any order. There is also express provision for an authority to ask for a 12-month extension,²⁰⁰ which may become used as a

default.

12-91 Schedule 14A will govern the confirmation of orders made by surveying authorities. This echoes some of the changes proposed in Sch.13A. Authorities will be able to refuse to submit opposed order to the Secretary of State where they deem objections to be irrelevant.²⁰¹ The Secretary of State may determine contested orders following an inquiry, a hearing or written representations.²⁰² There are also express provisions enabling the severance of orders where representations only relate to some modifications or where only some representations are relevant.²⁰³ The new procedure is otherwise similar to existing Sch.15.

12-92 A more innovative change proposed in the Deregulation Act 2015 is the power on authorities to make a “special order” that accommodates a landowner not wholly opposed to modification. Such orders will be known as “modification consent orders” and, where relied upon, authorities may bypass the process in Schs 13A and 14A. Indeed, an authority may confirm a modification consent order “whether or not any representations or objections are made”.²⁰⁴ The provision seems designed to deal with the influx of cases anticipated by the 2026 cut-off date.²⁰⁵ Under new s.54B, a modification consent order may be made where: (i) it appears to a surveying authority that it might be requisite to make a modification order; (ii) the basis for modification is documentary evidence from before 1949; and (iii) following notice, every relevant landowner would consent to the making of an order if it were either diverted from the proposed route, altered as to its width or subject to a new limitation or condition. A modification consent order is therefore a kind of fusion between modification order and public path order, insofar as it takes into account both historical evidence and the current or prospective position of landowners. Authorities will not be obliged to make special orders of this kind simply because owners would prefer it. For diversion orders, some of the protections from s.119 of the Highways Act 1980 are imported into s.54B.²⁰⁶ As with other provisions, exactly how modification consent orders operate will depend upon guidance. However, on any view, the provision represents an interesting compromise between the recognition of lost ways and the facilitation of modern land uses. The aim is presumably to encourage agreement and compromise and so to save the time and expense of the conventional order-making process (even as proposed to be updated). If owners do not consent to a special order, or the authority decides not to pursue such an order, the authority will have to commence the process of considering the modification order application under Sch.13A. In some cases, therefore, the existence of this special alternative power will cause delay.

12-93 Other changes proposed include:

- (a) a simplified procedure for the situation where “the need for the modification has arisen because of administrative error” and both the error and the requisite modification required are “obvious”;²⁰⁷
- (b) the transfer of responsibility to the surveying authority to notify landowners and occupiers of applications;²⁰⁸ and
- (c) a requirement that public notice be published on a website maintained by

the authority “and on such other websites or through the use of such other digital communications media as the authority may consider appropriate”.²⁰⁹

- 12-94** The Deregulation Act 2015 received royal assent on 26 March 2015. The changes proposed to the definitive map modification procedure contained within it are detailed and capable of implementation with little further guidance. It is nonetheless unclear when, whether and in what form they will be implemented. Cumulatively, the 2015 Act makes some radical alterations and should assist both in clearing the backlog of cases and in implementing the cut-off date for historic applications, which itself remains unimplemented after more than 20 years.

Transfer of applications

- 12-95** There is no express provision in the 1981 Act allowing for the transfer of applications. Nonetheless, in practice, it is not uncommon for applications to be transferred to or adopted by someone other than the original applicant in the course of their consideration, sometimes on the death of the original applicant. An authority’s s.53(2)(b) duty to keep the definitive map under review is not, in any event, dependent upon there being a live application.²¹⁰ Another one of the changes proposed by the Deregulation Act 2015 is to fill this gap by making it plain that an applicant “may at any time before the application is determined give notice in the prescribed form to the authority that another person named in the notice is to carry on the application”²¹¹

Challenging definitive map decisions in the courts

- 12-96** Following the publication of notice of confirmation of the order, there is then a 42-day period within which a challenge on ultra vires grounds may be made to the High Court. Thereafter, the order may not be questioned in any legal proceedings whatsoever.²¹² This is a statutory time limit, which is not capable of being extended. Failure to make an application within the prescribed time limit will, therefore, be fatal.²¹³ This limited right of challenge applies only to orders that have “taken effect”. However, the Court of Appeal has held that it also prevents any challenge being made to the process leading up to the confirmation of an order. In *R. v Cornwall CC Ex p. Huntington; R. v Devon CC Ex p. Isaac*²¹⁴ challenges had been mounted by way of judicial review to modification orders made, but not yet confirmed, by two surveying authorities. The grounds of challenge were that the original decisions to make the order had not been properly made.²¹⁵ The Court of Appeal took the view that the statutory intention was that the remedy in Sch.15 should be regarded as the exclusive means of challenge to the procedures leading up to the confirmation of an order, and quoted with approval from the judgment of Brooke J at first instance in the *Cornwall* case:²¹⁶

“It is quite clear, in my judgment, that Parliament intended to prescribe a comprehensive programme of the events which should happen from the time the

relevant authority sets in motion the consultation process mentioned in para.1 of Sch.15 and that once the order is made the prescribed procedure then follows, without any interruption for legal proceedings in which the validity of the order is questioned, until the stage is reached, if at all, when notice of a decision is given pursuant to the procedure prescribed in para.11. It is then, and then only, that Parliament intends that a person aggrieved by an order which has taken effect shall have the opportunity of questioning its validity in the High Court provided that he takes the opportunity provided for him by para.12(1) of Sch.15.”

12-97 It is not thought, however, that the decision in the *Cornwall* and *Devon* cases alters the law in relation to the situation where the surveying authority or the Secretary of State refuses to make or confirm an order. In such a case the decision may be challengeable on appropriate grounds by way of judicial review.²¹⁷ An application for permission to apply for judicial review must itself be made promptly and, in any event, within three months of the decision under challenge.²¹⁸ The three-month period is not an absolute bar to obtaining leave²¹⁹ but, equally, the fact that an application is made within that period does not mean that it has necessarily been made promptly. Even where permission to apply for judicial review has been obtained any delay in making an application can still be the basis of a refusal of relief. Section 31(6) of the Senior Courts Act 1981 states:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.”

Where an obvious error has occurred in the process leading up to the making of an order the potential applicant for relief will be advised to wait to see whether the order is confirmed. If it is, and he is opposed to the order, then he will have six weeks from the date of publication of the relevant notices to bring his challenge. If, following such an error, the order is not made or confirmed a potential applicant supporting the making of the order could, subject to the question of exhausting the appeal mechanism in para.4 of Sch.14,²²⁰ apply for leave to apply for judicial review. It is thought that time would then run from the date on which the decision not to proceed was made, even if the circumstances giving rise to the challenge arose earlier.²²¹ Whilst para.12(3) of Sch.15 would not in terms seem to prevent a challenge being made before a surveying authority has made an order, the policy approach adopted in the *Cornwall* and *Devon* decisions suggests that any attempt to challenge the order-making process before a final decision of one sort or another will be discouraged.²²²

12-98 The two statutory grounds of challenge to a confirmed order set out in Sch.15 are that the order is not within the powers of the Act “or that any of the requirements of this Schedule have not been complied with”. The first ground

is a familiar invocation of ultra vires principles and includes any challenge in law as to whether or not an appropriate “event” had taken place and whether the authority had the power to make the order.²²³ The second ground relates to the procedural requirements of Sch.15 only and relief will only be available where the applicant can establish that his interests have been “substantially prejudiced by a failure to comply with those requirements”. A procedural breach of one of the provisions of Sch.14 is not specifically addressed. This could mean that Parliament did not intend any of the provisions in Sch.14 to be mandatory and therefore to invalidate a subsequently confirmed order. However, the courts have found that the duty to investigate and determine an application for an order may be susceptible to challenge.²²⁴ Alternatively, it has been suggested that a breach of Sch.14 would necessarily be a breach of s.53(5) of the 1981 Act and could lead to a challenge on the grounds that the exercise of the power to modify was not within the powers of s.53.²²⁵

- 12-99** Although a confirmed order can only be challenged within the prescribed time limits and although the definitive map and statement will be conclusive evidence in any court of the matters set out in s.56 of the 1981 Act, landowners, and other parties with the required legal interest, may still apply to the courts to determine public rights of way issues notwithstanding the existence of ongoing, but incomplete, modification procedures under the 1981 Act. However, the court may well stay proceedings pending the outcome of the modification procedure where the issues involved in the two sets of proceedings are identical.²²⁶

The situation in London

- 12-100** The National Parks and Access to the Countryside Act 1949 did not require the then London County Council to prepare definitive maps, but permitted the Council, by resolution, to adopt the survey provisions for any part of the county. The London Government Act 1963 abolished the London County Council and established the new London boroughs. The outer London boroughs were comprised of areas which had, formerly, been part of other counties within which the general survey provisions of the 1949 Act applied. The Wildlife and Countryside Act 1981 s.58(1) excludes from the provisions relating to definitive maps “any area which, immediately before 1st April 1965, formed part of the administrative county of London”. London borough councils can, however, adopt the provisions of the Act in relation to those parts of their areas which are excluded by s.58(1).²²⁷

CREATION, MAINTENANCE, AND PROTECTION OF PUBLIC PATHS AND RESTRICTED BYWAYS

Creation of footpaths, bridleways and restricted byways

- 12-101** The creation of public rights of way by dedication and acceptance follows the general rules applicable to all highways. The Highways Act 1980 does, however, specifically provide for the creation of footpaths, bridleways and restricted byways by agreement and by order. These are discussed in Ch.2.²²⁸

One other, unique, way in which a footpath or bridleway can be created, occurs when vehicular rights are extinguished in a carriageway highway by virtue of a pedestrian planning order under the Town and Country Planning Act 1990 s.249.²²⁹

Maintenance of footpaths, bridleways and restricted byways

12-102 Section 23 of the Highway Act 1835 did not apply to footpaths and bridleways as such. It followed, therefore, that the duty to maintain these paths continued after 1836, whether or not there had been any formal adoption.²³⁰ Whatever doubt there may have been about this was resolved by s.47 of the National Parks and Access to the Countryside Act 1949, which declared that *all* existing public paths²³¹ were repairable by the inhabitants at large, but which also provided that s.23 was to apply to all paths dedicated after the commencement of the 1949 Act,²³² otherwise than in pursuance of a public path agreement.²³³ The present situation is that the following will be maintainable at the public expense:

- (a) all paths dedicated prior to December 16, 1949;²³⁴
- (b) all paths created since that date by virtue of public path creation orders or agreements;²³⁵
- (c) all paths which have otherwise been adopted by the highway authority by virtue of one of the adoption procedures in the Highways Act 1980 and its predecessors;²³⁶
- (d) paths which are created as replacements for stopped up or diverted paths;²³⁷
- (e) paths that have been subject to one of the reclassification processes relating to roads used as public paths (RUPPs);²³⁸
- (f) all restricted byways created by the automatic reclassification of RUPPs;²³⁹
- (g) all other paths which fall within one of the categories contained in the Highways Act 1980 s.36(1), for example public paths constructed by a highway authority and certain paths constructed as highways by a housing authority.²⁴⁰

However, the fact that such highways are maintainable at the public expense does not impose any obligation on the authority to metal the ways even in the case of byways open to all traffic (BOATs).²⁴¹

12-103 Non-metropolitan district councils may undertake the maintenance of footpaths and bridleways that are maintainable at the public expense. These councils may be reimbursed by the county council for expenses incurred in maintaining such highways.²⁴² Schedule 7 to the Highways Act 1980 sets out a procedure whereby the district council must give notice to the county council of its intention to exercise these powers, specifying the highways concerned. Where the county council is of the view that any highway so specified does not fall within the district council's maintenance powers, it may serve a counter-notice to this effect. Where the dispute cannot be resolved, it

must be referred to the Minister.²⁴³ In exercising these powers, the district

council stands in the shoes of the county council, and may sue and be sued in its own name. Indeed, an indemnity must be given to the county council in respect of any claim made against it, with regard to any failure to maintain a highway at a time when the district council was exercising its powers in respect of that highway, or any claim arising out of any maintenance works carried out by the district council pursuant to these powers.²⁴⁴ Non-metropolitan district councils may also undertake the maintenance of footpaths and bridleways which are maintainable by some other person (without affecting the continuing liability of that person to maintain the way) or which are maintainable by no one.²⁴⁵ The provisions of Sch.7, with respect to notices and indemnities, apply also here.

- 12-104** Parish and community councils may also undertake the maintenance of footpaths and bridleways, whether maintainable by the highway authority,²⁴⁶ or whether maintainable by some other person, or by no one at all.²⁴⁷ These powers of the parish are exercisable, however, without affecting the liability of the highway authority or any other person to maintain the path. The parish council is not entitled to automatic reimbursement of its expenses and is subject to overall statutory limitations on its expenditure. However, the highway authority or district council (where that council is itself exercising maintenance powers under s.42) may undertake to defray all or part of the parish or community council's expenses in maintaining publicly maintainable paths.²⁴⁸

Extent of maintenance

- 12-105** The same basic test applies to the standard of maintenance of public rights of way as it does to any other highway.²⁴⁹ However, public paths will not require a particularly high standard of maintenance and will not usually need to be metalled, although the surface must be kept clear and passable.²⁵⁰ The highway authority will have separate responsibility to effect the removal of vegetation that obstructs the highway, pursuant to its duties to assert and protect the rights of highway users.²⁵¹

Protection of highway rights over footpaths and bridleways

- 12-106** Footpaths and bridleways will generally cross open country, including farmland. They are less well defined on the ground than are carriageway highways and sometimes, perhaps for that reason, appear to be less well established and are less acceptable to landowners. In any event, it is regarding the footpaths and bridleways in country areas that most conflict between the interests of ramblers and landowners has occurred. There are, therefore, a number of provisions that are designed to protect the public right of way from encroachment by the landowner whilst attempting also to recognise and protect his interest in the proper husbandry of his land.

Signposts

12-107 It is an offence for any person to place or maintain, on or near any public path or restricted byway shown on a definitive map any false or misleading statement, likely to deter the public from using the way.²⁵²

12-108 Highway authorities have power, in consultation with the owner or occupier of the land concerned, to erect and maintain signposts along any footpath, bridleway or byway for which they are the highway authority.²⁵³ They are under a duty to erect a signpost at every point at which a public path or byway leaves a metalled road, unless they are satisfied that a sign is not necessary and the parish council or chairman of the parish meeting (who must be consulted) agrees.²⁵⁴ Such a sign should indicate the nature of the path and, so far as the authority considers appropriate or convenient, where the path leads. The highway authority is also under a duty to erect such signposts as it considers to be necessary to assist persons unfamiliar with the locality to follow the course of a footpath, bridleway or byway.²⁵⁵ Persons other than highway authorities may erect and maintain signposts along paths and byways, with the consent of the highway authority.²⁵⁶ It is an offence to pull down or obliterate any signpost erected or placed along a footpath, bridleway or byway, pursuant to these provisions.²⁵⁷

Stiles and gates

12-109 A footpath or bridleway may be dedicated (either expressly or impliedly) subject to obstructions across the way so long as these are not inconsistent with its dedication as a public path. Stiles and gates are not inconsistent with dedication,²⁵⁸ and may, in fact, provide a means for the rambler or rider to circumvent fences, walls and hedges, which are necessary for the proper agricultural use of the land, but which otherwise would provide an obstacle to the exercise of the right of way. However, once dedicated free from such obstacles, the erection of a stile or gate in an otherwise unrestricted part of the path may constitute an obstruction.²⁵⁹ In order to reconcile the potentially conflicting needs of the farmer and of the user of the path, the highway authority is empowered, on representations being made by the owner of agricultural land or of land which is being brought into use for agriculture,²⁶⁰ to authorise the erection on the path of stiles, gates or other works for preventing the ingress or egress of animals.²⁶¹ The authorisation may be conditional as to the maintenance of the gate or stile, and unless the conditions are complied with, the gate or stile will cease to be an authorised structure in the highway and may be subject to removal under the provisions of s.143 of the Highways Act 1980. Where the path is being maintained by a district council under the provisions of ss.42 or 50 of the Highways Act 1980, then the authorisation may be given by that council.

12-110 All gates in carriageway highways and bridleways are required to be of a minimum width. In the case of bridleways, this width is five feet, measured between the posts of the gate. Where, across such a highway, there is a gate of less than the minimum width, the highway authority may, by notice to the owner of the gate, require him to enlarge or remove it. Failure to comply with this notice is an offence.²⁶²

12-111 Stiles across footpaths and bridleways are required to be maintained by

the owner of the land in a safe condition, and to the standard of repair required to prevent unreasonable interference with the rights of the persons using the

footpath or bridleway. This duty of maintenance is subject to a contribution from the highway authority (or from the district council where the path is maintained by the district council).²⁶³ The duty does not apply to any structure which is the subject of an agreement between the landowner and the highway authority or district council, and which agreement imposes the liability of maintenance on that authority. Nor does the duty apply if any conditions for the maintenance of the structure are in force under s.147 of the 1980 Act. The highway authority (or district council) has default powers after giving the landowner not less than 14 days' notice and has power to recover all or part of its expenses reasonably incurred, from the landowner.²⁶⁴ It seems, therefore, that it is in the financial interests of the landowner to maintain his stiles subject to the authority's contribution rather than to run the risk of that authority recovering all of its costs of exercising the default power.

Improvements for the benefit of persons with mobility problems

- 12-112** The CROW Act 2000 made provision for authorities to enter into agreements with the owners and occupiers of land crossed by public paths and in which a stile, gate or other structure is located for the carrying out by the authority of works that will result in a structure that is safer and more convenient for persons with mobility problems.²⁶⁵

Ploughing

- 12-113** Common law recognised that a highway might be dedicated across land subject to the reservation of a right to plough that land. The highways legislation, however, has given farmers a statutory right to interfere with paths in order to plough their land, subject to safeguards relating to the length of the disturbance and to a duty of reinstatement. Amendments to that statutory right introduced by the Rights of Way Act 1990 have considerably tightened up these statutory provisions governing the reinstatement of the path with the objective that they may be more easily enforced.

- 12-114** Under the Highways Act 1980 s.134 (as amended), a statutory right to plough up²⁶⁶ paths in the interests of good husbandry is given to any occupier of any agricultural land (or of land which is being brought into use for agriculture) and the public right of way is subject to this right to plough. The right applies to any footpath or bridleway that passes over a field or enclosure consisting of agricultural land, or land that is being brought into use for agriculture. Field edge paths are excluded. The farmer is expected to be able to manage his farming activities so as not to disturb these paths. The statutory right arises where it is not reasonably convenient to plough or otherwise disturb the surface of farmland without also disturbing the surface of the path or way and rendering it inconvenient for the public to exercise their right of way.

- 12-115** The farmer is obliged, however, to make good the surface of the footpath or bridleway within certain time limits.²⁶⁷ the “relevant period”. Where the disturbance to the surface of the path is the first disturbance for the purposes of the sowing of a particular crop²⁶⁸ he has 14 days from the day on which the path was first disturbed before the path must be made good. In every other case he must make good the surface within 24 hours of the disturbance. Where the farmer faces difficulty in complying with these time limits he must make an application to the highway authority, either before the disturbance occurs or during the relevant period, and the authority may then grant an extension of that period for an additional period not exceeding 28 days.²⁶⁹
- 12-116** The extent of the duty to reinstate the path has also been made much more explicit and capable of practical enforcement. The surface of the path must be restored to not less than a prescribed minimum width and its line on the ground must be indicated to not less than that width so that it is both reasonably convenient for the exercise of the public right of way²⁷⁰ and apparent to members of the public wishing to use it. The prescribed minimum widths are set out in Sch.12A to the Highways Act 1980. In the case of paths affected by this section they are, where the width of the footpath can be proved,²⁷¹ that width; and in all other cases, 1m for footpaths crossing land, 2m for bridleways and 3m for any other kind of highway.
- 12-117** It is an offence to plough up any footpath or bridleway other than in accordance with the provisions of this section.²⁷² Enforcement of these provisions may be brought only by the highway authority, the district council or the parish or community council. However, the highway authority has a duty to enforce the provisions of the section. There is a default power for the enforcing authority²⁷³ to reinstate the path and recover the expenses of so doing from the occupier of the land who has carried out unauthorised ploughing. Powers of entry are given to the enforcing authority.²⁷⁴
- 12-118** The permissive power in s.134 does not act as a diversion of the path and there is no obligation on the farmer to provide any alternative route. The public may still cross the ploughed land during the period when the surface of the path is broken up. In practice, however, they are more likely to walk around the edge of the field. Formerly, a power to divert a path temporarily that could be used during the ploughing of a way was contained in s.135 of the Highways Act 1980. The power contained in that section does not now apply to cases where ploughing has disturbed a way. The present legislation has chosen instead to place stricter time limits on the disruption to a way which can be caused by ploughing activities.
- 12-119** The dedication of footpaths and bridleways subject to the right of the landowner to plough the land was recognised at common law.²⁷⁵ Where such a limited dedication had occurred, it was not the case that the public had the right to deviate from the path around the ploughed area, nor that they lost the right to follow the line of the path over the ploughed area.²⁷⁶ In *Mercer v Woodgate*²⁷⁷ the occupier of a field had been in the habit of ploughing up the whole of it, so destroying the footpath. There was no evidence of the existence of the footpath before living memory. It was held that the inference to be drawn was that the owner had originally dedicated the right of way to the

public, subject to this right of periodically ploughing it up. The provisions of s.134 do not seem to be intended to extinguish any existing common law rights²⁷⁸ although they may in practice provide farmers with a more certain and satisfactory basis on which to proceed. Nonetheless a more extensive right of interference may still exist where a path has been dedicated subject to the right of the landowner to plough across the path and where there is evidence of the extent of the reserved right to support it. Where a landowner relied upon an existing limitation on the dedication rather than on s.134 it would seem that the restoration to minimum width provisions would not apply. It may be noted that the reinstatement provisions only apply where the footpath has been disturbed “under the right” conferred by s.134(1).²⁷⁹

Interference with paths by excavations and engineering operations on agricultural land

12-120 Where the occupier of any agricultural land²⁸⁰ desires to carry out an excavation or engineering operation that is reasonably necessary for the purposes of agriculture, but which will so disturb the surface of a footpath or bridleway that passes over that land as to render it inconvenient for the exercise of the public right of way, he may apply to the highway authority for an order that the public right of way²⁸¹ shall be subject to the condition that he has the right to disturb the surface by that excavation or operation for a period to be defined in the order. The period that may be specified in such an order is one not exceeding three months. The highway authority must make an order where it is satisfied either that it is practicable temporarily to divert the path or way in a manner reasonably convenient to users or that it is practicable to take adequate steps to ensure that the path or way remains sufficiently convenient, having regard to the need for the excavation or operation, for temporary use while it is being carried out. The order must not authorise any interference with the apparatus or works of any statutory undertakers.

12-121 An order made under these provisions may provide for the temporary diversion of the path or way during the authorisation period,²⁸² but if the diversion is to be onto land not occupied by the applicant, the written consent of the occupier and of any other person whose consent is needed to obtain access to it will be required. Where a diversion is required, the order may include such conditions as the authority reasonably thinks fit for the provision, either by the applicant or by the authority at the expense of the applicant, of facilities for its convenient use, including signposts and other notices, stiles, bridges and gates. The authority must cause notices of such a diversion, together with a plan showing the effect of the diversion and the line of the alternative route provided, to be prominently displayed throughout the authorisation period at each end of the diversion.

12-122 An order under s.135 may include other conditions. These may relate to the protection and convenience of users of the path or way during the authorised period of interference; the making good of the surface of the path or way to not more than its minimum width before the expiration of the authorisation period; and the recovery from the applicant of expenses

incurred by the authority in connection with the order. The “minimum width” for paths is prescribed by Sch.12A as:

- “(i) as respects a footpath which is not a field-edge path,²⁸³ 1 metre,
- (ii) as respects a footpath which is a field-edge path, 1.5 metres,
- (iii) as respects a bridleway which is not a field-edge path, 2 metres, or
- (iv) as respects any other highway,²⁸⁴ 3 metres.”

12-123 An interference with the surface of a path that is not authorised by these provisions will be an offence under s.131A of the Highways Act 1980.²⁸⁵ If the applicant fails to comply with a condition imposed on an order under s.135 he will be guilty of an offence.²⁸⁶ Proceedings for an offence under s.135 may be brought only by the highway authority or (with the consent of the highway authority) by the council of the non-metropolitan district, parish or community in which the offence is committed. A default power to reinstate the surface of the path is given in Sch.12A.²⁸⁷ Highway authorities are placed under a specific duty to enforce the provisions of this section.²⁸⁸

Interference by crops

12-124 Section 137A of the Highways Act 1980²⁸⁹ requires occupiers of agricultural land on which a crop other than grass²⁹⁰ has been sown or planted to take steps to ensure that the line of certain highways running over their land is so indicated to not less than its minimum width²⁹¹ as to be apparent to members of the public wishing to use the highway. This provision is considered in Chapter 8.²⁹² The highways covered by this provision are footpaths, bridleways or un-made carriageways. The occupiers of such land are also required to prevent the crop from so encroaching²⁹³ on such highways over their land or which are on adjoining land as to render the highways inconvenient for the exercise of the public right of way.

Bulls

12-125 Restrictions are imposed by the Wildlife and Countryside Act 1981 on the keeping of bulls in fields crossed by footpaths, bridleways and byways open to all traffic.²⁹⁴ It is an offence²⁹⁵ for the occupier of a field or enclosure crossed by a public path to permit a bull “to be at large” in that field or enclosure. There are exceptions to this prohibition. It does not apply to any bull that is less than 10 months in age. Nor does it apply to any bull that is not of a recognised dairy breed²⁹⁶ that is at large in any field or enclosure in which cows or heifers are also at large. This latter exception significantly reduces the scope of the prohibition. Prior to the passing of the 1981 Act the restriction on the keeping of bulls in fields crossed by public paths was generally addressed locally in byelaws. This section replaces and overrides any such byelaws.²⁹⁷ Where the safety of persons using a path is put at risk by the presence of a bull in an adjoining field there may, however, be an offence under s.3 of the Health and Safety at Work Act 1974.

Other obstructions and dangers

- 12-126** The general provisions in the Highways Act 1980 concerning obstructions of the highway apply also to public paths.²⁹⁸ One or two provisions have particular relevance to public paths. By s.164 of the Highways Act 1980, a highway authority or district council may, by notice, require the removal of barbed wire, in any fence adjoining a highway, that constitutes a nuisance. Where the occupier of the land has failed to comply with the notice, the authority may apply to the magistrates' court for an order that the nuisance be abated and, where that order is not complied with within a reasonable period of time, the authority may take whatever steps are necessary to secure compliance, and may recover the expenses from the occupier of the land. Where the presence of the wire is likely to be injurious to persons or animals lawfully using the way, it will be deemed to be a nuisance.²⁹⁹ Where the land in question is occupied by the highway authority or district council, any ratepayer may stand in the shoes of the authority for the purpose of these provisions.

Powers to rectify damage to paths

- 12-127** Highway authorities and non-metropolitan district councils exercising powers under ss.42 or 50 of the Highways Act 1980 have powers to rectify damage caused to the surface of footpaths, bridleways and un-made carriageway highways together with powers of entry and power to recover costs.³⁰⁰

Prevention of obstructions

- 12-128** A new procedure has been introduced into the Highways Act 1980 to secure the removal of obstructions in public paths. This is discussed in Ch.7.³⁰¹

IMPROVING THE NETWORK

- 12-129** Every local highway authority other than an inner London authority³⁰² must prepare and publish a rights of way improvement plan. This requirement is contained in the CROW Act 2000 s.60. A rights of way improvement plan must contain the authority's assessment of the extent to which local rights of way³⁰³ meet the present and likely future needs of the public, the opportunities provided by local rights of way for exercise and other forms of open-air recreation and the enjoyment of the authority's area,³⁰⁴ and the accessibility of local rights of way to blind or partially sighted persons and others with mobility problems. The plan must also have regard to such other matters relating to local rights of way as the Secretary of State (as respects England) or the National Assembly for Wales (as respects Wales) may direct. The plans must contain a statement of the action the authority proposes to take for the management of local rights of way, and for securing an improved network of local rights of way, with particular regard to the matters dealt with in the assessment. The assessment must be repeated and the plan reviewed at least every 10 years.³⁰⁵

12-130 Before preparing or reviewing a rights of way improvement plan, and making any assessment, the authority is required to consult each local highway authority whose area adjoins its area, each district council, and each parish or community council, whose area is within its area, the National Park Authority for any National Park³⁰⁶ within its area, any local access forum established for any part of its area³⁰⁷ and Natural England or Natural Resources Wales (as appropriate).³⁰⁸ There is no intention to make regulations to add further statutory consultees under s.61(1)(g), but the statutory guidance suggests that authorities consider consulting the organisations in their area that would normally be consulted on public path orders. The local highway authority must then publish, in two or more local newspapers circulating in its area, notice of how a copy of the draft can be inspected or obtained and how representations on it can be made to it, and consider any representations made in accordance with the notice. In performing its plan-making or review function the local highway authority may act jointly with a district council or National Park Authority within its area and must have regard³⁰⁹ to statutory guidance.³¹⁰ Other statutory requirements such as the Equality Act 2010 will be relevant to the content of plans. In Wales, there is likely to be a particular overlap with the Active Travel (Wales) Act 2013.

PROVISION OF AMENITIES IN PEDESTRIAN WAYS

12-131 Part VIIA of the Highways Act 1980³¹¹ empowers councils³¹² to provide special facilities in certain kinds of pedestrian ways. The highways in which these powers may be exercised are:

- (a) footpaths, bridleways and restricted byways;
- (b) highways that have been the subject of an order under the Town and Country Planning Act 1990 s.249(2);³¹³
- (c) footways;
- (d) subways and footbridges constructed under Highways Act 1980 ss.69 and 70;
- (e) walkways (including those walkways and pedestrian ways that owe their existence to local Act powers);
- (f) highways that are the subject of orders under the Road Traffic Regulation Act 1984 ss.1, 6, and 9, prohibiting vehicular traffic either wholly, or for certain periods of the day or year.

12-132 The powers contained in Pt VIIA fall into two categories. The council is empowered to provide services and amenities in these highways, which may involve the carrying out of works in, on or over the highway, or the placing of structures in the highway. Secondly, the council is empowered to grant permissions to other persons to provide facilities and place objects in the highways.

Provision of services and amenities by councils

12-133 A council may carry out works and place objects or structures on, in or over highways, for the purposes of giving effect to a pedestrian planning order,³¹⁴

of enhancing the amenity of the highway and its immediate surroundings and of providing a service for the benefit of the public or a section of the public. The council may maintain the works, objects or structures that have been carried out or installed. The Highways Act 1980 gives as examples of ways in which the amenity of the highway may be enhanced, the provision of lawns, trees, shrubs or flowers.³¹⁵ Councils are also empowered to provide, maintain and operate facilities for recreation or refreshment on these kinds of highways.³¹⁶

12-134 It may well be the case that the exercise of these powers under Pt VIIA of the Highways Act 1980 will obstruct the highway. Section 115D makes it clear that this is permissible, subject to some overall restrictions. The council may not exercise its powers in such a way as to prevent traffic, other than vehicular traffic, from entering the highway, at any place where traffic could have entered it before the making of any pedestrian planning order or traffic order, nor from passing along the highway nor from having normal access to any premises adjoining the highway. Furthermore, the exercise of these powers cannot be used to restrict any use of vehicles which is allowed under the terms of a pedestrian planning order, or which is not prohibited by the road traffic regulation order, nor to prevent statutory undertakers, sewerage authorities or telecommunications operators from having access to their apparatus under, in, on or over the highway.³¹⁷

Grant of permissions by councils for the execution of works and use of objects or structures

12-135 A council may grant to a person permission to do anything that the council may itself do under this Part of the Act, in relation to the placing of objects and structures in, on, or under highways, or in providing facilities for recreation or refreshment.³¹⁸ It may also permit the use, by other persons, of objects or structures in the highway, for a purpose that will result in the production of income, or for the purpose of providing a centre for advice and information or for the purpose of advertising.³¹⁹ It follows that the council's permission can be granted to a third party to place objects or structures in the highway only for the same purposes as the council may itself place those objects or structures. However, if an object or structure has been lawfully placed in the highway by the council, either under the powers contained in this Part of the Act, or by virtue of any other powers, then that object or structure may be used for a further purpose of advertising. It seems unlikely that the powers in this Part of the Act may be used simply to permit a shopkeeper to place an advertising board in the highway outside his shop, unless it could be argued that the board could have been placed there by the council itself to provide a service for the benefit of the public or of a section of the public. The cases in which permission can be justified in this way are likely to be extremely limited.

12-136 Permissions may be granted conditionally, including a requirement to pay to the council its reasonable charges.³²⁰ The council may require an indemnity to be given against any claim in respect of any injury, damage or

loss arising out of the grant of permission, except in respect of the council's own negligence.³²¹ Where any person granted a permission is in breach of the terms of that permission, the council may serve a notice on him requiring him to take steps to remedy the breach. The council may itself take steps to remedy the breach in default of compliance with the notice, and may recover its expenses from the person on whom the notice was served.³²²

Procedure

12-137 Except where the council is exercising its powers under ss.115B or 115C,³²³ in relation to highways which are the subject of pedestrian planning orders or traffic orders, notices must be displayed at or near the position to which the proposal relates, and a copy must be served on the owner and occupier of any premises which appear to the council to be materially affected.³²⁴

12-138 A number of consents have to be obtained before the council may exercise its powers under this Part of the Act. "Walkway consent" must be obtained where the council itself carries out works or places any object or structure in, on or over any walkway, or provides facilities for recreation or refreshment therein.³²⁵ A "walkway consent" involves the consent of occupiers of the building in which the walkway subsists and who, in the opinion of the council, are likely to be affected by the exercise of the powers, and also the consent of the persons whose agreement would be needed to the creation of the walkway in the first place.³²⁶ In the case of local Act walkways, the consent of any person who is the owner or occupier of premises adjoining the walkway and who is, in the opinion of the council, likely to be affected by the exercise of the power, and the consent of the owner of the land on, under or over which the walkway subsists, must be obtained.

12-139 Where the council is using the power to place an object or structure in a footpath or bridleway or in a footway relating to which no pedestrian planning order is in force, and does so either for a purpose that will result in the production of income,³²⁷ or for the purpose of providing a centre for advice or information, it is necessary to obtain the consent of interested frontagers to the placing of the object in the highway for the purpose for which it is placed there. Where the council grants permission to a person to use an object or structure placed in any of the types of highway to which this Part of the Act applies, the consent of these frontagers must be obtained, not only to the placing of the object or structure and its purpose, but also to the grant of the permission.³²⁸ Frontagers are regarded as having an interest if their land adjoins that part of the highway and the object or structure is to be placed between their land and the centre of the highway.³²⁹

12-140 Where the highway in question is maintained by the British Railways Board³³⁰ or Transport for London (or any subsidiary of Transport for London), then the consent of these bodies must also be obtained. All consents should be obtained in writing.

12-141 Consents may not be withheld unreasonably, but it is not unreasonable for a consent to be given for a specified period of time or subject to the payment of a reasonable sum. Where a council has served a notice requesting consent,

and no reply is given within 28 days, then the consent will be deemed to have been refused unreasonably. Any question as to whether the consent has been reasonably refused is otherwise referable to arbitration and the arbitrator has power to direct that the consent, though unreasonably withheld, should only be given subject to conditions. The council is also required to consult the highway authority and the local planning authority (where it is not itself those authorities).

PRIVATE VEHICULAR USE OF PUBLIC FOOTPATHS, BRIDLEWAYS AND RESTRICTED BYWAYS

12-142 It is, subject to certain exceptions,³³¹ a criminal offence to drive a mechanically propelled vehicle on a footpath, bridleway or restricted byway without lawful authority. The offence is presently contained in s.34 of the Road Traffic Act 1988 (as amended). It has, however, been a criminal offence to drive a motor vehicle on a footpath or bridleway since the passing of the Road Traffic Act 1930 s.14. For the purposes of the presently worded section in the 1988 Act it is provided that a way shown in a definitive map and statement as a footpath, bridleway or restricted byway is, without prejudice to s.56(1) of the Wildlife and Countryside Act 1981, to be taken to be a way of the kind shown, unless the contrary is proved. The burden of proof would, therefore, fall on a person prosecuted under the section to prove that the way in question carried higher rights consistent with the usage for which he or she had been prosecuted. Bearing in mind the fact that most highway rights for mechanically propelled vehicles have now been extinguished by the Natural Environment and Rural Communities Act 2006³³² the opportunity to run this defence would appear to be somewhat limited.

12-143 The offence is not committed, however, in a number of defined situations or where the usage is not without lawful authority. First, it is not an offence under this section for a person with an interest in land, or a visitor to any land, to drive a mechanically propelled vehicle on a road if, immediately before the commencement of the CROW Act 2000 s.47(2), the road was shown in a definitive map and statement as a road used as a public path (RUPP), and in use for obtaining access to the land by the driving of mechanically propelled vehicles by a person with an interest in the land or by visitors to the land. The CROW Act 2000 s.50 also provides a private vehicular right of way for owners or lessees of premises adjoining or adjacent to restricted byways that were formerly RUPPs and were in the same ownership as the premises insofar as it is necessary for the reasonable enjoyment of and occupation of land. The Natural Environment and Rural Communities Act 2006 contains a number of provisions which are designed to protect those who depend upon the use of ways shown as footpaths, bridleways or restricted byways for access to their premises. Where immediately before commencement of the Act, use of the way for mechanically propelled vehicles was reasonably necessary to enable a person to obtain access to land, or would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only, then:

- (a) If the person has made an application to have the way shown on the definitive map as a byway open to all traffic then any public rights of way for mechanically propelled vehicles will not be extinguished.³³³
- (b) If no such application has been made then any public right exercisable becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.³³⁴

It is not clear where this leaves private roads which carry footpath rights but which were not marked on the definitive map as RUPPs, although usage of these roads by a landowner, at least, would probably still be with lawful authority.³³⁵

12-144 Secondly, it is not an offence to drive a mechanically propelled vehicle on any land within 15 yards of a road, being a road on which a mechanically propelled vehicle may lawfully be driven, for the purpose only of parking the vehicle on that land. Whilst s.34 also makes it a criminal offence to drive off-road—to which this exception makes obvious sense—it is not clear whether this exception could also apply to driving a mechanically propelled vehicle onto the first 15 yards of a footpath or bridleway with a view to parking. It is suggested that it does not apply because of the distinction drawn in the section between “land” and “road”. The footpath or bridleway is treated within the section as being a road—albeit a road over which restrictive rights exist—rather than land within 15 yards of a road. However, the contrary view may well be arguable. A person does not commit an offence if he proves to the satisfaction of the court that the vehicle was driven for the purpose of saving life or extinguishing fire or meeting any other like emergency.³³⁶

12-145 The existence of this criminal offence and the question of what could amount to lawful authority to drive a mechanically propelled vehicle on a footpath or bridleway raises a number of interesting questions about the effect of dedication of land as a footpath or bridleway on the rights of a landowner. A public path may become established through the principles of implied dedication over a private road used by the landowner as a vehicular access to his property. Where a path has been dedicated through the middle of land owned by a landowner it could, if there was no retained right of the landowner to drive over the path, create severance and a barrier that has serious effects on the effective use of land. Such a result would undoubtedly not have been contemplated by any landowner when he has acquiesced in, or positively encouraged, public usage of paths or roads across his land. Nor can there be any sensible public policy that such a result should be achieved by a regime that allows public rights to be gained through usage. However, the statutory offence in its present and historic form does not expressly address this situation. The absence of case law on the topic is probably more a tribute to the basic common sense of the users of paths and of prosecuting authorities than the result of detailed analysis.

12-146 The words “or excuse” that often accompany “without lawful authority” in many statutory prohibitions are absent from s.34. The meaning of the words “lawful authority or excuse” have been discussed in Chapter 8.³³⁷ Where land has been dedicated as a public highway it may have been dedicated subject to

limitations or conditions. Where public rights have been acquired through usage or forms of prescription they would usually be taken to have been acquired subject to the existing usage of the land. Dedication of land as a highway does not remove from the landowner the ability to continue the reasonable use of his land. In *St. Mary, Newington, Vestry v Jacobs*,³³⁸ Mellor J addressed the social consequences of the similar problem that would result from landowners being unable to drive vehicles over footways dedicated out of their land ownership which separated their properties from the highway.

“The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public.

If this were not so, the owner of a large estate, having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side of such roadway for their own more convenient use thereof, would, after a lapse of time, be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway, without being liable to be convicted under the provisions of the Highway Act. If this were really the law, the result would be most serious to owners who have dedicated, or may dedicate, roadways to the public; and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse, or cart, or carriage.”

The same concerns would appear to be equally applicable in the rural situation where a public footpath or bridleway has been established over a landowner's

property. Mellor J, giving the judgment of a court that included Lord Cockburn CJ, did not feel that there was any authority that prevented a common-sense approach from being adopted:

“That such is not the law, appears to us to be the result both of principle and authority; and we think that the provisions of the Highway Acts and the Metropolis Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the numerous instances which must have occurred, in which an owner, rebuilding or changing the character of his houses or other buildings, has made crossings of the

footpath, in order to carry into effect some object of convenience or business.”

A landowner who uses vehicles on his own land for purposes that are within the reasonable use and enjoyment of that land would, therefore, appear to have lawful authority for driving over a footpath or bridleway on his land. If so, then it would appear that the same principle should apply to those who the landowner may authorise to drive over his land. If a footpath is recorded over the only access road leading to a farm it must be the case that the invitees and licensees of that landowner are within the same lawful authority. Again, so long as it is within the reasonable use of his land and does not cause a public nuisance to the users of the highway it would seem that a landowner ought to be able to grant vehicular rights of way or even dedicate public vehicular rights of way over this land. More difficulty arises, however, where such rights are claimed through prescription or implied dedication.

12-147 The issue became of some importance through the related legal issue relating to driving on common land. In *Hanning v Top Deck Travel*³³⁹ it was held that, because it had been made an offence by s.193(4) of the Law of Property Act 1925 to drive without lawful authority on a common, a right of way could not have been acquired by 20 or more years of uninterrupted use. An easement could not be acquired by conduct which, at the time the conduct took place, was prohibited by statute. The same principle was then applied to the acquisition of vehicular rights over footpaths and bridleways through the principle of implied dedication.³⁴⁰

12-148 The effect of these decisions, at least in relation to common land, was that the rights of owners and occupiers of properties to access their properties in vehicles were thrown into question in circumstances where they neither owned nor had the benefit of an express right of way over the common which their access route crossed. The same problem was potentially applicable to roads carrying public paths. In order to provide some alleviation of these problems s.68 of the CROW

Act 2000 and regulations made under that section provided a procedure for the occupiers of property to acquire an easement of access to their property.³⁴¹

12-149 In *Bakewell Management Ltd v Brandwood*³⁴² the House of Lords decided that *Hanning* was wrongly decided and that a statutory prohibition that does not apply where usage is with lawful authority does not prevent the acquisition of vehicular rights based on the principle of lost modern grant. The speech of Lord Scott expressly recognises that the same approach may apply to the acquisition of public rights of way for vehicles over public paths, subject to the issue whether such usage might, in any event, be unlawful (and therefore without lawful authority) by reason of public nuisance.³⁴³ Whilst the restriction now created on the acquisition of new public vehicular rights for mechanically propelled vehicles over footpaths, bridleways and restricted byways probably mean that the particular point addressed by Lord Scott will no longer have much relevance, the application of the same principles would also suggest that private rights of way for motor vehicles could be granted by

a landowner or acquired by usage over a public path so long as this usage did not cause a public nuisance to other highway users.

FOOTNOTES

¹ See Wellbeloved, "A Treatise on the Law relating to Highways" (1828), p.4.

² At s.27(1). The councils of county boroughs were given power to adopt these provisions; National Parks and Access to the Countryside Act 1949 s.36.

³ [1975] Q.B. 891.

⁴ [1979] A.C. 705 at 715.

⁵ [2001] Q.B. 151.

⁶ National Parks and Access to the Countryside Act 1949 ss.27 and 28; see also the National Parks and Access to the Countryside Regulations 1950 (SI 1950/1066), all now repealed.

⁷ National Parks and Access to the Countryside Act 1949 s.30.

⁸ National Parks and Access to the Countryside Act 1949 s.31 and the Public Rights of Way (Applications to Quarter Sessions) Regulations 1952 (SI 1952/559) (all now repealed).

⁹ See *Armstrong v Whitfield* [1974] Q.B. 16; *LE Walwin and Partners Ltd v West Sussex CC* [1975] 3 All E.R. 604; in both cases it was held that decisions on appeal were binding *in rem*.

¹⁰ Challenge to the validity of the map after the six-week period was thereafter precluded: National Parks and Access to the Countryside Act 1949 Sch.1 Pt III para.10. See also *Chivers & Sons Ltd v Cambridge CC* [1957] 2 Q.B. 68.

¹¹ National Parks and Access to the Countryside Act 1949 s.33.

¹² The statutory process for stopping up paths was the only to effect their removal from the definitive map; see *Morgan v Hertfordshire CC* (1966) 63 L.G.R. 456.

¹³ National Parks and Access to the Countryside Act 1949 ss.33-34.

¹⁴ Countryside Act 1968 s.31 and Sch.3.

- ¹⁶ Local Government Act 1972 Sch.17 Pt II paras 27 and 29.
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- ¹⁷ Local Government Act 1972 Sch.17 Pt II paras 24-26.
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- ¹⁸ The duty to prepare maps was still not universal, in that the areas of some of the former county boroughs could still be excluded.
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- ¹⁹ A consideration of the historical development of the definitive map can be found in the judgments of the Court of Appeal in *R. v Secretary of State for the Environment Ex p. Simms and Burrows* [1991] 2 Q.B. 354 at 363-381.
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- ²⁰ Wildlife and Countryside Act 1981 s.54, now repealed.
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- ²¹ *Access to the Countryside: The Government's Framework for Action* (London: DETR, March 1999).
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- ²² CROW Act 2000 s.47, which came into force, subject to transitional provisions, in England on 2 May 2006 and in Wales on 11 May 2006; see SIs 2006/1172 and 2006/1279 (W.124).
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- ²³ As to the meaning of restricted byway, see paras 1-49 and 12-39.
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- ²⁴ See para.9-163.
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- ²⁵ CROW Act 2000 s.49(1); although there is no duty to provide any metalled surface; s.49(4).
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- ²⁶ CROW Act 2000 s.49(2).
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- ²⁷ Where they own an interest in the highway; CROW Act 2000 s.50(2).
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- ²⁸ CROW Act 2000 ss.60-62; see para.12-12 et seq.
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- ²⁹ CROW Act 2000 s.53, not yet in force.
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- ³⁰ See CROW Act 2000 ss.54 and 56.
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- ³¹ CROW Act 2000 s.55A, inserted by Deregulation Act 2015 s.20.
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- ³² CROW Act 2000 s.56(1). As the date gets closer, it becomes less and less likely that it will be the eventual cut-off. In a short debate on the topic in the House of Lords on 2 April 2019 the Minister (Baroness Vere of Norbiton) described delaying the cut-off date until 2031 at the

latest as a possibility (Hansard Vol.797, col.45GC). On 16 February 2022 Defra indicated to a stakeholder working group that the cut-off date would be delayed in England; it is likely to be repealed in Wales.

³³ Deregulation Act 2015 Sch.7 para.5 inserting ss.54B–C into the Wildlife and Countryside Act 1981. See para.12–89.

³⁴ Deregulation Act 2015 s.21 inserting s.56A into the CROW Act 2000.

³⁵ Deregulation Act 2015 s.21 inserting s.56B into the CROW Act 2000.

³⁶ Wildlife and Countryside Act 1981 s.53(1).

³⁷ In force in England by virtue of SI 2004/292, and in Wales by virtue of SI 2005/1314.

³⁸ See para.12–23.

³⁹ Wildlife and Countryside Act 1981 s.57(3).

⁴⁰ In *R. (on the application of Trail Riders Fellowship) v Dorset CC* [2015] 1 W.L.R. 1406 Lord Clarke of Stone-cum-Ebony said that given the availability of the Ordnance Survey map, it would be irrational for an authority not to use it (see para.28). Cf. Lord Toulson at [38].

⁴¹ Wildlife and Countryside Act 1981 s.57(2); Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12).

⁴² National Parks and Access to the Countryside Act 1949 ss.27(3) and 34.

⁴³ Wildlife and Countryside Act 1981 s.57A(4) inserted by the CROW Act 2000 Sch.5 para.8.

⁴⁴ Wildlife and Countryside Act 1981 s.56(3).

⁴⁵ See *R. v Secretary of State for the Environment Ex p. O’Keefe* (1998) 76 P. & C.R. 31 (CA), approving the decision at first instance by Pill J [1996] J.P.L. 42.

⁴⁶ [1975] 3 All E.R. 604.

⁴⁷ [2006] 1 W.L.R. 1103.

⁴⁸ Had this been the correct approach then the absurd result would have been that it would be impossible to achieve consistency between the map and the statement by means of a modification order. See *R. v Secretary of State for the Environment Ex p. Kent CC* (1995) 93 L.G.R. 322, discussed at para.12–62, for another abortive attempt to resolve errors in the

alignment of a path shown on a map.

⁴⁹ [2006] W.L.R. 1103 at [38].

⁵⁰ At [41].

⁵¹ But see *Perkins v Secretary of State for the Environment and Rural Affairs* [2009] EWHC 658 (Admin) on the need for accuracy.

⁵² [2010] EWHC 1036 (Admin).

⁵³ [2009] EWHC 3293 (Admin).

⁵⁴ At [58]-[59].

⁵⁵ See, however, s.57(6).

⁵⁶ In Wales the reference to “in each district” is omitted; subs.(5A) inserted by the Local Government (Wales) Act 1994 c. 19 Sch.16 para.65(7).

⁵⁷ Wildlife and Countryside Act 1981 s.57(5). This duty will be satisfied so long as that part of the map is available as relates to the particular district or parish. Local authorities are also urged to make copies available to the public; ROW Circular 1/09 para.2.3.

⁵⁸ Wildlife and Countryside Act 1981 s.53B inserted by the CROW Act 2000 Sch.5 para.2.

⁵⁹ Although this information can be omitted where its inclusion would be likely to cause substantial damage or substantial distress to the applicant or to another person.

⁶⁰ As to the full information required to be kept in these registers, see the Public Rights of Way (Register of Applications under s.53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005 (SI 2005/2461) and the Public Rights of Way (Registers) (Wales) Regulations 2006 (SI 2006/42) (W.8). See also the Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008/442) as amended.

⁶¹ i.e. the “county council, Welsh council, metropolitan district council or London borough council”; see Wildlife and Countryside Act 1981 s.66(1) as amended by the Local Government Act 1985 s.7 and Sch.3 and the Local Government (Wales) Act 1994 Sch.16. Unitary authorities will also be included.

⁶² 28 February 1983 (SI 1983/20).

⁶³ e.g. in the area of a former English county borough.

⁶⁴ As to which, see fn.61.

⁶⁵ Wildlife and Countryside Act 1981 s.55.

⁶⁶ i.e. under s.29(3), (4), and (6) of the 1949 Act, and para.4(4) of Pt II of Sch.3 to the 1968 Act.

⁶⁷ See para.12-71, et seq.

⁶⁸ Wildlife and Countryside Act 1981 s.53(2) and (3).

⁶⁹ e.g. in response to the “events” specified in s.53(3)(a) or where the authority itself becomes aware of evidence falling under s.53(3)(c).

⁷⁰ See para.12-71, et seq.

⁷¹ At para.12-44, et seq.

⁷² CROW Act 2000 ss.47-48.

⁷³ Countryside Act 1968 Sch.3 paras 7 and 8; Wildlife and Countryside Act 1981 s.54(2).

⁷⁴ A right to drive animals along a road; a “driftway” is also a kind of highway; see para.1-30.

⁷⁵ [1975] 1 Q.B. 891.

⁷⁶ See *R. (on the application of Kind) v Secretary of State for the Environment, Food and Rural Affairs* [2006] Q.B. 113; *R. v Secretary of State for the Environment, Ex p. Riley* (1990) 59 P. & C.R. 1.

⁷⁷ [2001] Q.B. 151.

⁷⁸ See *R. v Wiltshire CC Ex p. Nettlecombe Ltd* [1998] J.P.L. 707; *Buckland v Secretary of State for the Environment Transport and the Regions* [2000] 1 W.L.R. 1949.

⁷⁹ [2001] Q.B. 151 at 162.

⁸⁰ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344. Cf. the position under the Countryside Act 1968 Sch.3 Pt III para.10.

⁸¹ CROW Act 2000 s.47.

⁸²

⁸³ See, however, para.12-38 in relation to the position with restricted byways.

⁸⁴ As to the position where there is a conflict between the map and the statement, see para.12-21, et seq.

⁸⁵ Wildlife and Countryside Act 1981 s.56(2). See also s.56(2A) and 3A.

⁸⁶ Wildlife and Countryside Act 1981 s.56(1)(a).

⁸⁷ Wildlife and Countryside Act 1981 s.56(1)(b).

⁸⁸ Although cyclists also are permitted to use bridleways, by virtue of the Countryside Act 1968 s.30(1), the definitive map is not conclusive as to any rights that may exist for cyclists over such ways; Wildlife and Countryside Act 1981 s.66(3).

⁸⁹ Wildlife and Countryside Act 1981 s.56(1)(c).

⁹⁰ Wildlife and Countryside Act 1981 s.56(1)(d).

⁹¹ See *R. (on the application of Kind) v Secretary of State for the Environment and Rural Affairs* [2005] EWHC 1324 (Admin) This is now subject to the provisions of the Natural Environment and Rural Communities Act 2006 s.66 which restrict the creation of new rights of way for mechanically propelled vehicles.

⁹² Wildlife and Countryside Act 1981 s.56(1)(e). As to the position where there is a conflict between the map and the statement, see para.12-24 et seq.

⁹³ Wildlife and Countryside Act 1981 s.56(1)(e); and see *Edgar Ernstbrunner v Manchester CC* [2009] EWHC 3293 (Admin) discussed at para.12-26.

⁹⁴ See para.12-10 et seq.

⁹⁵ Sch.3 Pt I; see also para.12-10.

⁹⁶ [1988] J.P.L. 485.

⁹⁷ See also under the former law, *R. v Secretary of State for the Environment Ex p. Stewart* (1978) 77 L.G.R. 431.

⁹⁸ [1991] 2 Q.B. 354.

⁹⁹

¹⁰⁰ At 714.

¹⁰¹ National Parks and Access to the Countryside Act 1949.

¹⁰² As to the evidential burden to be overcome when seeking to establish that a path was included in error, see *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264; discussed at para.12-61.

¹⁰³ (1992) 64 P. & C.R. 16.

¹⁰⁴ Section 54A is not at the time of writing in force.

¹⁰⁵ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344.

¹⁰⁶ [1991] 2 Q.B. 354.

¹⁰⁷ Although they may have occurred before the commencement date of the 1981 Act; see s.53(2) (a) and see hereon, *R. v Secretary of State for the Environment Ex p. Andrews* [1995] J.P.L. 52.

¹⁰⁸ There is, in any event, a simplified procedure for modifying the definitive map and statement to take account of these orders; see s.53(6).

¹⁰⁹ See Wildlife and Countryside Act 1981 s.53A; and the Public Rights of Way (Combined Orders) (England) Regulations 2008 (SI 2008/442). The orders covered are those under the Highways Act 1980 ss.26, 118, 118A, 118B(4), 119, 119A, 119B(4); the Acquisition of Land Act 1981 s.32; the Housing Act 1985 s.294, and the Town and Country Planning Act 1990 ss.247(2A), 257 and 258(1).

¹¹⁰ As there is no requirement to show a cycle way on the map and no appropriate notation a cycle way would remain shown as a footpath on the map and so, it is suggested, would not fall within s.53(3)(a)(ii).

¹¹¹ e.g. under the Highways Act 1980 s.116; see Ch.9.

¹¹² e.g. by a public path creation order or an agreement.

¹¹³ As to the meaning of “restricted byway”, see paras 1-39 and 12-36.

¹¹⁴ Any challenge to such an order on the grounds that it contained errors would be by way of judicial review, as the procedures in Sch.15 do not apply to such an order; see s.53(6).

¹¹⁵ At para.2-48, et seq.

¹¹⁶ See e.g. *R. v Secretary of State for Wales Ex p. Emery* [1998] 4 All E.R. 367 and *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639.

¹¹⁷ [1991] 2 Q.B. 354.

¹¹⁸ See *Fowler v Secretary of State for the Environment and Devon CC* (1992) 64 P. & C.R. 16.

¹¹⁹ Wildlife and Countryside Act 1981 s.53(4A) and (4B). Unrecorded rights for mechanically propelled vehicles however were extinguished by s.67 of the Natural Environment and Rural Communities Act 2006, which came into force immediately after these provisions.

¹²⁰ [1991] 3 W.L.R. 1070.

¹²¹ At 1097.

¹²² At 1102.

¹²³ At 1090.

¹²⁴ (1990) 59 P. & C.R. 1.

¹²⁵ (1992) 64 P. & C.R. 16 at 22.

¹²⁶ (1993) 65 P. & C.R. 344.

¹²⁷ It would appear, therefore, that there is nothing to prevent repetitive, but unsuccessful, applications for modification based upon the same evidence “discovered” since the date of original map preparation.

¹²⁸ [2019] EWCA Civ 1639.

¹²⁹ At [62].

¹³⁰ At [63].

¹³¹ *Kotarski v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 1036 (Admin) per Simon J at [24]; see also *Norfolk CC v Secretary of State for the Environment* [2006] 1 W.L.R. 1103 and para.12-24 et seq.

R. v Secretary of State for the Environment Ex p. Hiley (1990) 59 P. & C.R. 1. See, however, the position where a modification order is seeking to remove a path from the map: *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264 discussed at para.12-65.

¹³³ See National Parks and Access to the Countryside Act 1949 s.27.

¹³⁴ See *R. v Secretary of State Ex p. Bagshaw and Norton* (1994) 68 P. & C.R. 402.

¹³⁵ [1998] 4 All E.R. 367; *R. v Secretary of State for the Environment Ex p. Norton and Bagshaw* [1994] 68 P. & C.R. 402.

¹³⁶ [2004] EWHC 1450 (Admin); see also *R. (on the application of Norfolk CC) v Secretary of State for the Environment, Food and Rural Affairs* [2006] 1 W.L.R. 1103; and per Lord Phillips MR in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264 at [30], quoted at para.12-65.

¹³⁷ [2019] EWCA Civ 1639 per Lindblom LJ at [37]; see also *R. (on the application of Norfolk CC) v The Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin) at [45] where Pitchford J described the reasoning in *Todd and Bradley* as “compelling”. The *extempore* judgment of Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment Food and Rural Affairs* [2003] EWHC 171 is wrongly decided to the extent that it is inconsistent with this.

¹³⁸ See para.12-87 et seq.

¹³⁹ *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 W.L.R. 1264; *R. (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171; *Thould v Secretary of State for Environment, Food and Rural Affairs* [2006] EWHC 1685 (Admin).

¹⁴⁰ [1991] 2 Q.B. 354; see para.12-45.

¹⁴¹ [2001] 1 W.L.R. 1264; see also *R. (on the application of Macintosh) v Secretary of State for the Environment, Food and Rural Affairs* [2006] EWHC 2703 (Admin).

¹⁴² At [30]; and see *R. (on the application of Leicestershire CC) v Secretary of State for the Environment Food and Rural Affairs* [2003] EWHC 171 (Admin).

¹⁴³ See *R. (on the application of Durbin) v Welsh Ministers* [2014] EWHC 4458 (Admin).

¹⁴⁴ (1995) 93 L.G.R. 322.

¹⁴⁵

i.e. by deleting the disputed section and showing the route of the path over a new line.

¹⁴⁶ See Ch.9.

¹⁴⁷ At 331.

¹⁴⁸ Such an approach would also ignore the statutory wording in s.53(4)(a) which expressly allows an order to be made in relation to the “position” of any public path.

¹⁴⁹ *R. (on the application of Norfolk CC) v The Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin); and see the discussion at para.12–24 et seq.

¹⁵⁰ Orders under s. 53(3)(a) *should* be made by the authority without the necessity for an application; see s.53(6).

¹⁵¹ See the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1983 (SI 1983/21).

¹⁵² Wildlife and Countryside Act 1981 Sch.14 para.1.

¹⁵³ See *R. (on the application of Warden and Fellows of Winchester College) v Hampshire CC* [2009] 1 W.L.R. 138. See also *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280.

¹⁵⁴ *Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2083.

¹⁵⁵ [2015] 1 W.L.R. 1406; also a s.67 case.

¹⁵⁶ SI 1993/12.

¹⁵⁷ At [102].

¹⁵⁸ [2009] 1 W.L.R. 138 at [55]. See also per Macpherson J in *R. v Isle of White CC Ex p. O’Keefe* (1990) 59 P. & C.R. 283 at 285.

¹⁵⁹ At [93].

¹⁶⁰ At [96], citing *Inverclyde DC v Lord Advocate* (1982) 43 P. & C.R. 375 and *Oxfordshire CC v Oxford CC* [2006] Ch 43.

¹⁶¹ The form of the notice and of the certificate is prescribed in the regulations.

¹⁶²

the analogy with the requirements of s.65 of the Town and Country Planning Act 1990 with respect to certificates accompanying planning applications is not exact; see thereon *Main v Swansea CC* (1985) 49 P. & C.R. 26.

¹⁶³ Sch.14 para.3(1). It may not, however, amount to strict compliance for the purposes of the Natural Environment and Rural Communities Act 2006 s.67.

¹⁶⁴ The obligation to investigate in para.3 of the Schedule relates to “the matter stated in the application”. The certificate is separate from the application.

¹⁶⁵ See para.12-98.

¹⁶⁶ [2009] 1 W.L.R. 138; see para.12-74.

¹⁶⁷ At [67].

¹⁶⁸ i.e. any non-metropolitan district council, parish or community council, or the parish meeting where there is no parish council.

¹⁶⁹ Wildlife and Countryside Act 1981 Sch.14 para.3(1).

¹⁷⁰ The judgment of the Court of Appeal in *R v Lancashire CC Exp Guyer* [1980] 1 W.L.R. 102 may be of some relevance; see para.7-06 et seq.

¹⁷¹ *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639 at [52]-[54].

¹⁷² See *Perkins v Secretary of State for Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin) and *Roxlena Ltd* at [35], [44]-[46].

¹⁷³ *R. v Isle of White CC Ex p. O’Keefe* (1990) 59 P. & C.R. 283. As to whether, and how, any failure to give a proper consideration to these issues may now be challenged in the courts, see para.12-96.

¹⁷⁴ See para.12-63.

¹⁷⁵ [1998] 4 All E.R. 367.

¹⁷⁶ At 376 per Roche LJ; see also *R. v Secretary of State for the Environment Ex p. Norton and Bagshaw* [1994] 68 P. & C.R. 402 and the cases cited at para.12-63.

¹⁷⁷ See Circular 1/09 para.4.9.

¹⁷⁸ See *R. v Secretary of State Ex p. Bagshaw and Norton* (1994) 68 P. & C.R. 402 and para.12-63.

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- ¹⁷⁹ See the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12).
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- ¹⁸⁰ Where these are not known or cannot be found, the Secretary of State may direct that the notice be addressed to “The owners and any occupiers” of the land and the notice affixed to some conspicuous object on the land; Sch.15 para.3(3).
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- ¹⁸¹ Together with a plan; Wildlife and Countryside Act 1981 Sch.15 para.3(7).
-
- ¹⁸² Wildlife and Countryside Act 1981 Sch.15, para.3.
-
- ¹⁸³ Provision is made for treating certain representations made to a draft map, where the survey has been abandoned by virtue of a direction under s.55, as having been made to the order; see the Wildlife and Countryside Act 1981 Sch.15, para.4.
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- ¹⁸⁴ *Lasham Parish Meeting v Hampshire CC* (1993) 65 P. & C.R. 331; the interest of the applicant, however, had not been substantially prejudiced by the failure to submit the order to the Secretary of State, so relief was refused.
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- ¹⁸⁵ SI 1993/12.
-
- ¹⁸⁶ Sch.15 para.3(1)(c).
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- ¹⁸⁷ Wildlife and Countryside Act 1981 Sch.15, para.10. As to the recovery of costs of resisting an application for a modification order, see *R. v Secretary of State for the Environment Ex p. Smith and Deller* [1995] J.P.L. 42 and Circular ROW 1/09.
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- ¹⁸⁸ Wildlife and Countryside Act 1981 Sch.15 para.7(2A) introduced by the Countryside and Rights of Way Act 2000 Sch.5(I) para.11 and the Countryside and Rights of Way Act 2000 (Commencement No.4) Order 2004 (SI 2004/292) subject to transitional provisions.
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- ¹⁸⁹ SI 2007/2008.
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- ¹⁹⁰ See the Wildlife and Countryside Act 1981 Sch.15, para.8(2)(a).
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- ¹⁹¹ See the Wildlife and Countryside Act 1981 Sch.15, para.8(2)(b) and para.8(3).
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- ¹⁹² In accordance with Sch.15 para.11.
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- ¹⁹³ Deregulation Act 2015 s.26 and Sch.7.
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- ¹⁹⁴ Sch.13A para.3. An appeal may be brought in the Crown Court against Magistrates’ Court

decisions.

¹⁹⁵ Sch.13A para.4. Subject to whether or not a modification by consent is sought, see para.12-92.

¹⁹⁶ Sch.13A paras 5-6. There is again provision for appeal to the Crown Court.

¹⁹⁷ Sch.13A para.8(1).

¹⁹⁸ Sch.13A para.8(3).

¹⁹⁹ Sch.14A para.1.

²⁰⁰ Sch.13A para.5(5).Sch.13A para.5(5).

²⁰¹ Sch.14A para.6(1); see also Sch.13A para.7(3). Guidance will be produced to assist, but whether or not a point is “relevant” is more a matter of law than discretion. There is no statutory appeal against such determinations.

²⁰² Sch.14A para.13(1).

²⁰³ Sch.14A paras 7-8.

²⁰⁴ Sch.14A para.9.

²⁰⁵ See para.12-16 et seq. and fn.32.

²⁰⁶ Deregulation Act 2015 s.54B(6)(a) and s.54C.

²⁰⁷ Deregulation Act 2015 Sch.7 para.3.

²⁰⁸ Sch.13A para.2(4)(b).

²⁰⁹ Sch.13A para.7(7) and Sch.14A para.5(2)(a).

²¹⁰ See *R. (on the application of Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) at [89] approved in the Court of Appeal [2019] EWCA Civ 1639.

²¹¹ Wildlife and Countryside Act 1981 Sch.13A para.12, proposed to be inserted by the Deregulation Act 2015 Sch.7 para.6.

²¹² Wildlife and Countryside Act 1981 Sch.15 para.12.

²¹³

see *R. v Secretary of State Ex p. Osuel* [1977] Q.B. 122; *R. v Secretary of State for the Environment Ex p. Kent* [1990] J.P.L. 124. However, a court may not be precluded from granting a declaratory remedy by way of judicial review which does not question the validity of the order; see *R. (on the application of Derwent Holdings Ltd) v Liverpool CC* [2008] EWHC 3023 (Admin).

²¹⁴ [1994] 1 All E.R. 694; see also *Enterprise Inns Plc v Secretary of State for the Environment, Transport and the Regions* (2001) 81 P. & C.R. 18; *R. v Planning Inspectorate Cardiff Ex p. Howell* [2000] N.P.C. 68.

²¹⁵ Such a challenge had been entertained in *R. v Isle of White CC Ex p. O'Keefe* (1990) 59 P. & CR 283.

²¹⁶ [1992] 3 All E.R. 566 at 576.

²¹⁷ See *Islington LBC v Secretary of State for the Environment; Stockport MBC v Secretary of State for the Environment* [1980] J.P.L. 739; *Lenlyn v Secretary of State for the Environment* (1985) 50 P. & C.R. 129.

²¹⁸ CPR r.54.5(1); Senior Courts Act 1981 s.31. Also see generally *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 A.C. 738.

²¹⁹ An extension of time may be obtained where the application is not made promptly or is outside the three-month period.

²²⁰ i.e. the appeal from the authority's refusal to make an order to the Secretary of State.

²²¹ As no challenge could have been brought whilst the modification procedures were still continuing.

²²² This did not prevent the claim in *R. (on the application of Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) which was brought against an authority's *resolution* to make a modification order. The claim was in any event dismissed in part on the basis that the Secretary of State would be able to address the contentions made by the claimant when considering whether or not to confirm the order.

²²³ See e.g. *Elveden Farms Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 644 (Admin) per Charles J at [3].

²²⁴ e.g. *R. v Isle of White CC Ex p. O'Keefe* (1990) 59 P. & C.R. 283.

²²⁵ See per Simon Brown LJ in *R. v Cornwall CR Ex p. Huntington; R. v Devon CR Ex p. Isaac* [1994] 1 All E.R. 694 at 701.

²²⁷ Wildlife and Countryside Act 1981 s.58(2).

²²⁸ See para.2-15 et seq.

²²⁹ See para.9-138.

²³⁰ Except where a public right of way on foot or by horse had grown up over a “road or occupation way” set out after 1835.

²³¹ Including those which had become established over private roads and occupation ways.

²³² i.e. 16 December 1949.

²³³ Public path creation orders were introduced later.

²³⁴ National Parks and Access to the Countryside Act 1949 s.47; Highways Act 1980 s.36(1).

²³⁵ Highways Act 1980 s.36(2)(d).

²³⁶ e.g. the Highways Act 1980 ss.37, 38, and 228; see also Ch.4.

²³⁷ See the Highways Act 1980 s.36(2)(d), and (e) and Ch.9.

²³⁸ See the Countryside Act 1968 Sch.3 para.9(2); Wildlife and Countryside Act 1981 s.54(4).

²³⁹ CROW Act 2000 s.49(1).

²⁴⁰ Highways Act 1980 s.36(2)(a) and (b); and see Ch.4.

²⁴¹ See the Countryside Act 1968 Sch.3 para.9(5); Wildlife and Countryside Act 1981 s.54(7); CROW Act 2000 s.49(4).

²⁴² Highways Act 1980 s.42. See also Sch.12A.

²⁴³ Where it is decided against the district council, then no further notice may be served by that council in relation to that highway, unless there is a change in the character or status of the way; Highways Act 1980 Sch.7 para.3.

²⁴⁴ Highways Act 1980 Sch.7 para.7.

²⁴⁵

Highways Act 1980 s.50. See also Sch.12A.

²⁴⁶ Under s.43.

²⁴⁷ Highways Act 1980 s.50.

²⁴⁸ Highways Act 1980 s.43(2). Such expenses will not then form part of the expenditure of the parish or community council.

²⁴⁹ See Ch.4.

²⁵⁰ See, generally, *Worcestershire CR v Newman* [1975] 1 W.L.R. 901; *Whiting v Hillingdon LBC* (1970) 68 L.G.R. 437.

²⁵¹ See the Highways Act 1980 ss.130 and 130A-130D, and para.7-03 and para.7-52, et seq.

²⁵² National Parks and Access to the Countryside Act 1949 s.57.

²⁵³ Countryside Act 1968 s.27(1).

²⁵⁴ Countryside Act 1968 s.27(2)-(3).

²⁵⁵ Countryside Act 1968 s.27(4).

²⁵⁶ Countryside Act 1968 s.27(5).

²⁵⁷ Highways Act 1980 s.131(2); Countryside Act 1968 s.27(6).

²⁵⁸ *Davies v Stephens* (1836) 7 C. & P. 570; *Att. Gen. v Meyrick & Jones* (1915) 79 J.P. 515.

²⁵⁹ See *James v Hayward* (1630) Cro. Car. 184; *Bateman v Burge* (1834) 6 C. & P. 301; *Durham CC v Scott* [1991] J.P.L. 362; cf. *Herefordshire CC v Pick* (1996) 71 P. & C.R. 231. See also para.8-69.

²⁶⁰ "Agriculture" includes forestry for this purpose.

²⁶¹ Highways Act 1980 s.147. Authorities must have regard to the needs of persons with mobility problems and to guidance issued by the Secretary of State; s.147(2A) and (2B).

²⁶² Highways Act 1980 s.145.

²⁶³ Highways Act 1980 s.146(1) and (4).

²⁶⁴ Highways Act 1980 s.146(2) and (3).

²⁶⁵ CROW Act 2000 s.69, inserting s.147ZA into the Highways Act 1980.

²⁶⁶ “or otherwise disturb the surface”, i.e. harrowing or other activity which is not technically ploughing but excluding excavations or engineering operations; s.134(2).

²⁶⁷ Formerly the period was within two weeks or, in exceptional weather conditions, as soon as is practicable.

²⁶⁸ If two crops are taken from a field in a year, then this right will arise twice a year.

²⁶⁹ S.134(8).

²⁷⁰ See, hereon, *Woodcock v Solari* (1966) 203 E.G. 133.

²⁷¹ For example, where the width of the path is indicated in the definitive map statement.

²⁷² Punishable with a fine not exceeding level 3 on the standard scale; Highways Act 1980 s.134(4).

²⁷³ i.e. a highway authority or a district council acting under the Highways Act 1980 ss.42 or 50; Sch.12A paras 2, 3, and 9.

²⁷⁴ Highways Act 1980 Sch.12A para.8.

²⁷⁵ *Mercer v Woodgate* (1869) L.R. 5 Q.B. 26; *Arnold v Blaker* (1871) L.R. 6 Q.B. 433; *Denis v Good* (1918) 88 L.J.K.B. 388.

²⁷⁶ *Arnold v Holbrook* (1873) L.R. 8 Q.B. 96.

²⁷⁷ (1869) L.R. 5 Q.B. 26.

²⁷⁸ See the Highways Act 1980 s.333(2).

²⁷⁹ Highways Act 1980 s.134(3).

²⁸⁰ Or land which is being brought into use for agriculture.

²⁸¹ The order may not affect the line of a footpath or bridleway on land not occupied by the applicant; Highways Act 1980 s.135(3)(c). A diversion may, however, be onto other land; subs.

(3)(a).

²⁸² Highways Act 1980 s.135(3).

²⁸³ i.e. a footpath or bridleway that follows the sides or headlands of a field or enclosure: Highways Act 1980 s.329(1).

²⁸⁴ e.g., in relation to this section, a bridleway which is a field edge path.

²⁸⁵ See para.8-19.

²⁸⁶ Liable to a fine not exceeding level 3 on the standard scale; Highways Act 1980 s.135(6).

²⁸⁷ Highways Act 1980 Sch.12A para.3.

²⁸⁸ Highways Act 1980 s.135(8).

²⁸⁹ Inserted by the Rights of Way Act 1990.

²⁹⁰ As to when a crop will be treated as being grass, see subs.(3).

²⁹¹ "Minimum width" is to be defined by reference to Sch.12A of the Highways Act 1980. See para.12-122.

²⁹² Para.8-51.

²⁹³ "Encroaching" for this purpose will occur where any part of the crop grows on or otherwise extends onto or over the highway so as to reduce its apparent width to less than its minimum width.

²⁹⁴ Wildlife and Countryside Act 1981 ss.59 and 66(1).

²⁹⁵ The offence is punishable by a fine not exceeding level 3 on the standard scale.

²⁹⁶ Defined at s.59(4) and (5).

²⁹⁷ Wildlife and Countryside Act 1981 s.59(3).

²⁹⁸ See Ch.8.

²⁹⁹ Highways Act 1980 s.164. See *Stewart v Wright* (1893) 9 T.L.R. 480.

³⁰¹ At para.7-12 et seq.

³⁰² These councils may adopt the provisions if they so choose.

³⁰³ Including cycle tracks; CROW Act 2000 s.60(5).

³⁰⁴ Particularly for pedestrians and cyclists.

³⁰⁵ Where an authority decides not to amend the plan it must re-publish the existing plan and give reasons why it has not changed.

³⁰⁶ Or the Broads Authority.

³⁰⁷ See Ch.13.

³⁰⁸ CROW Act 2000 s.61(1).

³⁰⁹ CROW Act 2000 s.61(4).

³¹⁰ Statutory Guidance to Local Highway Authorities in England (Defra, November 2002) and Guidance for Local Authorities on Rights of Way Improvement Plans (Welsh Government, July 2016).

³¹¹ Inserted by the Local Government (Miscellaneous Provisions) Act 1982. See also the limited duration power to issue pavement licences under the Business and Planning Act 2020 s.1.

³¹² i.e. county councils, metropolitan district councils, non-metropolitan district councils, London borough councils and the Common Council of the City of London.

³¹³ See para.9-138 et seq. These are, in any event, footpaths or bridleways.

³¹⁴ i.e. an order under the Town and Country Planning Act 1990 s.249.

³¹⁵ Highways Act 1980 s.115B(3).

³¹⁶ Highways Act 1980 s.115C.

³¹⁷ Highways Act 1980 s.115D.

³¹⁸ Highways Act 1980 s.115E.

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- ³¹⁹ Highways Act 1980 s.115E(1)(b).
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- ³²⁰ This will be a standard charge except where the council owns the subsoil; Highways Act 1980 s.115F(3).
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- ³²¹ Highways Act 1980 s.115F(4).
-
- ³²² Highways Act 1980 s.115K.
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- ³²³ i.e. where the council is not granting any permissions to third parties.
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- ³²⁴ Highways Act 1980 s.115G(1) and (2).
-
- ³²⁵ i.e. the Highways Act 1980 ss.115B and 115C.
-
- ³²⁶ See para.2-17.
-
- ³²⁷ Trading from a permanent structure authorised under Part VIIA of the Highways Act 1980 is not street trading for the purposes of the Local Government (Miscellaneous Provisions) Act 1982. See Sch.4 para.1(2)(g) of that Act and *Tower Hamlets LBC v Sherwood* [2002] EWCA Civ 229.
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- ³²⁸ Highways Act 1980 s.115B(7).
-
- ³²⁹ Highways Act 1980 s.115A(7).
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- ³³⁰ The section still refers to B.R.B. but such highways will probably now be maintainable by Network Rail.
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- ³³¹ See Highways Act 1980 s.300; certain local authority vehicles cleaning or removing obstructions from paths.
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- ³³² See para.9-160 et seq.
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- ³³³ Natural Environment and Rural Communities Act 2006 s.67(3)(c).
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- ³³⁴ Natural Environment and Rural Communities Act 2006 s.67(5).
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- ³³⁵ See para.8-03 et seq.
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- ³³⁶ Road Traffic Act 1988 s.34(4).
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- ³³⁷

At para.8-04, et seq. Also see also Highways Act 1980 s.300 and the vehicles (Conditions of Use on Footpaths) Regulations 1963 (SI 1963/2126 as amended by SI 1966/864).

³³⁸ (1871) L.R. 7 Q.B. 47; cf. *R. v Longton Gas Co* (1860) 2 E. & E. 651.

³³⁹ (1994) 68 P. & C.R. 14.

³⁴⁰ *Robinson v Adair*, *The Times*, 2 March 1995 DC; *Hereford and Worcester CC v Pick* (1996) 71 P. & C.R. 231; *Hayling v Harper* [2003] 39 E.G. 117.

³⁴¹ Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002/1711) and the Vehicular Access Across Common and Other Land (Wales) Regulations 2004 (2004/248) (W.25) now both repealed.

³⁴² [2004] UKHL 14.

³⁴³ This is discussed at paras 2-51 and 2-101.