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22 July 2022

Dear Inspector

Ref ROW/3278588
DC Ref T339

On looking again at my letter of 20 July 2022, it may be helpful if I add three supplementary points.

1. I remind the Inspector that the decision reached by the Committee in response to the Officer Report is of course subject to the 'reasonable allegation' test. The decision to be reached by the Inspector is subject to the 'balance of probabilities' test. See Counsel's Opinion at para 4 (b) re the Todd case.

2. I have checked the application and the user evidence to see if there is any suggestion of the 5 year main lawful user issue arising (NERCA s67(2)(a)). Answer no.

3. In my previous letter I referred to Counsel's Opinion having addressed the issues of using extract evidence and not supplying copies. The relevant passages are at paras 12 to 14. These also cover the position when the applicant submits supplementary evidence.

If anything I have said in my submission is unclear, the Inspector is invited to raise questions for me to answer.

Regards

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20 July 2022

Dear Inspector

Ref ROW/3278588
DC Ref T339

It is my submission that the DMMO should **not be confirmed** as the original application (Appx 4/3 as sent on 15 June 2022) was defective. It did not satisfy Sch 14 WCA 81 in two respects:

(i) Evidence on which the applicant relied was served too late; and
(ii) Reliance was placed on 'extract' evidence.

The central question for you to decide is "Which is to be preferred; the view of the RoW officer or the considered opinion of George Laurence QC + Ross Crail."

Sch 14 WCA 81 says:

***Form** of applications*
1.An application shall be made in the prescribed form and shall be accompanied by:
(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and
(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application

Para 1(a) is no longer relevant following the Dorset case in the Supreme Court. Para 1(b) however is still of full force.

Attention is drawn to the following wording on Form G of the application. The applicants:

have carried out research at the County Records Office and/or Public Records Office and wish the following documents to be considered in support of my application [see notes on reverse of **FORM A**]:

Document	**DRO/PRO Reference**
Inclosure Award and Map*	DRO Inclosure 79 DRO Ref D/FSI: Box 154 DRO Inclosure 21a DRO Ref Inclosure 67

and say in the 'Introduction' on the penultimate page of the application:

FoDRoW believes enough evidence is being submitted to justify this claim. Further evidence does exist and may be submitted at a later date. However, having considered the volume of claims likely to be submitted in the coming years this claim is being submitted now to avoid a future flood of claims when they are all fully researched.

These passages put beyond doubt the fact that the applicant did not attach copies of Record Office documents, and withheld evidence on which he/they relied in order to beat the clock. Such an application does not satisfy Sch 14. In making these assertions I rely on the Joint

Opinion of Leading Counsel. If these submissions are accepted then all documentary and user evidence is irrelevant.

Nonetheless, I will comment on the attachments to the PINS letter dated 15 June 2022:

Cover letter - Please note that this submission is from me personally; GLPG has been disbanded.

Appx 4/1 - Photographs of route are noted. NB that much appears to headland unused by motors. Where a used track is shown this may well be owner use. The photos serve little purpose.

Appx 4/2 - Land Registry Extract. Noted

Appx 4/3 - Application for DMMO. Dealt with above.

Appx 4/4 - Officer report. This is mostly irrelevant to the identified issues, but attention is drawn to :

> Para 1.3 - This confirms that the principal evidence was in 'extract' form.
> Para 1.5 - The application was made in Sept 2004. The user evidence is dated 2010 and cannot be regarded as satisfying Sch 14 (1)(b).
> Pages 9/10 record the original objection; the officer comments need updating.
> Para 11.9 says 'Officer Comments: As noted above, the Council is satisfied that the application has been made in accordance with the requirements of section 53 and Schedule 14' but fails to identify where and on what grounds.
> Appx 2, page 32, Para 6.4 says the Order of the SC stated that 'the applications complied with **all** [my emphasis] of the requirements of paragraph 1 of Schedule 14. It did no such thing. This is addressed in my attached letter as to the Registrar's findings.

Appx 4/5 - Documentary evidence. No comment

Appx 4/6 - User evidence - only 4 of 18 witnesses claimed use for 20 years before the challenge date of 2004 (which conflicts with para 9.5 of the Officer Report saying 7, corrected to 4 at para 9.19). I submit that the user evidence is insufficient to satisfy the requirements of s31.

Appx 6/1 - GLPG letter 11 Aug 2018. This records my arguments as to lack of evidence copies, and use of extracts as evidence.

Appx 6/2 - Counsels Opinion 26 Jan 2007. This is highly relevant to the issues in this case. I attach a Word copy to assist the Inspector as quoting from the pdf copy is not practicable.

Appx 6/3 - SC judgment re map scales. Not in issue

Appx 6/4 - Registrar message 5 Nov 2019. My letter to you dated 20 July covers what happened when DCC referred the ambiguity in the SC's 'Declaration' to the Registrar.

Yours sincerely

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20 July 2022

Dear Inspector - PINS Ref ROW/3278588; DC ref T339

Refusal by Lord Carnwarth to vary the Declaration by the Supreme Court Registrar Issued in April 2015 - Submission by Graham Plumbe

The Document issued by the Registrar read as follows:

AFTER HEARING Counsel for the Appellant [Dorset County Council], Counsel for the First Respondent [TRF] and the Intervener [Graham Plumbe obo GLPG] on 15 January 2015

THE COURT ORDERED THAT

1) The appeal be dismissed
2) The claim for judicial review of the Appellant's decision of 2 November 2010 succeeds
3) …. [costs] and

IT IS DECLARED that

4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref. T339), 21 December 2004 (ref. T350), 21 December 2004 (ref. T353) and 21 December 2004 (ref. T354) made to the Appellant under section 5.3 (5) of the Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

Issue

This has been interpreted by the TRF as saying that the relevant applications were compliant with the whole of Sch 14, para 1 (ie both subparas 1a and 1b) even though that is factually wrong. GLPG submitted (i) that the error was simply an ambiguity, (ii) that the TRF were attaching words that aren't there, (iii) that the offending text is simply a Declaration of what the Court ordered and is not an order per se, and (iv) that the TRF's interpretation amounts to a disregard of the law re compliance as found by the Court of Appeal in the *Winchester* case. Dorset Council (DC) agreed that the wording was wrong but regarded the Declaration as an order by which the Council was bound. With the support of GLPG, DC made an application to the Supreme Court (SC) Deputy Registrar (Ian Sewell) to amend the Declaration to reflect accurately what the Court had in fact ordered.

Supreme Court Response

The Deputy Registrar referred the matter to the SC. It was considered by Lord Carnwath who is reported as saying:

> "The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule

14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage."

Submission to PINS

I do not accept the validity of Lord Carnwath's response for the following reasons:

1. It is highly likely that Lord C did not read the papers in full, particularly the submission by GLPG. DC has stated: "I confirm that all the papers filed in relation to the application were sent to Lord Carnwath, who also had the benefit of all the case papers including the core volume" (my emphasis). Lord C makes no reference to any papers/submissions made to support DC's application, and appears to be relying solely on his recollection of the case. That view is further supported by the serious errors made by Lord C as detailed below.

2. Lord C's response is purely a negative position as to finding a reason to vary. It is not a ruling of law and cannot be binding on an Inspector who is entitled to reach his/her own conclusion as to the law having considered the SC judgment and the correctness or otherwise of the Declaration in recording what the Court in fact ordered. In particular Lord C does not state that the TRF interpretation is correct.

3. Lord C does not identify what he means by *'the order'*. He could be referring to (i) the order made by the Appeal Court (which was limited to the map scale question); (ii) the SC order which confirmed the CA findings; or (iii) the Declaration if he too refers to that as being an order. Taken in context, he appears to mean the Declaration, as it is that which was subject to the application to vary.

4. It is quite wrong to refer to *'the terms of the order'* having been *'agreed between the parties'*. At no stage were the terms of any of the orders listed under 3. above so agreed. I speak as one of the parties.

5. The statement *'Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position.'* is misconceived. Assuming *'these proceedings'* refers to the whole litigation from the High Court upwards, the original challenge was in fact by the TRF against the findings of DCC. The High Court judgment opens with the passage 'The Claimants [the TRF] challenge the decision of Dorset County Council, the Defendant, to reject five applications made under section 53(5) of and Schedule 14 [to the 1981 Act]'. It would have been wholly inappropriate to address the Court as to matters not listed as being in dispute given the limitations of the challenge by the TRF.

6. The *'form of the relief sought in the original claim'* was the Court's endorsement that an application was valid even if based on maps which were drawn to the wrong scale. That relates solely to the first limb of Sch 14 para 1(a) ('a map drawn to the prescribed scale'); it does not relate to the 2nd limb ('and showing the way or ways to which the application relates) nor to para 1(b) (copies of any documentary evidence ….).

7. The passages '*Had the council wished to challenge the validity of these applications'* and '*… it is too late to raise such issues at this stage'* are also misconceived. The endorsement by the SC of the validity of the original applications on the map scale issue means that these 5 cases have had to be reopened, partly because of the need to consider whether other grounds are relevant. Furthermore, applications are of course challengeable by landowners and members of the public, and the need to re-open the cases and start again necessitates renewed public consultation. That process is currently in hand.

8. The onus of proof is on the claimant of rights (confirmed by Defra). The absence of legal substance in Lord C's response raises the question of whether the TRF have produced any legal reasons for an interpretation of the ambiguity which is contrary to the findings of the Court of Appeal as to compliance.

9. An unnreasoned (and erroneous) opinion of a single judge cannot be regarded as an order of the SC. The SC always sits as a group of five judges when deciding cases.

Conclusion

Given Lord C's unreasoned disregard of the application to vary the Declaration, the Inspector is invited to reach his/her own conclusions as to what was meant by the recorded ambiguity, and whether it carries any authority to disregard the findings of the Court of Appeal in the *Winchester* case as to compliance, noting the obiter confirmation by the Supreme Court in the Dorset case that the *Winchester* case was correctly decided.

Yours sincerely

Graham Plumbe Cc Interested parties

26/01/2007

IN THE MATTER OF SECTION 67 OF THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

JOINT OPINION

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1. We are asked to advise the Green Lanes Protection Group ("GLPG") on various aspects of the interpretation and application of section 67 of the Natural Environment and Rural Communities Act 2006 (hereafter referred to simply as "section 67" and "the 2006 Act"). Our Opinion is structured by reference to the specific questions posed in our Instructions.

2. For ease of reference we set out section 67 in full, as follows.

"67. –(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement-

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8).

(2) Subsection 1 does not apply to an existing public right of way if-

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.

(3) Subsection (1) does not apply to an existing public right of way over a way if-

(a) 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,

(b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles-

(i) was reasonably necessary to enable that person to obtain access to the land, or

(ii) 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.

(4) "The relevant date" means-

(a) in relation to England, 20th January 2005;

(b) in relation to Wales, 19th May 2005.

(5) Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies-

(a) was reasonably necessary to enable a person with an interest in land to obtain access to the land, or

(b) 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,

the right 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.

(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.

(7) For the purposes of subsections (3)(c)(i) and (5)(a), it is irrelevant whether the person was, immediately before commencement, in fact-

(a) exercising the existing public right of way, or

(b) able to exercise it.

(8) Nothing in this section applies in relation to an area in London to which Part 3 of the Wildlife and Countryside Act 1981 (c. 69) does not apply.

(9) Any provision made by virtue of section 48(9) of the Countryside and Rights of Way Act 2000 (c. 37) has effect subject to this section."

A. Exemption for applications made under section 53(5) of the Wildlife and Countryside Act 1981 before the relevant date[1] and for determinations made before commencement.[2]

Q.A1 On whom is the burden of proof?

3. In judicial or quasi-judicial proceedings instituted to establish the positive proposition that a full vehicular public right of way exists, the burden of proof that it exists rests on the party so asserting: the claimant in court proceedings for a declaration against the landowner, or the surveying authority or other person promoting or supporting at public inquiry a definitive map modification order to show the way as a byway open to all traffic ("BOAT"). If it is that party's case that the right came into existence before the commencement of section 67, and on the commencement date the way was not shown in a definitive map and statement as a BOAT, then it is for that party to identify the particular exemption(s)[3] in section 67 on which he relies for the continued existence of the right, and the applicability of that (or those) exemptions is one of the elements of his case as to which he has assumed the burden of proof.

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1 20 January 2005 (19 May 2005 in Wales) – section 67(4) of the 2006 Act.

2 2 May 2006 – see sections 71(2), 107(4) of the 2006 Act, and see also the Natural Environment and Rural Communities Act 2006 (Commencement No. 1) Order 2006 (SI 2006 No. 1176).

3 We use the term exemption in this Opinion although there is obviously no objection to the term favoured by Defra in its Guidance on Part 6 of the 2006 Act, viz exception. (All references in this opinion to the Defra Guidance are to version 4, issued in November 2006.) The opening words of subsections (2) and (3) are plainly apt to introduce an exception to or exemption from the extinguishing effect provided for by subsection (1).

4. In the context of an application for a definitive map modification order under section 53(5) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), it is not really appropriate to speak of a burden of proof, for the following reasons:

   (a) in deciding whether or not to make a modification order, the surveying authority is not confined to the evidence put before it by the applicant; its duty under paragraph 3(1) of Schedule 14 to the 1981 Act is to *"investigate the matters stated in the application,"* and it has to consider all relevant evidence available to it for the purposes of section 53(3)(b) or (c); its investigations may yield material which proves the existence of the claimed right and justifies the making of an order where the material put forward by the applicant by itself would not;

   (b) for the purposes of section 53(3)(c)(i), the material put forward by the applicant considered together with all other relevant available evidence need disclose no more than a reasonable allegation of the subsistence of the right of way claimed for an order to be made; proof on the balance of probabilities is for the later, confirmation, stage: *Todd & Bradley v. Secretary of State for the Environment* [2004] 1 WLR 2471;

   (c) in deciding whether to make an order, the surveying authority is not making a final determination; the confirmation stage remains to be gone through.

5. We accordingly do not think that it would be appropriate for a surveying authority to purport to impose on an applicant, as a precondition of complying with its duties under Schedule 14 paragraph 3(1) or otherwise, a requirement that he should prove on a balance of probabilities that one of the section 67 exemptions applies.[4] That is not to say that a surveying authority cannot ask an applicant who has not volunteered the information (which, in the case of an application made before 2 May 2006, he will not have done) to say whether he maintains his application in the light of this legislative development, and if so, to specify upon which of the exemptions he relies and on the basis of what evidence, as its starting-point for investigating that aspect of the matters raised by the application. But it cannot claim to have been relieved of its investigative duty

[4] Subject to what is said in paragraph 7 below.

and to be entitled to reject the application out of hand if he does not produce evidence sufficient to satisfy the authority on the balance of probabilities that one of the exemptions applies. In any event, if section 53(3)(c)(i) is in play, it is enough for it reasonably to be alleged that one of the exemptions applies, as well as that there was a full vehicular right of way in the first place.

6. Moreover, as is correctly pointed out in the Defra Guidance at paragraphs 6 and 7, the outcome of a particular application may be that no section 67 exemption applies and yet, because the highway was fully vehicular prior to 2 May 2006, it would fall to be shown as a restricted byway. Section 67 only extinguished the right of way for mechanically propelled vehicles. The investigation and determination of whether a full public vehicular right existed over the way before and up to the commencement of section 67 therefore has to proceed to completion as if the 2006 Act had never been enacted, at each of the order-making and confirmation stages. The potential applicability of the section 67 exemptions is an additional issue to be considered and resolved if the full public vehicular right is established, but cannot be taken in isolation and treated as determinative of the application. If the way is not shown on the definitive map at all, or is shown only as a footpath, the investigation of a BOAT claim may lead to the making of an order to show a footpath or bridleway. We therefore agree with the Defra Guidance at paragraph 35 (read with paragraphs 6 and 7) in envisaging that the question of whether an exemption applies should be determined "in the process [i.e., as we read that phrase, as part of the process and not as a first step[5] in the process] of making a determination." The only possible exception to this would be if the way was already shown as a restricted byway pursuant to automatic reclassification under section 47 of the Countryside and Rights of Way Act 2000 ("the 2000 Act"). In such a case, it might be legitimate to investigate as a preliminary matter whether one of the exemptions applied. The justification for doing that would be that it was potentially determinative of the application, in as much as if none of the exemptions could apply, an order showing the way as a BOAT could not be made (and there would be no point in wasting time and resources investigating the matter in greater depth). However, even in such a case the authority might not be in a position to eliminate all the exemptions until it had covered much if not all of the ground which it would have covered apart from section 67; so the scope for this approach may in practice be limited.

[5] See the suggestion to that effect in our instructions.

7. With specific reference to the exemptions in section 67(3), we would qualify what is said in paragraph 5 above to the extent that it must be for an applicant who relies on paragraph (c) of that subsection to produce evidence to satisfy the surveying authority that he had an appropriate "interest in land". So far as concerns paragraph (b), no one should know better than the authority itself whether and when it has made a determination. As for paragraph (a), it should be within the authority's own knowledge what it has received from an applicant and when (and it is a matter for the authority's judgment - not the applicant's - whether that was enough). If it is in doubt about the date of receipt of documents from the applicant because it has kept no record of that date, then it can obviously ask the applicant when they were sent or delivered, but is likely in practice to have little alternative but to accept whatever answer the applicant gives[6] because by definition it will have no evidence to the contrary; if it had, it would not be asking. In such a case we do not think that a court would insist on the applicant's producing documentary evidence eg. proof of posting or a receipt from the authority. In a dispute before a court or tribunal as to whether the authority had received documents which it denied having received at all, the burden of proving delivery would be on the person claiming to have made the application.

Q.A2 Is paragraph 1 of Schedule 14 to the 1981 Act mandatory or directory?

8. For the purposes of section 67(3), a section 53(5) application is made *"when it is made [i.e. by being made] in accordance with"* paragraph 1 of Schedule 14: section 67(6). As a matter of interpretation of that subsection, those words can only mean that all of the requirements of paragraph 1 must be complied with before an application is to be treated as having been made for the purposes of section 67(3). That entails the submission to the surveying authority of:

   (i) an application in the form set out in Schedule 7 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12) ("the 1993 Regulations") or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case (Regulation 8(1) of those Regulations);

[6] Unless what the applicant says is inconsistent with correspondence he has had with the authority, or a previous conversation with one of its officers; or can be shown to be impossible.

(ii) a map on a scale of not less than 1/25,000 (Regulations 2, 8(2) of the 1993 Regulations) showing the way(s) to which the application relates; and

(iii) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

9. Paragraph 1 of Schedule 14 says that an application *"shall be accompanied by"* the map and copies of documentary evidence. However, we do not think that an application would not count as having been made in time for the purposes of section 67(3) if the items had been submitted to the authority separately and at different dates rather than all at once, provided that all three categories of item had been submitted by the relevant date. We think that it is not fatal to the validity of an application under Schedule 14 if the requirements are not all strictly complied with, but that defects can be put right. The use of the word "shall" in paragraph 1 shows that its requirements are mandatory in the sense that they are *"not intended to be optional"*: *R v. Home Secretary, ex p. Jeyeanthan* [2000] 1 WLR 354 at p.358 per Lord Woolf MR. However, adopting the approach propounded by the Court of Appeal in that case of asking what the legislator should be judged to have intended to be the consequences of non-compliance on consideration of the legislative language against the factual situation and seeking to do what is just in all the circumstances, we do not think that in enacting the 1981 Act any serious consequences for an applicant would have been intended to follow from delays in submitting documents, given that most section 53(5) applications are made by laymen and that prejudice is unlikely to result from such delays. There would be no useful purpose to be served by requiring a fresh application to be submitted (on which there would be no restriction).[7] Time is not of the essence for the purposes of section 53. The process of reviewing the definitive map established by the 1981 Act is a continuing one, with the object of producing the most reliable map and statement possible.[8] Time is, however, critical for section 67(3), and if defects were remedied only after the relevant date, then the section 67(3)(a) exemption will not in our view be available, because of the terms of section 67(6).

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[7] Cf. the relaxed attitude of the Courts to applications for registration of land as a town or village green under the Commons Registration Act 1965 and associated Regulations in *Oxfordshire County Council v. Oxford City Council* [2006] 2 WLR 1235.

[8] *R v. Secretary of State for the Environment, ex p. Burrows and Simms* [1991] 2 QB 354, eg. at pp.385-386.

Q.A3 Do different tests apply to the different elements of Schedule 14, paragraph 1?

10. *The application form:* Paragraph 1 of Schedule 14 itself contemplates variations on the basic prescribed form, either in the nature of adaptations to suit the particular circumstances of the case, or in the wider sense of departures from the wording or format of the prescribed form which do not matter because the document is *"substantially to the like effect"* as the prescribed form. That means that the document must contain the essential information required by the prescribed form[9], even if it is differently worded or laid out: see eg. the recent case of *James Hay Pension Trustees Ltd v. First Secretary of State* [2006] EWCA Civ 1387 helpfully drawn to our attention by our Instructing Surveyor. The prescribed form includes the words *"I/We attach copies of the following documentary evidence (including statements of witnesses) in support of this application: List of documents".* We are instructed that a common variation of the form is the substitution of the words *"Please see attached checklist"* for these words. We do not think that it is essential for the list of documents to be written on the application form; a separate piece of paper will suffice so long as it is clearly identified as the list of documents referred to in the form or prepared in connection with the application. As we have said above, we also do not think a court would hold it to be a fatal defect if the list of documents were to be supplied separately and subsequently and the form said eg. "list to follow" or "documents to follow", or if the "list of documents" section were just left blank. But we think there has to be a list of documents supplied at some stage (see further below, paragraph 12).

11. *The map*: Paragraph 1 of Schedule 14 and the 1993 Regulations say a map must be supplied to show the way(s) to which the application relates, and be to a scale of not less than 1:25,000. We think that those (not very onerous) requirements do have to be met, in order to identify the route(s) in issue and enable the authority, affected landowners and others to see what it is that is being claimed.

12. *The documentary evidence:* Paragraph 1 of Schedule 14 (in conjunction with the 1993 Regulations) clearly requires the applicant to identify (in list form) the particular items of documentary evidence upon which he relies in support of his

9 Ie. details of the surveying authority; name and address of each applicant; fact that a modification order under section 53(2) of the 1981 Act is being sought in respect of that authority's definitive map; nature of order sought (to add/delete/change status); details of location of each route concerned, status claimed and (if already on map) status shown; details of any change to particulars in statement sought.

application, *and to provide copies of them*. Unless and until the applicant has provided the surveying authority with an itemised list of documents and a set of copies of the listed documents, he cannot in our view be regarded as having complied with the statute. It has to be acknowledged that there may be documents of which for good reason[10] the applicant cannot readily or at all obtain and provide copies, and exceptions to that requirement may have to be made; but we think that the requirement to provide copies should be complied with wherever reasonably possible. We are asked whether we think compliance is achieved by the applicant's writing in place of "List of documents attached" such words as "see report", accompanied by a detailed exposition of evidence sources and what they are said to indicate, but no copy documents. We do not think that can be regarded as the equivalent of providing copy documents, or as substantial compliance with the requirement to supply copies. Selected extracts, or summaries, or interpretations, of documents are very different from copies, which give the full picture and enable the reader to form his own impressions of the meaning and significance of the documents. There is no reason why the applicant should not voluntarily provide a statement or summary of the evidence as he sees it over and above complying with the requirement for the production of copies, and it may be helpful for him to do so. But that is not a substitute for producing the copies. It might, however, fulfil the requirement to supply a list of documents relied on, depending on how the particular "report" is written.

Q.A3(a) Must the surveying authority apply the Schedule 14 requirements strictly when deciding whether an application is exempt under section 67(3)?[11] *Should it*

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10 Eg. because of the fragile state of the original. So we think the requirement to supply copies would be interpreted as a requirement to do so "whenever reasonably possible". It would in such a case be for the applicant to justify his failure to supply copies of every document on his list. So, for example, if an applicant asserted that he was entitled to claim the benefit of section 67(3)(a) because he had made an application before 20 January 2005 in accordance with paragraph 1 of Schedule 14, the authority might respond by saying – "No you didn't : one of the documents you put on your list was not copied." The applicant would then reply by saying: "I know. But since the original of that document was a fragile enclosure award and map in your archives which you refused to allow me to copy, I contend that I did everything reasonably possible to comply with the requirement to include with my application copies of the documents on which I wished to rely." The authority could then check whether the applicant's explanation was true, and make a judgment as to whether it afforded a satisfactory excuse for not providing a copy. (In the example given**,** it obviously would.) This example illustrates how in most cases the decision at order-making stage whether a section 67(3) exemption is available will not turn on burden of proof. Rather it will depend on what the issue in dispute is and who is in the best position to give the evidence which will resolve it, and involve an *inquiry* into the application of the exemption as opposed to requiring the applicant to assume the burden in every respect of proving its application. The same is, we think, true of section 67(2) exemptions at order-making stage. We refer back to paragraph 4 above.

11 Strictly speaking it is not the application which is exempt; it is the public right of way for mechanically propelled vehicles which is exempted from extinguishment in a case where section 67(3) applies. It of

restrict such decision to a consideration of the evidence accompanying the application at the relevant date, or can it take into account subsequent submissions of evidence made after the relevant date in order to "perfect" an application so as to take advantage of the section 67(3) exemption?

13. In deciding for the purposes of section 67(3)(a) or (c) whether a section 53(5) application for an order to show a way as a BOAT was made before the relevant date or the date of commencement of section 67 (as the case may be), a surveying authority ought in our view to regard an application as having been made before that date if and only if before that date it had received from the applicant the documents specified in paragraph 8 above (as explained in paragraphs 10-12 above). We do not think that lists or copies of documents submitted after that date should be counted towards satisfaction of the requirement for a document list and copy documents to have "accompanied" an application made before that date. The application should be regarded as having been made "in accordance with" paragraph 1 of Schedule 14 when all the requirements of that paragraph have been complied with, not before; so if at the relevant date (or date of commencement of section 67) the document list or copy documents remained outstanding, then the application had not as at that date been made in accordance with that paragraph.

14. The picture is more complicated if at the relevant date (or date of commencement of section 67) the applicant had already submitted a list of documents and copies of the documents listed, but following that date he went on to supply additional documentary evidence. Does it follow that the original submission of documentary evidence did not satisfy the requirements of paragraph 1 of Schedule 14? We would suggest the following propositions:

    (1) The criterion for inclusion of documents in the list and set of copies to accompany the application is that they be *"any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application"*. The time at which the applicant's wish to

course does not follow from non-applicability to a right of way of a section 67(3) exemption that a section 67(2) exemption does not apply. Nor does it follow from an application for a BOAT order not satisfying the section 67(3) criteria that the application cannot or should not proceed to a determination, because of the potential for the applicability of the other exemptions and for the other reasons discussed in paragraph 6 above.

adduce a particular document falls to be tested is at latest the date when he submits his list and set of copies and perfects his application.

(2) If he subsequently discovers other documents or witness evidence which he would like to draw to the surveying authority's attention, that can have no effect on the question whether he complied with paragraph 1 of Schedule 14 when submitting his original batch of documentary evidence.

(3) If after having submitted his original batch of documents he for the first time forms a wish to rely on a document or documents of which he was previously aware, but which he either overlooked or chose not to include for reasons which he has since reconsidered, the submission of that extra material cannot retrospectively undo his compliance with paragraph 1.

(4) However, "*any* documentary evidence" must in the context of paragraph 1 be read as equivalent to "*all* documentary evidence"; so if the applicant deliberately keeps some material back when submitting his original batch, or does not defer his application until he has finished researching and collating material, he is not complying with the requirements of paragraph 1. (There may of course be evidential difficulties in establishing that to be the case, unless it is patent on the face of his application form or list that he has other documents in mind. See further paragraph 17 below).

Q.A3(b) Where the surveying authority has no record of the date of receipt of evidence supplied by an applicant, on whom does the burden of proof rest as to the date of receipt?

15. We refer to paragraph 7 above.

Q.A3(c) Is documentary evidence of a general nature which is not specific to the way in question on its own sufficient to satisfy the requirement to provide documentary evidence in support of the application?

16. The "all the documentary evidence the applicant wishes to adduce" test is a subjective one; whether it is satisfied depends on the state of mind of the applicant, although inferences as to what is in his mind may be capable of being drawn from his outward conduct and the circumstances of the application. Paragraph 1 of Schedule 14 does not impose any objective criteria on the

documentary evidence to be produced, eg. that it actually does support the application or even that it be relevant to the application[12]. We think that a court or other tribunal would be slow to infer against an applicant who provided inadequate or irrelevant material that he was acting in bad faith (eg. by putting in an application before having done any research into the history of the claimed route) or otherwise than in a genuine attempt to comply with paragraph 1 of Schedule 14; but would do so in an appropriate case.

Q.A3(d) Do Counsel agree with the possible test offered by GLPG in respect of "wishes to adduce", namely: "As a matter of probabilities based on such material as is available, has the applicant produced the evidence on which he would rely for the purpose of a determination being made, or does his application amount simply to a holding operation?"

17. We would not put it in quite that way. The legislative intention underlying paragraph 1 of Schedule 14 is that the applicant should have prepared his case to the best of his ability *before* making his application, and not the other way round. If an applicant purports to comply with paragraph 1 by putting in a "holding" list or set of documents which he knows to be incomplete and/or inadequate and with the intention of putting in further documents to make that good, he is not complying with the spirit of the legislation and we would agree that he is not complying with the letter of the legislation either. So the question for the authority (and the "test" we would suggest) is whether, in all the circumstances, it is satisfied (i.e. satisfied on a balance of probabilities) that the applicant can reasonably be supposed to have put forward all the evidence he thought necessary to secure the object of his application viz designation of the way as a BOAT. Those "circumstances" would be likely to vary considerably from case to case. For example, it might be reasonable to conclude that the test was not satisfied where the applicant was a professional applicant such as the Trail Riders Fellowship and the evidence adduced was evidently "thin" but readily available further probative material existed in the authority's archives. A professional applicant would ordinarily conduct its or his own search of such material before making, and if found include it in, the application: failure to do so where the material was readily available would tend to indicate a holding operation.

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[12] Evidence of course does not necessarily have to relate exclusively or even specifically to a particular way to be relevant to the claim that rights exist over it. But documents such as articles about interpretation of evidence are not themselves "evidence". The inclusion of such items would not harm the application but if the *only* documents referred to were non-evidential in nature there would be non-compliance.

Q.A4 If the surveying authority has initiated a review of the definitive map not based on a section 53(5) application, does a subsequent application introduce exemption?

18. Section 67(3)(b) exempts from extinguishment a public right of way for mechanically propelled vehicles over a way if before the commencement of the section, *"the surveying authority has made a determination under paragraph 3 of Schedule 14 … in respect of such an application".* The question arises: what is "such an application"? It is clearly a reference back to section 67(3)(a), and must mean "an application … made under section 53(5) of [the 1981 Act] for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic". It cannot, however, entail the further requirement that such application have been made before the relevant date for the purposes of section 67(3)(a), because (i) if that were the case, paragraph (b) would be redundant, paragraph (a) applying to all applications made before that date including those determined before commencement; and (ii) the expression "such an application" recurs in paragraph (c), which applies on its face to all applications made before commencement.

19. If before 2 May 2006 a surveying authority which had earlier received a section 53(5) application for an order to show a way as a BOAT (by adding or upgrading it) formally resolved[13] to accede, or not to accede, to that application, we think section 67(3)(b) would bite. We do not think it would make any difference that the authority had at an earlier date undertaken investigations into the status of that way on its own initiative. The position might be different if the authority had already resolved to make a modification order to show the way as a BOAT, but that is not as we understand it the situation which our Instructing Surveyor has in mind (and would seem an unlikely scenario as an application would not be made or pursued in such circumstances). If reliance can be placed on section 67(3)(a) or (c), then again we do not think it would matter whether the authority had independently been reviewing the status of the way in question before the application was made.

13 At whatever level (committee or officer) was appropriate in accordance with the authority's delegation scheme for the time being in force.

Q.A4(a) If a Committee resolves to make a definitive map modification order[14] *in response to a section 53(5) BOAT application, can it be said to be "a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application" and thereby gain exemption under section 67(3)(b) of the 2006 Act if on the facts the application is not fully compliant with Schedule 14 of the 1981 Act?*

20. The exemption introduced by section 67(3)(b) engages section 67(6) just as much as does the exemption introduced by section 67(3)(a). For a determination to fall within section 67(3)(b) it has to be "in respect of" an application as defined in and required by section 67(6). For an application to satisfy section 67(6) it must (but need only) be in accordance with paragraph 1 of Schedule 14; there is no further requirement that notice of the making of the application be served, as required by paragraph 2 of Schedule 14.

21. A separate question arises if the authority purports to determine an application validly made in accordance with paragraph 1 of Schedule 14, but in respect of which there has never been any certificate as required by paragraph 2(3) of Schedule 14. For in that event the landowner may have known nothing of the application and had no opportunity to influence its outcome. We think that in such circumstances it could not be said that there had been a valid determination under paragraph 3 of Schedule 14 in respect of the application for the purposes of either the 1981 Act itself or section 67. The intent of section 67(3)(b) was to exempt from extinction public rights for mechanically propelled vehicles where the decision to make a BOAT modification order had been properly reached in response to an application made in accordance with paragraph 1 and certified under paragraph 2. Where there was no such certificate, the decision would not have been properly reached, and there would have been no valid determination in respect of the application. It is a precondition of the authority's duty and power under paragraph 3(1) of Schedule 14 to investigate the matters stated in the application and decide whether or not to make the order applied for that it should have received a certificate under paragraph 2(3).

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14 It should be noted that where the section 67(3)(b) exemption applies, it can be taken advantage of even if, for example, the decision was to make a modification order showing the way not as a BOAT, but as a bridleway. So the applicant would be entitled to object to the order and, having proved at the ensuing inquiry that the true status of the way was vehicular before 2 May 2006, he would be entitled to claim the benefit of the exemption so as to require the inspector to propose a modification of the order to show the way as a BOAT.

22. If a decision to accept an application is taken in the absence of a certificate, the landowner would in the ordinary way have two[15] opportunities to challenge the legality of the authority's action. (1) If he found out about it in time, before the decision was acted upon by making the order, he could apply for an injunction to restrain the authority from proceeding to do so: *R. v. Wiltshire County Council ex p. Nettlecombe Ltd.* [1998] JPL 707. (2) Once an order has been made, the ouster clause in paragraph 12(3) of Schedule 15 to the 1981 Act bites, and in that case the landowner would have to wait until the order had been confirmed before challenging it in court on the basis of *ultra vires* action by the authority: *R. v. Cornwall County Council ex p. Huntington, R v. Devon County Council ex p. Isaac* [1994] 1 All ER 694, where the Court of Appeal held that the ouster clause precluded a challenge on that basis between making of the order and publication of the notice of confirmation. The Court of Appeal nonetheless affirmed that complaints about the process whereby the respective councils had come to their decisions to make orders in the first place would be justiciable under paragraph 12(1) of Schedule 15 in due course (per Simon Brown LJ at p.701). And when the order in Mr. Isaac's case was subsequently confirmed and challenged by him on those (among other)[16] grounds, Sedley J did consider his allegations of shortcomings in the authority's decision-making process, although on the facts he rejected them. He said that *"…to succeed under paragraph 12 in an attack on the surveying authority's decision to make an order it would be necessary to show that its decision-makers lacked the power to decide …"* (transcript p.12). We think that in the absence of a paragraph 2(3) certificate, the authority would have lacked the power to determine the application. The Judge said that the statutory scheme does not permit the inspector at inquiry *"to conduct any form of procedural review of the acts of the County Council. The modification order is his starting point; from it he proceeds to examine all the issues afresh; and it is upon further recourse to this court that both his and the surveying authority's processes can be scrutinised …"* (transcript p.21).

23. However, we think that the inspector could, and indeed would, have to listen to the landowner's complaint, and adjudicate upon it, in the kind of case under consideration here: that is to say, where the very existence of the vehicular right depended on the question of whether the authority had made a valid

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[15] These are discussed in the remainder of this paragraph. But for reasons given in paragraph 23 below, we think that there would in fact be three opportunities in the kind of case under consideration here.
[16] *Isaac v. Secretary of State for the Environment* CO-2527-94 (10th November 1995).

determination before the commencement of section 67. That would go beyond procedure, to the substantive issue which is the inspector's to determine - the status of the way. So in such a case we think that the landowner would, exceptionally, have three opportunities to raise the authority's *ultra vires* act in determining the application without a certificate. If, however, he were to take none of those opportunities, and let the 42-day period allowed for challenges under Schedule 15, paragraph 12 to the confirmed BOAT order elapse, the ouster clause would prevent the point from being taken thereafter. The status of the way as a full vehicular highway could not be disputed in later proceedings, because that would be a challenge to the validity of the order which the ouster clause would not allow.

24. What if there *was* a certificate, but evidence that the applicant had certified incorrectly came to light? We find this a very difficult question because there are a number of possible answers (considered in detail below), none of which is self-evidently the only correct one, each of which has something to be said for it, and any of which might commend itself to a court. Everything that follows in paragraphs 25 to 30 below should be read with that qualification in mind. We approach the question under four heads.

25. (1) *A certificate is just a piece of paper in the right form.* The intention behind paragraph 2(3) in Schedule 14 to the 1981 Act was, evidently, to relieve the authority from having to make inquiries about whether service had been properly effected. It is entitled to take an apparently valid certificate at face value and as triggering the paragraph 3 duty to investigate and decide whether or not to make an order. One possible approach would be to say that the words "a certificate under paragraph 2(3)" in paragraph 3(1) of Schedule 14 mean no more than "a piece of paper signed by the applicant in the prescribed form of certificate." So even if at any stage before making the order the authority were to discover that the certificate was apparently incorrectly given, it would not be for the authority to make an adjudication about that. It would be entitled and bound to proceed to make its decision under paragraph 3 in the normal way. Its power and duty under paragraph 3 to investigate and decide would arise as soon as the authority was in receipt of a signed piece of paper in the prescribed form of certificate; and the decision reached would be a determination in respect of the application for the purposes of section 67 whatever the applicant had done (or not

done) in the way of service, being made in response to the application and as a consequence of the application.[17]

26. There is however something distasteful about this stark way of approaching the problem. If an applicant certified without have made any effort to find out who the owners/occupiers were, and the giving of the certificate enabled the authority to make a determination before 2 May 2006, to allow that applicant the benefit of the section 67(3)(b) exemption would be to allow him to take advantage of his own wrong, something the law is rarely prepared to countenance. That would be so regardless of whether the landowner had in fact suffered any prejudice in the sense of being unaware of the application and denied the opportunity to influence the outcome (although that might also have been the case). The landowner would have suffered another form of prejudice: being deprived of the benefit of section 67(1).

27. (2) *A certificate requires full compliance with paragraphs 2(1) and 2(2).* The alternative construction of Schedule 14 is that "a certificate under paragraph 2(3)" means a certificate which has been provided when (and only when) "the requirements of [paragraph 2(1) and (2)] have been complied with". One consequence of adopting that construction would be that in any case of non-compliance, a determination in respect of the application could be said not to have been a valid determination under paragraph 3 of Schedule 14 such that it ought not to count for the purposes of section 67(3)(b). Another consequence would be that the smallest and most technical defect in service would invalidate the whole subsequent order process (subject to the exercise of the court's discretion to refuse a quashing order in any case), even if no one had been in the least prejudiced by it, and regardless of whether there was any culpability on the part of the applicant. So, for example, an applicant who had made every effort to identify the owner of unregistered land, but had in all good faith served the wrong person (eg. because of misinformation from an apparently reliable source), would be penalised just as severely as the applicant who had made no effort to comply

[17] It would also follow that where there has been a valid application and an apparently valid certificate, it would not be open to the authority in such a case (whether the certificate was correct or not) to purport to carry out its own continuous review exercise and then claim that its determination was not "in respect of" the application. The authority's action, if upheld, would have operated to prevent the section 67(3)(b) exemption from being available. We think that in such a case, and on this approach, the court would treat a decision to make a modification order as having been "in respect of" the application. (Compare, however, paragraph 30 below, first sentence).

at all and had knowingly provided a false certificate – even if the true owner had found out about the application in good time to make representations to the authority. In a case like that where the applicability of section 67 was not an issue, we cannot conceive of a court granting relief to the landowner either on a judicial review application before the making of the order or under paragraph 12 of Schedule 15 after confirmation (cf *R v. Isle of Wight County Council ex p. O'Keefe* [1989] 59 P&CR 283 at p.285); and we can envisage considerable judicial reluctance to rule that the section 67(3)(b) exemption was not available in a case where (section 67 apart) the order would be upheld.

28. Nonetheless, we think that the arguments for the second of the two constructions suggested above are stronger than those for the first. The second enables justice to be done and provides redress whereas the first does not, in cases where the applicant is at fault (even to the point of being fraudulent) and/or the landowner suffers prejudice in the sense of being kept ignorant of proceedings until it is too late. The first construction renders the requirement of service of notice on the landowner effectively meaningless, by allowing it to be ignored with impunity. That cannot, we think, be right. It should be possible for an authority which discovers at any stage before making an order that the certificate it has been given is incorrect (whether through fraud, negligence, or innocent mistake) to refuse to proceed under paragraph 3 unless and until the requirements of paragraph 2 of Schedule 14 have been complied with, and a fresh certificate to that effect has been provided. If that is possible, then it must also be possible where the true facts only come to light after an order has been made for the authority (as well as the landowner) to say that its decision to make the order, and the order, were not properly made. In the ordinary case, that would not be a matter for the inspector at inquiry, but only for the High Court on a Schedule 15 paragraph 12 challenge in the event of confirmation, and by that stage the chances of the court's quashing the order on this basis would be remote. In cases where section 67(3)(b) was in play, however, the matter would also be one for the inquiry (cf paragraph 23 above). Accordingly, if the inspector wrongly confirmed the order, it would be challengeable in the ordinary way under Schedule 15, paragraph 12.

29. (3) *A possible middle way?* As noted above, if the second of the approaches suggested above were to be strictly applied and followed through to its logical conclusion, in any case where there had been non-compliance with paragraph 2 of Schedule 14, despite the provision of a certificate valid on its face, there would

not have been a valid determination under paragraph 3 of Schedule 14. The reality must therefore be faced that a court might refuse to go that far, and instead try to draw a line somewhere between the extremes of the two approaches already explored, whether by reference to the particular facts and circumstances of particular cases, or the time at which the authority found out the truth, or the degree of culpability on the part of the applicant, or the degree of prejudice to the landowner in the sense of exclusion from the process, or some further or other criteria which we cannot presently conceive. One possible compromise would be, by analogy with *George v. Secretary of State for the Environment* (1979) 38 P&CR 609[18] (the Court of Appeal case cited by MacPherson J in *O'Keefe*), to say that failure to serve notice of the application on the landowner would lead to the order being outside the powers of the 1981 Act (and, therefore, not a valid determination for section 67(3)(b) purposes) if and only if the failure resulted in such unfairness to the landowner as to constitute a breach of natural justice. Such an approach might not be objectionable if and so long as it took into account the kind of unfairness to a landowner which would be involved in his being deprived of the benefit of section 67(1) by, for example, an applicant who had calculated (correctly) that if he delayed in order to comply with paragraph 2 of Schedule 14, he would lose the chance of getting a determination before the commencement of section 67, and so furnished a fraudulent certificate to the authority to expedite matters. If and to the extent that taking account of that kind of prejudice requires divorcing the question of what would constitute a valid decision to make an order within the powers of the 1981 Act from what would constitute a determination under paragraph 3 of Schedule 14 within the meaning of section 67(3)(b), and construing the latter phrase more strictly against applicants, then we consider there to be a good argument for doing that (if not one that can be guaranteed to succeed).

30. (4) *Our Instructing Surveyor's example*. If the approach discussed in paragraph 27 above were to be endorsed, either altogether or in some circumstances, then it must logically follow that when and to the extent that a surveying authority would be entitled to refuse to proceed further under paragraph 3 of Schedule 14 on account of non-compliance with paragraph 2, we think that (just as if the

[18] That case of course concerned different legislation (the requirement in the Acquisition of Land (Authorisation Procedure) Act 1946 for an acquiring authority to serve notice of a compulsory purchase order on every affected landowner before submitting it for confirmation). The plaintiff was a joint owner of land with her husband, who had been duly served (and had told her of it). Unsurprisingly, she was held to have suffered no prejudice and be entitled to no relief.

application was invalid, or if there was no certificate), the authority would be entitled to take the matter forward on its own initiative and would *not* be treated as having done so in answer to the application. (Compare footnote 17 above). If in such a case the authority thereafter consciously proceeded, not in response to the application, but in the exercise of its own duty to keep the definitive map and statement under continuous review, we think the resulting decision to make an order would be valid, but would not be within section 67(3)(b). If, on the other hand, the decision at the time purported to be made in response to the application, then we do not think it could retrospectively be re-characterised as an exercise of the authority's independent continuous review duty. We would need much more information about the facts of the actual case instanced by our Instructing Surveyor in his second supplementary note of 4 December 2006 before we could express any view as to whether that particular decision to make a BOAT modification order amounted to a permissible exercise of the authority's independent review power (or even purported to be). If it did, then it would not have been a determination in respect of the application and the section 67(3)(b) exemption could not be prayed in aid. If on the other hand the decision is properly to be regarded as having been in response to the application and the parish council's complaints are correct, then strictly applying the strict approach discussed in paragraph 27 above would lead to the same result. The application of that approach would not involve retrospectively characterising the authority's determination as an exercise of its continuous review duty but would achieve the same result. The same result would be achieved because the authority (or landowner) would be entitled to deny that the decision to make the order was a valid determination such as to attract the exemption conferred by section 67(3)(b).

Q.A4(b) *Is paragraph 2(2)of Schedule 14 to the 1981 Act satisfied if any one of the following apply?*

(i) a bald statement that land is not registered without any evidence of any other form of enquiry as to ownership

(ii) a report is given that land is not registered but is incorrect and there is no other form of enquiry

(iii) the enquiry as to ownership is limited to "the surface of the lane"

(iv) there is tacit acceptance by the surveying authority that assertions of non-registration satisfy Schedule 14, no evidence of Land Registry search is called for and no written direction is given that the site notice procedure may be followed

31. Paragraph 2(2) of Schedule 14 provides as follows:

> *"(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description 'owner' or 'occupier' of the land (describing it) and by affixing it to some conspicuous object or objects on the land."*

. The inquiry referred to must, we think, be inquiry on the part of the applicant. This is a sensible interpretation which is supported by paragraph 34 of Annex B to DOE Circular 2/1993:

> *"... consent [to serve notice by affixing to a conspicuous object] should not normally be withheld if the applicant can show that he or she has made every reasonable effort to identify the owner and occupier of the land".*

32. We answer questions (i) to (iv) set out in Q.A4(b) above as follows (we interpret the questions as asking whether the authority could properly give a direction under paragraph 2(2) in the circumstances mentioned):

(i) No.

(ii) No.

(iii) No.

(iv) No.

We think that in all the circumstances mentioned, the authority could not properly conclude that reasonable inquiry had been made such as to satisfy paragraph 2(2).

Q.A4c Would counsel's view on the above be any different if the facts of non-compliance with Schedule 14 had not been the subject of complaint, but the report to committee referred only to section 53(2) and (3) as the basis for the resolution and there was no

reference anywhere to the requirement for a determination under paragraph 3 of Schedule 14? This question is posed in the context of the correspondence referred to earlier.

33. See generally the discussion in paragraphs 25-30 above.

Q.A5 Putting together the answers to the above questions, Counsel are asked to advise on the framework which is to be derived from the 2006 Act and the 1981 Act so that a set of generic guidelines suitable for determining the validity and thus exemption under section 67(3) of an application can be applied in individual cases.

34. As at present advised, we think the more helpful approach is to seek to identify particular problems and then to address them in the manner set forth above. Indeed, we are doubtful whether such a framework could be produced, so as to be really helpful. In the end, the many intriguing problems which section 67 throws up will have to be worked out against the background of the detailed facts of actual cases. The whole of this Opinion needs to be read subject to that general observation.

B. The User Test (s.67(2)(a))

Q.B1 On whom is the burden of proof?

35. Where the term "burden of proof" is apposite, that is to say in the context of judicial or quasi-judicial proceedings, the burden is on the party seeking to rely on paragraph (a) of section 67(2). See paragraph 3 above. Where the issue of the applicability of the section 67(2)(a) exemption arises in the context of an application for a definitive map modification order, whether the user test is satisfied on the balance of probabilities (or, in a section 53(3)(c)(i) case, whether there is a reasonable allegation that it is, or is not[19], satisfied) is one of the issues on which the authority has to reach a conclusion on the basis of all relevant available evidence. See paragraph 4 above. There will be other situations, of which examples are given in paragraphs 38-41 below, in which a judgment will have to be formed on the basis of all relevant available evidence as to whether or not on the balance of probabilities the user test is satisfied, without there being a burden of proof on any party.

Q.B2 Is use for access regarded as use by the public?

36. We think the phrase "main lawful use by the public" was intended to exclude use by those who used the way for access. This would therefore include frontagers and those who, but for the public right of way, would have had a right to use the way in any event by virtue (i) of their ownership; or (ii) of having been granted an easement or licence; or (iii) of being the invitees (express or implied) of such owners or grantees of an easement or licence. (So the postman, fire service and milkman would be amongst those excluded.) The idea underlying the section, in our view, was to save from extinguishment those ways vehicular use of which (other than for access) outweighed use on foot or horseback (other than for access). Those who used ways for access without having an independent right to do so were separately protected by sub-sections 67(3)(c) and (5), so they would not be prejudiced by not being counted among "the public" for the purposes of section 67(2)(a).

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19 Depending on whether the order applied for is to show the way as a BOAT or a restricted byway.

Q.B3 How should the balance of use be measured?

37. Pragmatically. The Defra Guidance in paragraph 24 is in our view correct insofar as it says that the authority's judgment as to what was the main use of the way by the public between May 2001 and May 2006 must be arrived at by assessing the available evidence as to the relative volumes of different categories of use during that period – how to give effect to it is the problem. This is particularly so because the use may have been distorted by deliberately-engineered extra vehicular use, in some cases, in the period since first publication of the Government's proposals. In such cases, an evaluation of how a particular way is *currently* being used is unlikely to be a safe or reliable guide to the extent of use over the relevant 5 year period. If current evaluation is not a guide, how, in practice, the authority is to determine the matter is difficult to say. There is unlikely to be any scientific basis for the assessment; unless traffic surveys have been undertaken in respect of the route, there will be no statistical record of use, and the persons in the best position to give witness evidence from personal observation (affected landowners and occupiers, and users of the route) are self-interested – although they obviously should be invited to contribute to the evidential picture before any view is formed. Ultimately the authority (or the Secretary of State's inspector, or the court, depending on the forum in which the matter arises for decision) will just have to do the best that can be done on the basis of all relevant available evidence against the background of the character and condition of the way, where it leads, the surrounding highway network, and the inherent probabilities of the situation.

Q.B4 Who decides the user test and when?

38. It appears to us that there is a range of circumstances in which a highway authority or surveying authority cannot avoid having to take a view about the status of a way outside the context of existing court proceedings or 1981 Act modification processes. For one, the duty to assert and protect the public right of way which lies on highway authorities under section 130 of the Highways Act 1980 requires that a view be taken as to what the public right in question is. There is no escape from making such a judgment where a way, acknowledged to have been a public vehicular highway, is shown on the definitive map and statement but not as a BOAT, or is not shown at all, and vehicular users pray in aid section 67(2)(a) as having saved the public right of way for mechanically propelled vehicles from being extinguished. That is because, if extinction has

occurred, the public right on foot, horseback and with non-mechanically propelled vehicles can only be properly asserted and protected if action is taken against those who continue (unlawfully) to use the way with mechanically propelled vehicles. If in such circumstances, the authority is presented with evidence of use by eg off-roaders, the authority would not only have to form its own evaluation of that evidence: it would have to form a view as to the extent of use by other users over the 5 year period preceding 2 May 2006. This is all the more so where off-roaders have thrown down the gauntlet by defending themselves from prosecution in reliance on section 67(2)(a) or by positively requesting the authority to confirm that the exemption applies.

39. Moreover, vehicular ways (including minor ways which are neither recorded on the definitive map and statement nor on the list of publicly-maintainable streets) over which the public's right for mechanically propelled vehicles was extinguished on 2 May 2006 qualify to be shown as restricted byways. The surveying authority's duty under section 53(2) and (3)(i) of the 1981 Act is then to add the way as a restricted byway on the basis that rights on foot, horseback and horse-drawn carriage subsist (or are reasonably alleged to subsist), and to do so without anybody making an application under section 53(5). If the way is already shown as a footpath or bridleway, the authority would act under section 53(2) and (3)(c)(ii) of the 1981 Act.

40. It does not follow from this right/duty that an authority is bound to confine itself to the procedure prescribed by the 1981 Act for making a modification order in order to make a decision on whether the user test is satisfied. In a clear enough case, eg of a minor highway which has, and can be proved to have, fallen into disuse for mechanically propelled vehicles, where there is no reason to suppose that any other of the section 67(2) exemptions applied, an authority would be quite entitled to take any action lawfully open to it to prevent any member of the public traversing the way in a mechanically propelled vehicle. The authority would be entitled, in short, to make its own determination on such evidence and, having concluded that there was no relevant use by mechanically propelled vehicles during the 5 years prior to commencement, to take action to discourage use by those in control of mechanically propelled vehicles. Such discouragement could take the form of a warning letter, notices, prosecution or civil proceedings for a declaration as to the status of the way. However, if the mechanically propelled users were intransigent there is, at the end of the day, no alternative to court proceedings or using the 1981 Act procedures. The Defra Guidance at

paragraph 25 is technically correct to say that it would be for users claiming the benefit of the exemption to do so, but unless the authority is willing to commence court proceedings or to activate procedures for making a modification order under the 1981 Act, there is nothing in practice that the authority could do to prevent continuing use by mechanically propelled vehicles where such users were determined to go on using the way, except to promote a traffic regulation order.

41. Other examples of cases where a view has to be taken about the status of ways are to be found in the context of extinguishment/diversion procedures, where the availability of certain powers depends on the non-existence of full public vehicular rights (eg. section 118 of the Highways Act 1980), or when a highway authority has to come to a decision about the standard of maintenance required (different kinds of surface, and/or supporting structures eg. bridges, being required according to the classes of public traffic entitled to use the way). It will typically be impracticable to embark upon long drawn out 1981 Act modification processes in order to resolve such issues. The authority will simply have to come to a working view on the best evidence available. Fears that persons prejudiced by views arrived at without the benefit of a formal dispute resolution process (in court or at a public inquiry) would be left without remedy (such as to call for amending legislation) are, we think, unfounded. Once action was taken, or proposed to be taken, by an authority on the strength of such a view, an appropriate means of challenge would be available to anyone with a real interest in challenging it. In the context of a section 118 extinguishment order, for example, the authority's jurisdiction could be challenged as a ground of objection to the making, and (if made) the confirmation, of the order. A proposal to surface a way in a manner appropriate only for full vehicular highways could be challenged in injunction proceedings by a landowner who contended that the right for mechanically propelled vehicles had been extinguished. Any landowner who disagrees with an authority's assessment of the status of a way can commence court proceedings for a declaration on the subject. Any member of the public who disagrees with an authority's assessment that full vehicular rights exist can apply for a definitive map modification order. It is true that a member of the public who disagrees with an authority's assessment that full vehicular rights have been extinguished will be able to make such an application only where the way satisfies the BOAT definition in section 66 of the 1981 Act, so if he is relying on the section 67(2)(a) exemption, that course will be unavailable to him and he would technically need the Attorney-General's fiat to commence declaratory proceedings in court (unless he could find an alternative opportunity

to resolve the issue, eg. in proceedings under section 56 of the Highways Act 1980). But such a member of the public is in no worse a position than a member of the public claiming the existence of a full vehicular highway not satisfying the BOAT definition before the 2006 Act was passed.

C. DMMOs that are no longer valid because of extinguishment

Q.C1 Can existing DMMOs be replaced?

42. The situation postulated is one in which (none of the section 67 exemptions applying) section 67(1) has extinguished rights for mechanically propelled vehicles on 2 May 2006 in relation to a way as to which the authority had before 2 May 2006 decided to make a definitive map modification order showing the way as a BOAT and acted on that decision by making the order. Two possible scenarios then arise: either (i) by 2 May 2006 the order was the subject of an unwithdrawn objection which led to its being submitted to the Secretary of State for confirmation by him; or (ii) as at 2 May 2006, the order remained with the surveying authority, either because the objection period had not yet run; or because the objection period had expired without anybody objecting; or because there had been objections but they had all been withdrawn; or because there had been an objection which remained on foot but the authority had not yet submitted the order to the Secretary of State.

43. *Scenario (i).* There is no power for an authority to withdraw an order from the Secretary of State once submitted for confirmation. What it can do is to alter its own position from one of support for its order to one of opposition to it, and/or propose a suitable modification. The Secretary of State (or, in practice, his inspector) must carry on with the proceedings even if the authority's position is that extinction of rights for mechanically propelled vehicles has occurred, for several reasons. First, that is what the legislative scheme requires: see section 48(9) – (11) of the 2000 Act, and article 3 of the Countryside and Rights of Way Act 2000 (Commencement No. 11 and Savings) Order 2006[20], discussed further

[20] *"3.–(1) Nothing in sections 47 or 48 of the Act shall affect the operation of section 53 or 54 of, or Schedule 14 or 15 to , the 1981 Act in relation to –*
(a) a relevant order made before the appointed day; or
(b) an application made before the appointed day for a relevant order.
(2) In particular, where, before the appointed day, a surveying authority has made a relevant order under section 54 of the 1981 Act, but that order has not yet come into operation –
(a) the order shall continue to have effect on and after the appointed day, and

below in paragraph 45. Secondly, there is no certainty that the true status of the way was ever vehicular. If, for example, the inspector concluded that the true status was that of bridleway then there were no vehicular rights in the first place and the 2006 Act is irrelevant. He would propose a modification of the order to show a bridleway. Thirdly, even where an authority does not feel able to support its own order, the applicant and other members of the public should be given the opportunity to do so and to satisfy the inspector that a section 67 exemption applied after all. Fourthly, the inspector might be satisfied that there were rights for mechanically propelled vehicles until extinguishment thereof occurred on 2 May 2006, in which case the question arises whether he would have power to propose a modification of the order to show the way as a restricted byway (see and compare paragraph 6 above). Clearly, that would not be an option in the case of a former RUPP automatically reclassified as a restricted byway under section 47 of the 2000 Act; but then in such a case neither would it be necessary. (The definitive map cannot be modified under section 53 to show something which it shows already, and under section 54, there is no provision recognising restricted byways.) The correct course would, we think, be to refuse to confirm the order (however uncomfortably that sits with the wording of section 54).

44. Even in other cases, there is at first sight a technical difficulty in the way of such a modification, sensible as it may seem. The order will specify a "relevant date" antecedent to its making (albeit by no more than 6 months), as it is required to do by section 56(3) of the 1981 Act and the form of order prescribed in the 1993 Regulations, Schedules 2 and 3. It is as at the date so specified that the entry of the way in the definitive map and statement would provide conclusive evidence of the status of the way as a BOAT: section 56(1)(c), (2)(b). So in the case of an order adding a BOAT made on (say) 1 April 2006 with a relevant date of 1 January 2006, it would seem wrong to modify that order to show the way as something which at the relevant date it was not and could not have been, ie. a restricted byway, without also modifying the relevant date by substituting a date after 2 May 2006 – and it is highly questionable in our view whether that is a modification within the Secretary of State's powers. However, it would be

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(b) the provisions of Schedule 15 to the 1981 Act shall continue to have effect in relation to the order,

as if section 54 had not been repealed."

"Relevant order" means an order relating to a way shown as a RUPP made under either section 54 or section 53(c)(ii).

absurd to require the inspector to confirm the order showing the way as a BOAT on the basis that that is what it was at the relevant date, leaving the authority to make a legal event order under section 53(3)(a)(ii) to remove it (a highly unsuitable procedure where the grounds of extinguishment would involve disputed factual matters, there being no right of objection or inquiry). It would also be absurd to require the inspector to refuse to confirm it at all on the basis that paragraph 7(3) of Schedule 15 confers a discretion to refuse to confirm where it would be futile to do so, eg. because there has been a total extinguishment of rights over the route since the relevant date. The answer is, we think, that it does not actually matter if the upshot is that the entry of the way in the definitive map and statement provides conclusive evidence under section 56(1)(d) that there was at the (pre-2 May 2006) relevant date a highway along its route and that the public had thereover at that date rights of way on foot, horseback and with non-mechanically propelled vehicles, that paragraph being expressed to be *"without prejudice to any question whether the public had at that date any right of way other than those rights"*.

45. *Scenario (ii).* The authority would appear to have two options, depending on the facts. If there was no objection at the end of the objection period, or any objections that had been made were withdrawn, the authority would ordinarily be entitled itself to confirm the order under paragraph 6(1)(a) of Schedule 15 to the 1981 Act. However, faced with clear evidence of extinction of the rights for mechanically propelled vehicles under section 67(1), *prima facie* the authority would be entitled either to not confirm the order[21] and make and promote a restricted byway modification order instead, or submit the order to the Secretary of State for confirmation with modifications (to show the way as a restricted byway) under paragraph 6(1)(b) of that Schedule.[22] Of course, if there were objections which were *not* withdrawn, the authority would have to submit the order to the Secretary of State anyway (under paragraph 7(1) of Schedule 15). We think that the proper course even in the absence of objections would be to submit the order to the Secretary of State under paragraph 6(1)(b) rather than to refuse to confirm it under section 6(1)(a). That is not only because of the possibility that the authority might be wrong, and because the legislative scheme is to continue, not abandon, ongoing modification processes, but because the

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21 The authority has a discretion *not* to confirm an unopposed order which is impliedly conferred by paragraph 6(1)(a) *("the authority <u>may</u> confirm the order without modification").*

22 Paragraph 6(1): *"… the authority may: …(b) if they require any modifications to be made, submit the order to the Secretary of State for confirmation by him".*

effect of not doing so in relation to former RUPPs would be to lose the potential benefit of section 48(11) of the 2000 Act[23]. In a case where the true status of a RUPP had not after all been vehicular, but only a bridleway or footpath, the conferment of restricted byway rights by section 48(1) is only undone by the taking effect of a modification order made or applied for before the commencement of section 47.

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26 January 2007

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[23] *"(11) Where–*

(a) by virtue of an order under subsection (3) of section 103 ("the commencement order") containing such provision as is mentioned in subsection (5) of that section, an order under Part III of the 1981 Act ("the Part III order") takes effect, after the commencement of section 47, in relation to any way which, immediately before that commencement, was shown in a definitive map and statement as a road used as a public path,

(b) the commencement order does not prevent subsection (1) from having effect on that commencement in relation to that way, and

(c) if the Part III order had taken effect before that commencement, that way would not have fallen within subsection (1),

all rights over that way which exist only by virtue of subsection (1) shall be extinguished when the Part III order takes effect."

IN THE MATTER OF SECTION 67 OF THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

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