

Roads and Rights of Way Committee

4

Dorset County Council



Date of Meeting	7 October 2010
Officer	Director for Corporate Resources
Subject of Report	Determination of Applications to Modify the Definitive Map and Statement of Rights of Way to Record Byways Open to All Traffic (BOATS)
Executive Summary	<p>In 2006 the Natural Environment and Rural Communities Act introduced changes to the law so as to curtail the future scope for establishing and recording public rights of way for mechanically propelled vehicles.</p> <p>Amongst other steps the 2006 Act extinguished <u>subject to exemptions</u> any existing but unrecorded public rights of way for mechanically propelled vehicles. One of the exemptions is contained within a transitional provision the effect of which is to preserve from extinguishment an existing public right of way for mechanically propelled vehicles which before 20 January 2005 was the subject of an application to show the way as a byway open to all traffic (BOAT).</p> <p>The County Council received thirteen BOAT applications before the 20 January 2005 cut off date. Representatives of objectors to some of these applications maintain that the applications do not comply with the requirements for valid applications set out in the Wildlife and Countryside Act 1981. They contend that if the applications were not made strictly in accordance with the 1981 Act then they should be refused. The question of compliance with the requirements of the 1981 Act centres mainly around the use of computer generated maps and whether the maps used are invalid enlargements of small scale maps. The applicant maintains that he has acted in strict compliance with the 1981 Act.</p>

	<p>This report considers the respective arguments of the applicant and objectors. Both the applicant and the Green Lanes Protection Group (GLPG) were invited to comment on a draft version of this report. This report reflects some comments made on behalf of GLPG but there has been no response from the applicant to an invitation to comment.</p> <p>Having considered the transitional provisions in the 2006 Act and other possible exemptions the report recommends that the outstanding applications be refused.</p>
<p>Impact Assessment:</p>	<p>Equalities Impact Assessment: This report concerns the application of the legal requirements contained in the 2006 and 1981 Acts and does not give rise to the need for an impact assessment.</p> <p>Use of Evidence: Recommendations in this report are based upon the application of relevant law and guidance.</p> <p>Budget/ Risk Assessment: Any financial implications arising from proposed modifications to the definitive map are not material when considering evidence relating to the existence or otherwise of public rights and the application of the law to determine whether modifications are required to the definitive map.</p>
<p>Recommendation</p>	<ol style="list-style-type: none"> 1. That the following applications all be refused: <ol style="list-style-type: none"> i) byway open to all traffic at Bailey Drove, Batcombe/Leigh ii) upgrade Bridleway 8 (part) Cheselbourne and Bridleway 18, Dewlish to byway open to all traffic (Doles Hill Plantation east to Chebbard Gate) iii) upgrade Bridleway 12, Tarrant Gunville to byway open to all traffic and to add an unclassified road in Chettle as byway open to all traffic (one continuous route) iv) upgrade Bridleway 14, Beaminster to byway open to all traffic (Meerhay to Beaminster Down) v) upgrade Bridleways 17 and 35 to byway open to all traffic and to add an unclassified road as byway open to all traffic (one continuous route -Crabbs Barn Lane) 2. That for those other pre 20 January 2005 applications for byways open to all traffic where the County Council has already made a decision the County Council's stance in any further local inquiry or other process be modified: <ol style="list-style-type: none"> a) to reflect the Committee's view that applications supported by computer generated enlarged versions of ordnance survey maps are not in strict compliance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981. b) to recognise that any failure to supply copy documents of evidence relied upon also constitutes non compliance.

Reason for Recommendation	<ol style="list-style-type: none"> 1. For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question were accompanied by computer generated enlargements of ordnance survey maps and not by maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused. 2. The question of compliance is in all respects an overriding factor in the determination of any application in relation to rights for mechanically propelled vehicles.
Appendices	<ol style="list-style-type: none"> 1. Report of the Director for Corporate Resources to the 12 May 2009 meeting of the Roads and Rights of Way Committee. 2. Schedule of relevant legislation. 3. Representations made by the applicant. 4. Letters dated 19 March and 10 December 2009 from the Ordnance Survey.
Background Papers	DEFRA Guidance on Part 6 of the Natural Environmental and Rural Communities Act 2006 and Restricted Byways
Report Originator and Contact	<p>Name: Jonathan Mair Tel: 01305 224181 Email: j.e.mair@dorsetcc.gov.uk</p>

1. Background

- 1.1. At its meeting on 12 May 2009 the Roads and Rights of Way Committee considered the report included as Appendix 1. Members accepted the recommendations set out including that in the case of applications to record byways open to all traffic made before 20 January 2005 each application shall be reviewed to consider whether it is strictly in compliance with the provisions of the Wildlife and Countryside Act and the Committee agreed an approach that should be followed, as set out in Appendix 3 to the report.
- 1.2. The approach previously agreed by the Committee involves considering compliance with the Wildlife and Countryside Act as part of the wider investigation of each application including detailed consideration of all of the evidence relating to each application.
- 1.3. Objectors believe that the County Council should be able to make a free standing decision on the question of compliance with the Wildlife and Countryside Act without the need to wait for a full investigation of all other factors relating to each application. If the Committee was to adopt this two stage approach then if, at stage one, members were to conclude that an application to add public rights of way for mechanically propelled vehicles to the definitive map and statement did not comply

with the 1981 Act then the application would be refused at that point without the need for further investigation and the applicant would then be entitled to appeal against the County Council's decision. The applicant can alternatively make a fresh application in a compliant form although, for the reason set out below, this could not lead to the recording of any vehicular rights for mechanically propelled vehicles.

2. The Law and Guidance

- 2.1. Appendix 2 to this report is a schedule of legislation relevant to the issues raised in this report. The schedule sets out in full sections 66 and 67 of the Natural Environment and Rural Communities Act 2006 the effect of which are to restrict the creation of new public rights of way for mechanically propelled vehicles and to extinguish, subject to exceptions unrecorded public rights of way for mechanically propelled vehicles on routes which immediately before the commencement of the Act were not shown on the definitive map and statement or were shown only as being subject to footpath, bridle way or restricted byway rights.
- 2.2. Transitional provisions contained in section 67 subsection 3 of the 2006 Act protect from extinguishment public rights of way for mechanically propelled vehicles if those rights were the subject of an application made before 20 January 2005 under section 53 (5) of the Wildlife and Countryside Act 1981.
- 2.3. Section 53 (5) of the Wildlife and Countryside Act enables any person to apply to the County Council for an order modifying the definitive map and statement as a consequence of certain events listed in subsection 3, including that a right of way which is not in the map and statement subsists or is reasonably alleged to subsist or 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.
- 2.4. The five applications listed in the first recommendation, above, were all made under section 53 (5) and before the cut off date of 20 January 2005. On the face of it therefore these applications meet the transitional provisions in the 2006 Act, should be investigated and if the evidence justifies this then orders should be made to modify the definitive map and statement to record them as byways open to all traffic. However, the law also requires that applications must be made in a form that complies with the requirements of schedule 14 to the Wildlife and Countryside Act. This is considered below.
- 2.5. Paragraph 1 of schedule 14 to the Wildlife and Countryside Act requires that an application shall be made in the prescribed form and shall be accompanied by a map drawn to the prescribed scale and showing the way or ways to which the application relates. Regulations made under the 1981 Act provide that, consistent with the definitive map itself, the prescribed scale of the map which accompanies an application is a scale of not less than 1:25,000.
- 2.6. In May 2008 DEFRA published version 5 of Guidance for Local Authorities, Enforcement Agencies, Rights of Way Users and Practitioners on part 6 of the 2006 Act. At paragraph 39 onwards the guidance comments upon the transitional provisions in section 67 (3) of the 2006 Act and advises that:

“In every case it is necessary, under sub section 67 (6) that the application is made strictly in accordance with paragraph 1 of schedule 14 to the Wildlife and Countryside Act 1981, as prescribed by the relevant regulations.”

The DEFRA guidance goes on to refer to the important case of R (Warden and Fellows of Winchester College and Humphry Feeds Ltd) v Hampshire County Council and Secretary of State for the Environment, Food and Rural Affairs. In that case the Court of Appeal determined that in order to benefit from the transitional provisions in section 67 (3) of the 2006 Act an application must have been made in the prescribed form and be accompanied by both a map drawn to a scale of not less than 1:25,000 showing the way in question and copies of all the documentary evidence relied upon by the applicant.

- 2.7. It is clear from the Court of Appeal's decision in the Winchester case that an application not made strictly in accordance with the requirements of schedule 14 to the Wildlife and Countryside Act and the regulations is not "Winchester compliant" and hence does not benefit from the transitional provisions which would otherwise prevent the extinguishment of existing unrecorded rights of way for mechanically propelled vehicles. The DEFRA guidance supports the Court of Appeal's decision, if such support is needed.

3. Are the applications in question "Winchester compliant"?

Maps

- 3.1. Paragraph 1 of schedule 14 to the Wildlife and Countryside Act requires that an application shall be made in the prescribed form and shall be accompanied by a map drawn to the prescribed scale and showing the way or ways to which the application relates. Regulations were made under the 1981 Act and provide that, consistent with the definitive map itself, the prescribed scale of the map which accompanies an application is drawn to a scale of not less than 1:25,000.
- 3.2. The Ordnance Survey state that their data has a nominal scale of 1:50,000 and is view with best clarity at scales between 1:15,000 and 1:60,000 and that it is only outside of these recommended scales that pixilation may become an issue.
- 3.3. Each of the applications in question is accompanied by a computer generated map purporting to have been drawn at a scale of 1:25,000. However those who object to the applications contend that the maps were in fact drawn at a scale of 1:50,000 by the Ordnance Survey but have been enlarged using computer software.
- 3.4. The Court of Appeal in the Winchester case did not consider the meaning of "drawn" and whether a photographic enlargement of what was originally a 1:50,000 scale map enlarged to 1:25,000 or better would be "Winchester compliant". However, in the context of photographic enlargements DEFRA officials have concluded that where an application is accompanied by a map drawn to a scale of 1:50,000 photographically enlarged to 1:25,000 the courts would be likely to take the view that this would amount to a failure to comply strictly with the requirements of the legislation and that such a failure would not be regarded as de minimis. The officials therefore conclude that authorities should regard such applications as not qualifying under the transitional provisions in section 67 (3) of the 2006 Act.
- 3.5. The position over computer generated maps is more complex than those that are photographically enlarged. The applicant maintains that objectors have pressurised DEFRA to change their policy in relation to photographic/photocopy enlargements of maps and that there is nothing in the legislation about how maps should be drawn or what level of details should be shown. He then distinguishes computer generated map images from photographic enlargements. DEFRA have declined to be drawn on

the matter of generated maps, acknowledging that this is a technical legal matter that will be resolved by the courts.

- 3.6. The applicant maintains that the maps were printed using computer mapping software and were drawn to a minimum 1:25,000 scale. He explains how Ordnance Survey mapping is generated from large scale digital base data and that when the applicant uses his mapping software he is able to select any scale he wishes and the map is drawn (on screen and/or printed on paper) at that scale. Thus the applicant maintains that he is not taking a map at a given scale and enlarging it to a different scale and the submitted application maps only gained a scale when they were printed on his laser printer.
- 3.7. The applicant's points are set out in full in appendix 3 to this report. This information includes a technical description of the use of digital information in "RASTER" format through which mapping information is stored as a series of coloured dots suitable for printing at a scale of anything from 1:15,000 to 1:60,000.
- 3.8. On 24 May officers met with representatives of the Green Lanes Protection Group (GLPG), the main business of the meeting being to hear their representations about the invalidity of applications accompanied by computer generated maps. The applicant was invited but was unable to attend this meeting. His representations, set out in Appendix 3 to this report were put to GLPG and they were invited to comment.
- 3.9. At the meeting on 24 May, GLPG enlarged on an earlier paper provided to the County Council and explained their view that the computer software used by the applicant enabled maps to be viewed and printed at differing levels of enlargement. However, the base information being worked from was a 1:50,000 Ordnance Survey map which in these cases the applicant had enlarged using the software. GLPG were familiar with the programme used (Anquet Maps) which was clearly identified on the application maps and where, as they explained, the labelled scale 1:50,000 remains fixed whatever the enlargement. In addition Ordnance Survey letters were produced which GLPG said confirmed these facts, that they scale and detail are inherently linked and the supply of a scale based product to Anquet. In GLPG's view the key to the differences lies in the failure by the applicant to recognise that Ordnance Survey base data may carry no scale but that is not true of the products sold to agents and used by the public (including the applicant).
- 3.10. GLPG also drew attention to what they said was the applicant's confirmation in some applications that the maps submitted were blown up copies of 1:50,000 maps and a statement to the County Council that the process used "applies to all maps submitted with our applications". Furthermore DEFRA had not changed its policy, it had simply clarified an ambiguous statement.
- 3.11. At the same meeting there was a technical discussion of the difference between Raster and Vector mapping. Raster mapping involved taking a scan of a drawing. That scan is composed of a certain number of pixels. A Raster map can be magnified but the base information (the number of pixels) remains the same. In the view of GLPG such magnification of Raster mapping using computer software is much the same as photographically enlarging a map of a certain scale. Vector mapping is different as it works from co-ordinates rather than pixels and Vector mapping does enable the scale of a map to be changed electronically.
- 3.12. Officers have considered the competing points of view of the applicant and GLPG. In the absence of any determination by the Courts on the status of computer generated mapping in these circumstances, it is for the County Council through the Roads and

Rights of Way Committee to make its best determination of what it believes the correct position to be. What is absolutely clear is that as a result of the Winchester case the law requires that in order for an application to benefit from the transitional provisions in the Natural Environment and Rural Communities Act then there must be strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act. In the view of the Head of Legal and Democratic Services the applications in question are not strictly in compliance. The taking of a 1:50,000 scale map and then through computer software being magnified and reproduced is very much like a photographic enlargement. The base information (the number of pixels making up the map and its features) remains the same and it is simply the size of the pixels rather than the original scale of the map which is enlarged.

- 3.13. In reaching this conclusion the Head of Legal and Democratic Services has advised that neither he nor any other officer is able to point to a definite decision of the Courts on this point but in his judgement the argument of GLPG is to be preferred. In reaching this conclusion he has taken account of the letters set out at appendix 4 to this report. The letter dated 19 March 2009 from the Ordnance Survey is especially clear. In that letter the Ordnance Survey write:-

“As this extract has been produced from our 1:50,000 scale Raster product, as suggested by Jonathan Stuart, this is still an enlargement of 1:50,000 scale mapping, rather than a 1:25,000 scale map. The definition of Raster data is digital material where the information is made up of pixels. An example of Raster data is a scanned image or photograph. When enlarging Raster data, it is the pixels that are being enlarged, meaning that the greater the enlargement, the more distorted and inaccurate the image becomes. It is only with Vector data, which is made up from straight lines joining 2 data points, that it is possible to enlarge the data accurately, and the extract enclosed is not a Vector image.”

It is clear from 23 March 2009 letter that the Ordnance Survey consider the maps in question to be enlarged 1:50,000 scale maps and not 1:25,000 scale maps. If this is correct then the use of such enlargements means that the applications in question are not Winchester compliant. As the data used for the original maps from which the application maps have been produced was at a nominal scale of 1:50,000 it could be argued that the application maps are at or better than the prescribed scale. However, it is the manner in which the application maps were drawn that is in issue.

- 3.14 In a follow up letter dated 10 December 2009 the Ordnance Survey comment on a number of specific points. In the fourth paragraph of their letter, the Ordnance Survey comment on the term “photographic enlargement”. This is not a term used by the Ordnance Survey themselves. However, they regard it as an acceptable term to describe what has happened in this case ie the enlargement of a map that was drawn at a scale of 1:50,000 by the Ordnance Survey. The letter also helpfully comments on the use of the term “drawn” in relation to mapping. The legislation requires that an application is accompanied by a map drawn at a scale of not less than 1:25,000. The applicant argues that the application maps were drawn when he printed them from his computer. GLPG maintain that the maps were drawn and the scale therefore set when they were produced by the Ordnance Survey. Again, “drawn” is not a term used by the Ordnance Survey but in the penultimate paragraph of their letter they do comment helpfully on the process of digital map production. Digital mapping is “produced” and any printing of that map is a “redrawing” or a “facsimile”.
- 3.15 A redrawing of an Ordnance Survey map is a printing of the map at its original scale.

A facsimile is an image which is printed or copied, where the mapping is identical to that produced by the Ordnance Survey but the mapping has been enlarged or reduced in size or has had additional information added by a third party. It is clear to me that what the applicant has provided are not drawings at a scale of not less than 1:25,000 or redrawings but instead he has provided enlarged facsimiles of maps produced by the Ordnance Survey at a scale of 1:50,000.

4. Next steps

4.1 In the light of the above conclusions the Committee are advised that the applications listed in the first recommendation should be refused on the basis that they are not Winchester compliant and therefore do not benefit from the transitional provisions in the Natural Environment and Rural Communities Act. Consistent with this the second recommendation relates to the County Council's stance in relation to similar applications already determined by the County Council.

4.2 Refusal of the applications gives the applicant an entitlement to appeal to the Secretary of State. If the Committee was to reach the conclusion that the applications are Winchester compliant then the applications would be the subject of individual reports making recommendations about the claimed vehicular rights.

Copy Documents

4.3 In their representations GLPG make the point that the requirements relating to applications are not confined to maps. The applicant must also attach copies of all evidence relied upon in support of the application, a requirement which was also confirmed in the Winchester case as calling for strict compliance. In the case of *Maroudas v Secretary of State for Environment, Food and Rural Affairs* the Court of Appeal held that all such documents must be supplied within a very short period from the date of the application. In determining the County Council's stance in relation to the pre 20 January 2005 applications where a decision has already been made the Committee are invited to conclude that a strict approach should be taken under which the County Council opposes any reliance by the applicant upon documentation which was not provided at the time of the application or shortly afterwards.

4.4 In addition to the transitional provisions the Natural Environment and Rural Communities Act contains a number of exceptions which preserve from extinguishment certain public motor vehicular rights not already recorded as such on the definitive map and statement, as follows:-

- The first exception relates to ways that are part of the ordinary roads network i.e. those that have been lawfully used more by motor vehicles than by other categories of user.
- Ways that are both recorded on the list of streets as being maintainable at public expense and which are not recorded on the definitive map and statement.
- Ways that have been expressly created or constructed for motor vehicles.
- Ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
- The final exception preserves from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive off road.

Page 9 - Determination of Applications to Modify the Definitive Map and Statement of Rights of Way to Record Byways Open to All Traffic (BOATS)

The applicant has not relied in the applications upon any of the above exceptions. Accordingly, if the Committee concludes that the applications are not Winchester compliant and if the applicant is unsuccessful in any appeal then there will be no question of public vehicular rights over any of the routes in question.

- 4.5 The five applications listed in the first recommendation should be refused on the basis that they are not compliant with the regulations in respect of maps. In the case of all other pre January 2005 BOAT applications the County Council's stance should be to resist the establishment of rights for mechanically propelled vehicles on the basis that the applications are not Winchester compliant as to maps. In addition such rights should be resisted where evidence relied upon by the applicant was not made available at the time of the application or shortly afterwards

Elaine Taylor
Director for Corporate Resources
September 2010.

Agenda Item:

12

Roads and Rights of Way Committee

Dorset County Council



Date of Meeting	12 May 2009
Officer	Director for Corporate Resources
Subject of Report	Applications to modify the definitive map and statement of rights of way to record byways open to all traffic (BOATS)
Executive Summary	The purpose of this report is to consider, in the light of Counsel's advice, the Council's approach to outstanding applications for BOATS to be added to the definitive map and statement of rights of way; with particular reference to the effect of the Natural Environment and Rural Communities Act 2006 (NERC) following the Court of Appeal decision in <i>The Queen on the Application of Warden and Fellows of Winchester College and Humphrey Feeds Limited V Hampshire County Council -and- The Secretary of State for Environment, Food and Rural Affairs [2008] EWCA Civ 431 (Winchester)</i> .
Budget/Risk Implications	Any financial implications arising from proposed modifications to the definitive map are not material when considering evidence relating to the existence or otherwise of public rights and applying the law to determine whether modifications are required to the definitive map. The number of outstanding applications to be determined has resource implications and timescale implications and consequent delay in considering applications may lead to complaints against the County Council.
Recommendations	That: <ol style="list-style-type: none"> 1. Applications continue to be investigated and submitted to this Committee for determination in accordance with the Committee's Statement of Priorities; and, 2. In the case of applications to record byways open to all traffic made before 20th January 2005 each application

	<p>shall be reviewed to consider whether it is strictly in compliance with the provisions of paragraph 1 of Schedule 14 Wildlife and Countryside Act 1981 (WCA) in accordance with the decision of the Court of Appeal in Winchester, in particular that the approach outlined in Appendix 2 be used in relation to considering application maps.</p>
Reason for Recommendations	<p>The County Council has a duty to make modifications to the Definitive Map and Statement to record the correct status of public rights of way.</p> <p>The Committee's Statement of Priorities for Definitive Map Modification Orders sets out the Committee's policy for the order in which applications to modify the definitive map and statement should be investigated and reported to the Committee.</p> <p>NERC extinguished public rights for motorised vehicles in certain circumstances. Exceptions apply and the Court of Appeal in Winchester has clarified that applications made before the 20th January 2005 must be strictly in compliance with the provisions of paragraph 1 of Schedule 14 WCA in order to benefit from the exception in section 67(3) NERC.</p>
Appendices	<ol style="list-style-type: none"> 1. Table: "Outstanding Byway Claims Received Before The 'Cut-Off Date' Of 20 January 2005"; 2. Opinion of Brian Ash QC: February 18th 2009 In the Matter of the Validity of Applications for Definitive Map Modification Orders; 3. Approach to application plans when considering whether section 67(3) NERC applies to an application to record public vehicular rights;
Background Papers	<p>DEFRA publication entitled "Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways: A guide for local authorities, enforcement agencies, rights of way users and practitioners Version 5 - May 2008"</p>
Report Originator and Contact	<p>Name: Sarah Meggs Tel: 01305 225104 Email: s.l.meggs@dorsetcc.gov.uk</p>

1. Background

- 1.1. The definitive map and statement for an area is a conclusive record of public rights of way referred to in it, but is without prejudice to any other or higher rights that may exist.
- 1.2. Section 53(2) WCA places a duty on the County Council, as surveying authority, to keep the definitive map and statement under continuous review. This includes the making of any modification orders that appear necessary as a result of the occurrence of any of the events specified in section 53(3) WCA.
- 1.3. Section 53(3)(c) WCA includes the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that an amendment should be made to the map and statement.
- 1.4. Section 53(5) WCA provides that any person may apply for a modification order to be made. Schedule 14 WCA provides that such an application must be in the prescribed form and be accompanied by (a) a map drawn to a scale of not less than 1/25,000 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.
- 1.5. NERC extinguishes any public vehicular rights not recorded on the definitive map and statement on 2 May 2006 subject to specified exemptions. One exemption is that an application for public vehicular rights to be recorded on the definitive map and statement had been made to the County Council before 20 January 2005.
- 1.6. Appendix 1 lists the outstanding byway applications received before the 'cut-off date' of 20 January 2005. Some have been determined by the County Council but are subject to ongoing proceedings. Six of the applications listed have not yet been investigated and/or finally determined by the County Council and one is to be reconsidered by the Committee.
- 1.7. The applications are in the prescribed form but are accompanied by plans which are generally digitally enlarged copies of smaller scale OS plans.
- 1.8. The applications enclose electronic copies of the primary sources of evidence relied on. Some applications, however, also refer to further evidence that does exist and may be submitted at a later date.
- 1.9. At its meeting on 4 July 2007 the Committee approved a statement of priorities for dealing with applications for definitive map modification orders. Essentially, applications shall be dealt with in order of receipt unless one of the listed exceptions applies. In fact this means that the applications in question will be dealt with next, depending upon the Committee's decision in relation to this report.

2. Impact of Winchester

- 2.1. The Court of Appeal in Winchester considered the extent to which an application must comply with paragraph 1 of Schedule 14 WCA in order to be exempt from the general extinguishment provisions of NERC.

- 2.2. The Court ruled that such an application must comply with the strict requirements of paragraph 1 of Schedule 14 WCA in order to benefit from the exception in section 67(3)(a) NERC.
- 2.3. In that case, the applications had been accompanied by a list of the documentary evidence relied on but not copies of the documents. Accordingly, the Court considered that the strict requirements of paragraph 1 of Schedule 14 WCA had not been complied with and, for the purposes of section 67 NERC the application was not valid.
- 2.4. The Court of Appeal did not consider the meaning of “drawn” or the nature of the plan required to be submitted with the application.

3. DEFRA guidance

- 3.1. Paragraph 6 of the DEFRA publication entitled “Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways: A guide for local authorities, enforcement agencies, rights of way users and practitioners Version 5 - May 2008” makes it clear that NERC does not relieve local authorities of their obligation to process all definitive map modification order applications for BOATs to a full determination.
- 3.2. The guidance suggests that in the case of applications made after 20 January 2005, where a public right of way for vehicles can be established, but has been extinguished by NERC, such determinations may give rise to a restricted byway. This suggestion would apply equally to cases where an application was made before 20 January 2005 but was not “Winchester valid”.
- 3.3. Paragraph 42 of the guidance clarifies that, in the context of BOAT applications, local authorities should make the decision as to whether applications are exempt under subsection 67(3) NERC as part of processing of the definitive map modification order applications.
- 3.4. Essentially the guidance supports a two part sequential process:
 - 3.4.1. First establishing whether a public right of way for mechanically propelled vehicles existed immediately before commencement on 2 May 2006;
 - 3.4.2. Second, if it is established that a public right of way for vehicles exists, is to apply the tests in subsections 67(2) and 67(3) NERC to establish whether that public right of way for mechanically propelled vehicles was extinguished.

4. Submissions to the County Council and Counsel’s opinion

- 4.1. The validity of the outstanding applications has been challenged on 2 grounds. That:
 - 4.1.1. as the applications plans are enlarged copies of a plan to a smaller scale than 1/25 000, it is not “drawn” to the requisite scale, and
 - 4.1.2. the applications refer to the possibility that further evidence may be submitted at a later date.
- 4.2. On the basis that the applications are, therefore, invalid in Winchester terms it has been requested by objectors that all outstanding applications to record public vehicular status are dismissed without further investigation.

- 4.3. In order to assist the County Council in considering these representations officers asked Brian Ash QC to advise the County Council in its role as a neutral decision making body. In particular the following questions were asked:
 - 4.3.1. whether it is within DCC's power to refuse to investigate at all the status of the routes the subject of the applications, either on the basis of a defective plan, or that all evidence is not enclosed with the application; and
 - 4.3.2. Whether plans are "drawn" for the purposes of WCA if they are enlarged copies of smaller scale plans and/or computer generated;
 - 4.3.3. Whether applications are duly made and/or "Winchester compliant" if some documents are copied with the applications and others are not.
 - 4.3.4. Whether, the applications appear duly made such that the evidence should be considered by DCC in the usual way; or
 - 4.3.5. Whether, in any event, DCC has a duty to investigate the status of the application routes in accordance with section 53(2)(b) WCA;
 - 4.3.6. If DCC must (or chooses to) consider the routes subject to the applications and considers that, on the balance of probabilities the evidence shows that public motor vehicular use is shown to exist before 2 May 2006, whether the applications received before the relevant date appear compliant for the purposes of benefiting from the exemption in section 67(3)(a) NERC.
- 4.4. Counsel's advice is attached at appendix 2. In particular, Counsel:
 - 4.4.1. does not come to a final conclusion on the validity of the application plans but gives guidance on the approach to be adopted when considering the plans. This has informed preparation of the document at appendix 3.
 - 4.4.2. considers that there is a sound basis upon which the Council can find the applications to be valid in relation to the documentary evidence.
 - 4.4.3. advises that if any of the applications are found to be invalid for the purposes of WCA, the Council is empowered to determine them if it can conclude that any procedural irregularities can be waived. Further, notwithstanding any question of validity of the applications, the material which accompanies the applications constitutes evidence discovered by the Council within the meaning of section 53(3)(c) Wildlife and Countryside Act 1981. It, therefore, has a duty to consider the applications under section 53(2)(b).
 - 4.4.4. advises that if the applications are found to be valid in relation to section 67 NERC the Council is obliged to determine them on the basis that there has been no statutory extinguishment of any existing motor vehicular rights. If not valid for the purposes of section 67 NERC, as now interpreted by the Court of Appeal in Winchester, then evidence of public vehicular rights will result in restricted byway status.
- 4.5. Counsel has subsequently been asked to comment on the proposed approach to application plans set out at appendix 3. Counsel is satisfied that the proposed approach is acceptable.

5. Conclusions

- 5.1. Irrespective of whether an application is Winchester valid, an application for BOAT status still needs to be investigated to determine whether restricted byway or some other status should be recorded. The evidence accompanying these applications has been brought to the County Council's attention and even if, for technical reasons, an application is defective the County Council has a duty to investigate evidence of which it is aware.
- 5.2. In view of this it seems appropriate that the applications are managed in accordance with the Statement of Priorities and that the validity issue is considered as part of that process.
- 5.3. The practical importance of Winchester validity means that a defective application cannot benefit from the exception in section 67(3)(a) of NERC. If no other exception applies to the route in question, public rights for mechanically propelled vehicles will have been extinguished. There may, however, be a basis upon which a restricted byway should be recorded.

Table: "Outstanding Byway Claims Received Before The 'Cut-Off Date' Of 20 January 2005"

PARISHES	DETAILS	CLAIMED STATUS
CHESELBOURNE / DEWLISH	UPGRADE BR 8, CHESELBOURNE (PT) AND BR 18, DEWLISH TO BYWAY	BYWAY
PIDDLEHINTON / PIDDLETRENTHIDE	UPGRADE BR 18 (PT), PIDDLEHINTON AND BR 18, PIDDLETRENTHIDE TO BYWAY	BYWAY
PIDDLETRENTHIDE	UPGRADE BR 2(P.T) AND BR 14 (PT) TO BYWAY AND ADD BYWAY LINKING TO BR 2	BYWAY
TARRANT GUNVILLE & CHETTLE	UPGRADE BR 12, TARRANT GUNVILLE TO BYWAY AND ADD UCR IN CHETTLE TO DEF MAP	BYWAY
BEAMINSTER	UPGRADE BR 14, BEAMINSTER TO BYWAY	BYWAY
BEAMINSTER	UPGRADE BRs 17 AND 35 AND ADD PART UCR AND PART UNRECORDED AS BYWAY – CRABB'S BARN LANE	BYWAY
CORFE CASTLE	UPGRADE BR FROM CORFE CASTLE TO CHURCH KNOWLE ROAD BR 70 (PART)	BYWAY
CHESELBOURNE/ DEWLISH	UPGRADE BR 6 CHESELBOURNE AND BR 3, DEWLISH TO BYWAY	BYWAY
PIDDLEHINTON	UPGRADE BR 3(P.T) TO BYWAY	BYWAY
BATCOMBE / LEIGH	UPGRADE FP 11(P.T) BATCOMBE, ADD BYWAY FROM FP 3 TO BR 18, LEIGH & UPGRADE BR 59, LEIGH TO BYWAY	BYWAY
PIDDLEHINTON / PIDDLETRENTHIDE / CHESELBOURNE	UPGRADE BR 4,, PIDDLEHINTON, BRs 14(P.T) & 5, PIDDLETRENTHIDE AND BR 11, CHESELBOURNE TO BYWAY	BYWAY
STOURPAINE / IWERNE STEEPLETON	UPGRADE BR 1, STOURPAINE AND BR 8,. IWERNE STEEPLETON TO BYWAY – SMUGGLERS' LANE	BYWAY

OPINION OF BRIAN ASH QC: FEBRUARY 18TH 2009 IN THE MATTER OF THE VALIDITY OF APPLICATIONS FOR DEFINITIVE MAP MODIFICATION ORDERS;

IN THE MATTER OF
THE VALIDITY OF APPLICATIONS FOR
DEFINITIVE MAP MODIFICATION ORDERS

OPINION

1. I am asked to advise Dorset County Council ("The Council") as to the validity of a number of applications for Definitive Map Modification Orders made pursuant to section 53(2) of the Wildlife and Countryside Act 1981. The particular concern relates to the question whether the form of the applications in each case is sufficient to preserve any unrecorded rights of way for mechanically-propelled vehicles which would otherwise have been extinguished under the Natural Environment and Rural Communities Act 2006. ("NERC")

2. Such extinguishment occurs by virtue of section 67(1) of NERC subject to certain exceptions including those set out in section 67(3) which, so far as is relevant for present purposes, provides that:-

"(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 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic..."

3. The 'relevant date' in England for the purpose of section 67(3) is January 20th 2005 (sub-section (4)) and sub-section (6) provides that:-

"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."

Paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 ("WCA") provides that:-

"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."

4. The prescribed form for such an application is set out in Schedule 7 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 and, by virtue of Regulation 8(2), the prescribed scale for the accompanying map is "not less than 1/25,000".
5. In the present case the disputed applications upon which my opinion is sought are, as I understand it, those set out in the third category of cases identified in the schedule at the beginning of document 1 in my instructions. These applications were all made before the relevant date and were set out on what I assume to be the Council's own pro forma version of the prescribed form. The suggested basis for the invalidity of the applications is, firstly, that the accompanying maps were not "drawn to the prescribed scale", because they were enlargements of base maps of a smaller scale. It appears that the Applicant disputes this claim as a matter of fact and says that the plans were computer generated from Ordnance Survey base data. This means that there is no original printed map from which any scale can be identified. The scale of the submitted plans is determined by the resolution at which they were printed and this "equates to a given physical map scale" which was, in each case, "always greater than 1:25K".
6. The second suggested basis for invalidity is that the applications refer to the existence of further evidence in support of the claim which may be submitted at a later date. This is said to contravene the requirement of Paragraph 1 of Schedule 14 to WCA (*supra*) that the application must be accompanied by any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.
7. In R (Warden & Fellows of Winchester College) v Hampshire County Council [2008] EWCA Civ 431 the Court of Appeal adopted a strict approach to the requirements of paragraph 1 of Schedule 14 to WCA in the context of section 67 of NERC. In summary, the court decided that, whilst there may be circumstances in which non-compliance with the paragraph 1 procedural requirements would not invalidate a modification application for all purposes, such non-compliance is fatal to any claimed exception to extinguishment of rights under section 67(3), save in cases of insignificant minor departures from the requirements or where compliance is

impossible. In Winchester the applications were accompanied by lists of documents but no copies of the documents were attached.

8. In relation to the issue of the maps, the question is essentially a matter of fact, namely, whether, in each case, the attached map showing the way is properly described as being drawn to a scale of not less than 1:25,000. Although the Winchester Case means that a failure to provide such a map invalidates the application for the purposes of section 67, it does not, in my opinion, imply that a more strict approach should be adopted to the question of construction of the ambit of the relevant statutory provisions than would otherwise be the case. This means, for example, that it would be permissible to adopt a purposive construction, if necessary.
9. It is not clear to me whether any of the maps in the present case are enlargements of 1:50,000 base maps. The letter from the Ordnance Survey dated May 29th 2007 says explicitly that the two maps which they have inspected are "in fact copies of 1:50,000 mapping which have been blown up to the 1:25,000 scale". The letter from Vanessa Penny dated July 28th 2008 says that the Council does not dispute that the maps are enlarged copies of 1:50,000 OS maps. However, the Report at document 3 of my instructions appears to accept that the contested plans are digitally produced without any enlargement from a base plan and that any references to "1:50K symbols" are "a selection made in the digital map process."
10. It may be that the Report indicates that the Council's officers now accept the explanation which was given on behalf of the applicant in the email of October 21st 2008, which postdates the correspondence with the Ordnance Survey. However, the views expressed in the earlier letters to which I have referred are quite definitive. I assume that the Council has officers with expertise in the interpretation of maps and it could be that their advice has led to the change in the approach to this matter in the Report. If this is not the case, such advice should be taken before any decision is made as to the validity of the applications so that members can be informed of the officers' professional opinion on this issue.
11. Turning to the approach to the construction of the statutory requirements concerning the map, the purpose of those requirements must be to ensure that the location and extent of the way to which the application relates can be identified to at least the same

degree of accuracy as that of the definitive map itself. However, I have considerable doubt as to whether this purpose would qualify or override the basic requirement that, in order to assess the validity of the map, it must be possible to identify its actual scale. I would also assume, in the absence of professional advice to the contrary, that a map whose actual scale is unknown would not provide the requisite degree of accuracy.

12. Against this background, the phrase "drawn to" does not, in my opinion, exclude any form of electronic manipulation or processing. It does not require that the attached plan must be hand drawn, which would be impracticable. It need not be a marked up original OS plan. I assume that photocopies of such plans are capable of being produced which do not materially distort the scale of the original and that such photocopies are routinely provided in support of modification applications.
13. Since I do not claim any expertise in the interpretation of maps, I am unable to say whether an enlargement of a map of less than 1:25,000 could properly constitute a map of the prescribed scale. However, I would attach considerable weight to the view expressed in the Ordnance Survey letter that an enlarged map would only be accurate to the scale of the original. Unless the Council is advised by its officers that any maps in this case which are enlargements to 1:25,000 of an original at a 1:50,000 scale are, for all practical purposes relevant to a modification application, the equivalent of a 1:25,000 scale map, it would be difficult to justify accepting such maps as being "drawn to the prescribed scale".
14. Similar considerations apply to a computer generated map. The fact that it is created electronically and then printed does not take it outside the meaning of "drawn", properly construed in its context. However, the Council must, again, be satisfied that the scale of the map can be identified and that it is not, in relation to its intended use, materially inferior in terms of its detail and accuracy to a map produced by what might currently be described as more conventional means.
15. As to the question of the accompanying documents and evidence, the short point is whether the submitted material constitutes "copies of any evidence...which the applicant wishes to adduce in support of the application." The majority of the contested applications contain an introductory paragraph which says:-

"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 in order to avoid a future flood of claims when they are all fully researched."

16. In each case there follows a review of the documents submitted and in some of them this is preceded by a list of documents introduced by the phrase: "The following evidence is being submitted to support our DMMO application". It should also be noted that, in every case, the paragraph set out above follows an indication that "on the basis of the evidence presented below FoDRoW believes the route should today be a byway."
17. There is no statutory requirement that all of the evidence known by the applicant to be available to support the application must accompany it. The requirement is limited to the provision of the evidence which the applicant wishes to adduce. A statement to the effect that there is further evidence to be adduced which does not accompany the application would mean that the application would be incomplete and, therefore, invalid for the purpose of section 67 of NERC. An unqualified statement reserving the position as to the evidence which the applicant wishes to adduce would also render the application incomplete.
18. Although the meaning of the last sentence of the introductory paragraph set out above is not entirely clear, the overall sense is that the applicant is content for the application to be determined upon the basis of the submitted material. There is an element of reservation of the position in the reference to the existence of further evidence which may be submitted at a later date but this is not, in my opinion, sufficient to negate the other indications that the material which the applicant wishes to adduce is that which has been submitted. The words "on the basis of the evidence *presented* below" (my emphasis) must be a reference to the material analysed and not some prospective, unspecified further evidence. This point is reinforced in those cases where the document list is repeated and is preceded by the indication to which I have already referred that: "The following evidence is being submitted to support our DMMO application".

19. My conclusions on the status of the contested applications for the purposes of section 67 of NERC is that there is a sound basis upon which the Council can find them to valid in relation to the documentary evidence. I have given guidance on the approach to be adopted when considering the maps but, in view of the need for further clarification of the factual issues, I am unable to advise as to their validity in this respect on the information available to me at present.

20. I am asked about the powers and duties of the Council to determine the applications depending upon their status. If they are found to be valid in relation to section 67 of NERC, the position is straightforward. The Council is obliged to determine them and to do so on the basis that there has been no statutory extinguishment of any existing motor vehicular rights.

21. If any of the applications are found to be invalid, the Council is empowered to determine them, provided that it can reasonably conclude that any procedural irregularities can be waived. I can see no reason, in principle, why such a course would not be available. This would be the position if the maps are technically defective but are sufficiently accurate to provide a reliable indication of the location and extent of the way in question both on the ground and on the definitive map. Similarly in relation to the evidence, the Council would be entitled to conclude that it has received sufficient information to enable it to make a reliable determination. If it considers that the information is insufficient but that further relevant material is available to the applicant, I can see no reason why it cannot ask the applicant to produce it.

22. Even if I am wrong in this respect, the material which accompanies the applications constitutes evidence discovered by the Council within the meaning of section 53(3)(c) of WCA. It therefore has a duty to consider it under section 53(2)(b).

A handwritten signature in black ink, appearing to read 'Brian Ash', with a large, stylized initial 'B'.

BRIAN ASH Q.C.

**4-5 Gray's Inn Square
Gray's Inn
London WC1R 5AH**

February 18th 2009

**IN THE MATTER OF
THE VALIDITY OF
APPLICATIONS FOR
DEFINITIVE MAP
MODIFICATION ORDERS**

OPINION

**Dorset County Council
County Hall
Colliton Park
Dorchester
Dorset DT1 1XJ
Ref: SLM/D879**

APPROACH TO APPLICATION PLANS WHEN CONSIDERING WHETHER SECTION 67(3) NERC APPLIES TO AN APPLICATION TO RECORD PUBLIC VEHICULAR RIGHTS

As part of the process of investigating an application:

1. Consider application plan and consider OS maps at different scales:
 - 1.1. Check for distortion;
 - 1.2. Check/compare base information available;
 - 1.3. Obtain statement from the applicant as to the method of production of the plan and its scale;
 - 1.4. If possible, check with OS for comments on issues of distortion and method of production.

2. The following outcomes may be possible:

2.1. If:

- 2.1.1. Correct scale application map; and
- 2.1.2. As much base information as the os map at the appropriate scale; and
- 2.1.3. No distortion;

Then it is recommended to the Committee that the plan is deemed acceptable for these purposes.

2.2. If

- 2.2.1. Inappropriate scale; or
- 2.2.2. Distortion, then

Then it is recommended to the Committee that the plan is not acceptable for these purposes

2.3. If different, or less, base mapping information is included in the application plan when compared with appropriate scale OS plans the case officer's judgment of the acceptability of the plan will be indicated in the recommendation to the committee.

Schedule of relevant legislation

Natural Environment and Rural Communities Act 2006

66 Restriction on creation of new public rights of way

- (1) No public right of way for mechanically propelled vehicles is created after commencement unless it is—
- (a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or
 - (b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.
- (2) For the purposes of the creation after commencement of any other public right of way, use (whenever occurring) of a way by mechanically propelled vehicles is to be disregarded.

67 Ending of certain existing unrecorded public rights of way

- (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.

Wildlife and Countryside Act 1981:

53 Duty to keep definitive map and statement under continuous review

- (1) In this Part “definitive map and statement”, in relation to any area, means, subject to section 57(3) [and 57A(1)],—
 - (a) the latest revised map and statement prepared in definitive form for that area under section 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 section 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 section 55(3).

(2) As regards every definitive map and statement, the surveying authority shall—

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows—

(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 section 54A, 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.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—

(a) the position and width of any public path[, restricted byway] or byway open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

[(4A) Subsection (4B) applies to evidence which, when considered with all other relevant evidence available to the surveying authority, shows as respects a way shown in a definitive map and statement as a restricted byway that the public have, and had immediately before the commencement of section 47 of the Countryside and Rights of Way Act 2000, a right of way for vehicular and all other kinds of traffic over that way.

(4B) For the purposes of subsection (3)(c)(ii), such evidence is evidence which, when so considered, shows that the way concerned ought, subject to section 54A, to be shown in the definitive map and statement as a byway open to all traffic.]

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

[(5A) Evidence to which subsection (4B) applies on the commencement of section 47 of the Countryside and Rights of Way Act 2000 shall for the purposes of subsection (5) and any application made under it be treated as not having been discovered by the surveying authority before the commencement of that section.]

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).

SCHEDULE 14 APPLICATIONS FOR CERTAIN ORDERS UNDER PART III

Section 53

Form of applications

1

An application shall be made in the prescribed form and shall be accompanied by—

- (a) a map drawn to the prescribe 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.

Notice of applications

2

(1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.

(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.

(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

(4) Every notice or certificate under this paragraph shall be in the prescribed form.

Determination by authority

3

(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall—

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

(b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates.

(2) If the authority have not determined the application within twelve months of their receiving a certificate under paragraph 2(3), then, on the applicant making representations to the Secretary of State, the Secretary of State may, after consulting with the authority, direct the authority to determine the application before the expiration of such period as may be specified in the direction.

(3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).

Appeal against a decision not to make an order

4

(1) Where the authority decide not to make an order, the applicant may, at any time within 28 days after service on him of notice of the decision, serve notice of appeal against that decision on the Secretary of State and the authority.

(2) If on considering the appeal the Secretary of State considers that an order should be made, he shall give to the authority such directions as appear to him necessary for the purpose [(which may include a direction as to the time within which an order is to be made)].

Interpretation

5

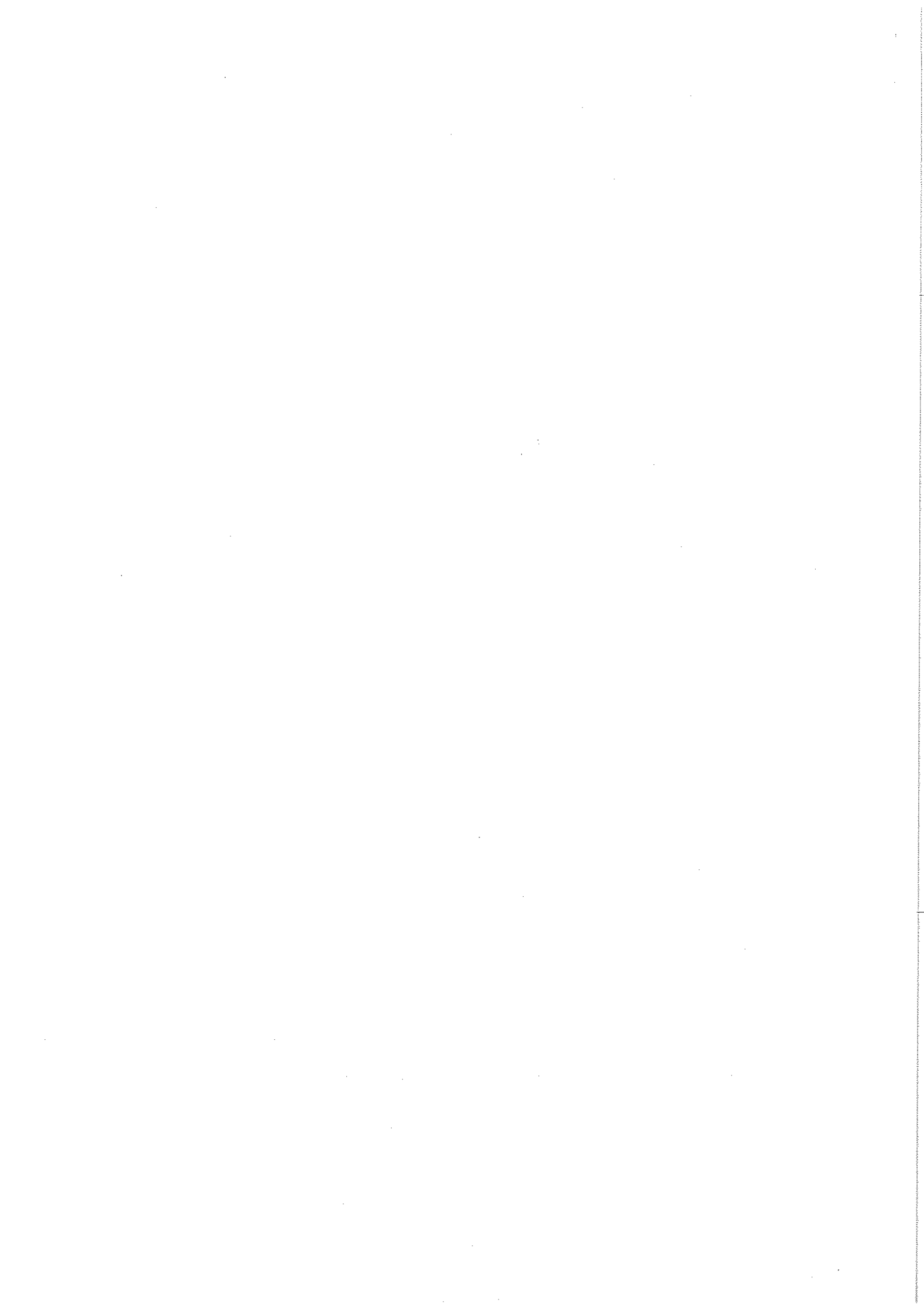
(1) In this Schedule—

“application” means an application under section 53(5);

“local authority” means [a non-metropolitan district council], a parish . . . council or the parish meeting of a parish not having a separate parish council [but, in relation to Wales, means a community council];

“prescribed” means prescribed by regulations made by the Secretary of State.

(2) Regulations under this Schedule shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.



Representations made by the applicant extracted from an e-mail dated 20 May 2010.

Dear Mr Mair,

Clearly, following the "Winchester case" applications for BOATs must fully comply with the relevant legislation otherwise they fail. The Wildlife and Countryside Act 1981 simply says that maps accompanying DMMO applications "shall be accompanied by a map drawn to the prescribed scale and showing the way or ways to which the application relates"; the prescribed scale is a minimum of 1:25,000. The legislation says nothing about how the map should be drawn or what level of detail should be shown. So, for example, anything from a traditional paper OS map to a hand drawn sketch would be acceptable as long as it was drawn to at least 1:25K. GLEAM have pressurised DEFRA to change their policy to state maps photocopied to larger scales (what DEFRA calls "photographically enlarged") are invalid although this is clearly at odds with the legislation. I say "pressurised" because DEFRA originally stated that "photographically enlarged" maps are valid but GLEAM continually lobbied DEFRA until this policy was changed. No-one else was given the opportunity to submit contrary arguments during this process.

GLEAM then turned their attention to applications that included maps printed using computer software, which brings us to FoDRoW's applications. However, all parties apart from GLEAM have agreed that this is different to the "photographically enlarged" cases. First, reflecting back to the actual legislation, I think it is clear that our maps are drawn to "the prescribed scale", i.e. we submitted maps drawn to a minimum of 1:25K with our applications. These maps were printed using computer mapping software. Those maps use the 1:50K mapping symbols, etc, because that is all that was publicly available 5 years ago, but they were not 1:50K scale maps. GLEAM appear to argue that our maps were originally drawn or printed at 1:50K and that we have printed "digital scans" of these maps at 1:25K, thus all that differs from "photographically enlarged" maps is the technical process used. This is incorrect. All Ordnance Survey mapping today is generated from large scale digital base data. The mapping software we use contains digital information in "bitmap" or "raster" format, which is simply a series of coloured dots. Furthermore, that is created from the OS base data and not from scans of paper maps. I know little about the law but my job is an IT Consultant and I am very clear on the technical structure of bitmap data and it cannot have a scale, it is just the digital representation of a series of dots and there is neither a mathematical formula nor physical presence to give this data a scale. Maps presented as bitmap data only get a scale when they are displayed or printed. When I use our mapping software I can select any scale I wish and the map is drawn (on screen or printed on paper) at that scale. Thus, we are not taking a map at a given scale and enlarging it to a different scale and the maps we submitted only gained a scale when they were printed on my laser printer. This is confirmed by the OS in their technical specification for the 1:50K raster data, which you can read on the following web page:

<http://www.ordnancesurvey.co.uk/oswebsite/products/50kraster/techinfo.html>

There are some key sections on that page. First, the map data's scale is described as "Nominal scale is 1:50 000. Recommended minimum to maximum scale range is 1:15 000 to 1:60 000 scale.". Note this is *nominal scale* because, as stated above, this data does not have an actual scale; if the map data had a scale then OS wouldn't use the word "nominal". Despite this, GLEAM no doubt seize on the nominal scale being 1:50K; however, this is because this map data uses 1:50K Landranger symbols and the raster dots ("pixels") are at a density that suits printing at around 1:50K but it is a complete mistake to think this means the binary map data has a scale of 1:50K. In fact, according to the OS, the raster dots' density suits printing at anything from 1:15K to 1:60K and that further demonstrates that these maps do not have a particular scale and they they are suitable for printing to a scale larger than the 1:25K required. It is true that there is a loss of quality at the larger scales but the OS's maximum recommended scale of 1:15K is larger than the 1:25K prescribed for DMMO applications. In any case, the legislation says nothing about quality, it is only concerned with drawn scale.

Another useful part of the 1:50K technical specification is the "Resolution", i.e. the pixel density of the raster data. This is "254 dots per inch = 100 dots per cm" and that is the same as for the 1:25K raster data (see following link for 1:25K technical specification that confirms this) and that raises some very difficult questions for anyone trying to argue that the 1:50K and 1:25K digital data files have different scales; if this data has a scale then it would not make sense for the resolution of 1:50K data and 1:25K data to be the same! Furthermore, presumably GLEAM would not contest computer generated maps that had been printed from 1:25K base data but what is the difference between those maps and the 1:50K maps? There is no difference in resolution and there is no scale so it is just the appearance of the maps that is difference, i.e. 1:25K Explorer vs 1:50K Landranger symbols, and that is irrelevant. Thus there is no case for the suggestion that maps printed from 1:50K digital base data are invalid for DMMO applications.

<http://www.ordnancesurvey.co.uk/oswebsite/products/25kraster/techinfo.html>

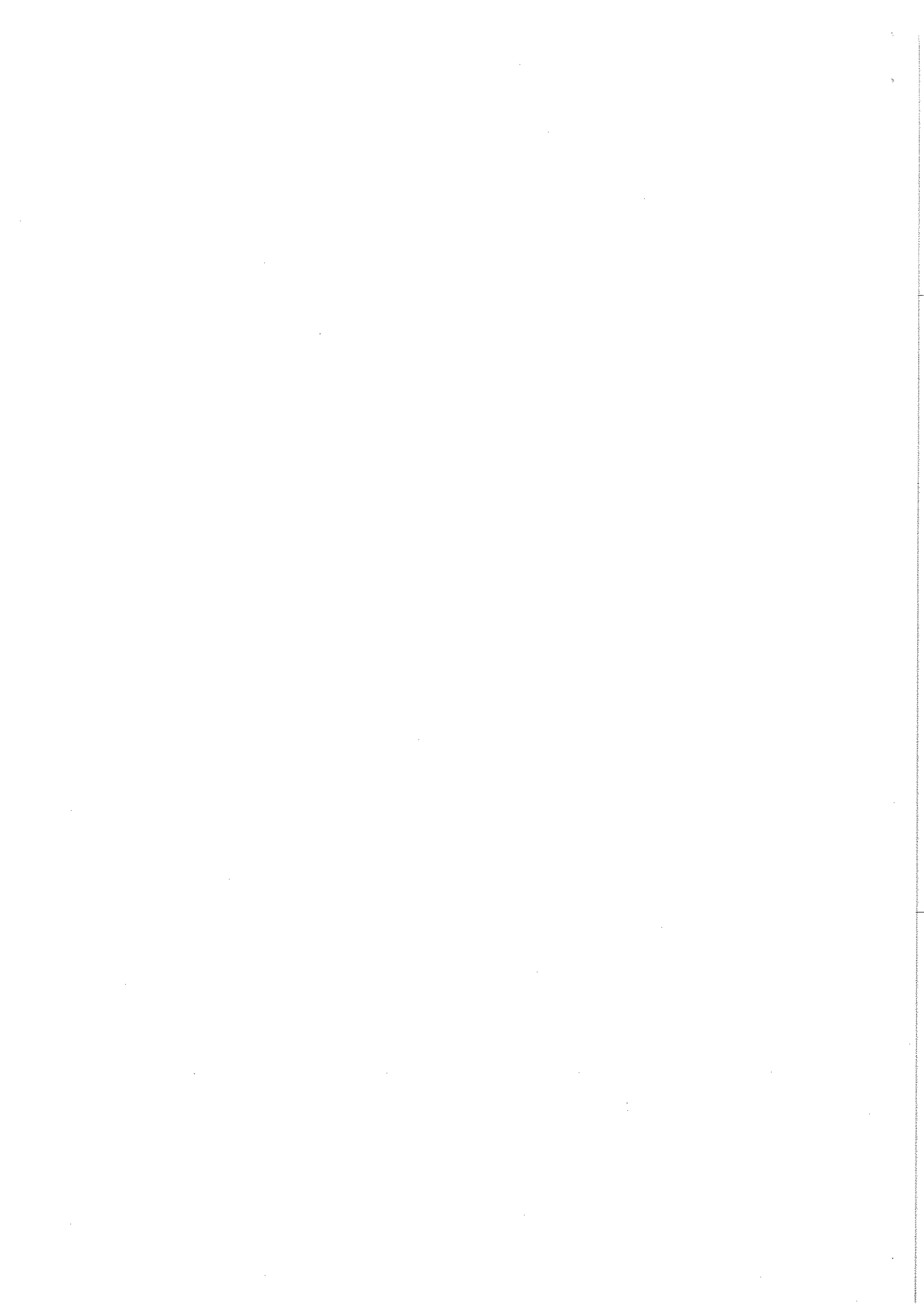
In summary, the law simply requires that we submit paper maps drawn to at least 1:25K. We clearly did that. It has been bizarrely although successfully argued that photographically enlarged maps are not only invalid but sufficiently faulty to cause an application to fail. In practice it is hard to see how such mapping is invalid and even if there are issues then these are surely *de minimis*. However, we have not enlarged maps from one scale to a new scale, rather we have printed at the required scale digital data that previously did not have a scale, so no enlargement has taken place. The OS's data files do not have a scale (if Mr Plumbe asserts that they do then I want to see where this exists in the structure of a bitmap/raster files) and they are not scans of paper maps (they are generated from the OS's base digital data) so no enlargement has occurred.

Coincidental to the emails we have exchanged over the last week, I have been in touch with Dave Waterman, DEFRA's policy officer, because some of our DMMO appeals

have been delayed and I thought this was related to the question of map scales. In fact the delays are not related to map scales but as part of that email exchange Mr Waterman has again confirmed that DEFRA's policy regarding photographically enlarged maps does not apply to computer generated maps and he has also indicated why Mr Plumbe may be incorrectly saying DEFRA has been misquoted. I will forward that email to you separately because I think the DEFRA policy is very important here and should not be ignored. DEFRA policy is not to be taken on a "pick and mix" basis and if we are all to accept the policy that photographically enlarged maps are not allowed then we should also abide by the intention that this does not apply to computer generated maps.

Thanks and regards,

Jonathan Stuart





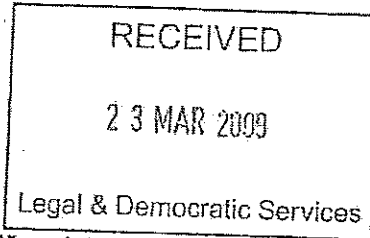
Ordnance Survey
Romsey Road
SOUTHAMPTON
United Kingdom
SO16 4GU

19 March 2009

Sarah Meggs
Legal and Democratic Services
Dorset County Council
County Hall, Colliton Park
Dorchester, Dorset
DT1 1XJ

General enquiries: +44 (0)8456 05 05 05
Dedicated Welsh Language HelpLine: 08456 05 05 04
Textphone (deaf and hard of hearing users only please):
+44 (0)23 8079 2906

www.ordnancesurvey.co.uk
customerservices@ordnancesurvey.co.uk
Direct phone: 08456 05 05 05
Mobile:
Direct fax: 023 8079 2615
Email: customerservices@ordnancesurvey.co.uk



Our ref: SAP 70567
Your ref: SLM/D879

Dear Sarah

Ordnance Survey Mapping

Thank you for your letter dated 13th March regarding Ordnance Survey maps supplied to you by Mr Milne of Piddlehinton.

Of the two extracts supplied with your letter, one extract is taken from our 1:25 000 scale maps. This is the colour extract which covers a larger area.

The second extract, covering a smaller area and in black and white, is, as stated by Mr Tipler, an enlargement of our 1:50 000 scale mapping. As this extract has been produced from our 1:50 000 Scale Raster product, as suggested by Jonathan Stuart, this is still an enlargement of 1:50 000 scale mapping, rather than a 1:25 000 scale map. The definition of raster data is digital material where the information is made up of pixels. An example of raster data is a scanned image or photograph. When enlarging raster data, it is the pixels that are being enlarged, meaning that the greater the enlargement, the more distorted and inaccurate the image becomes. It is only with vector data, which is made up from straight lines joining two data points, that it is possible to enlarge the data accurately, and the extract enclosed is not a vector image.

I hope this information is helpful to you.

Yours sincerely

J. M. Chiplin

Jane Chiplin
Customer Service Advisor
C454





Ordnance Survey
Romsey Road
SOUTHAMPTON
United Kingdom
SO16 4GU

10049

10 December 2009

General enquiries: +44 (0)8456 05 05 05
Dedicated Welsh Language HelpLine: 08456 05 05 04
Textphone (deaf and hard of hearing users only please):
+44 (0)23 8079 2906

Phil Hobson
Countryside Access
Dorset County Council
County Hall, Colliton Park
Dorchester
DT1 1XJ

www.ordnancesurvey.co.uk
customerservices@ordnancesurvey.co.uk

Direct phone: 08456 05 05 05
Mobile:
Direct fax: 023 8079 2615
Email: customerservices@ordnancesurvey.co.uk

Our ref: SAP 70567
Your ref: PCH RW/T342

13 DEC 2009
REF TO ADW

Dear Mr Hobson

**Application for Definitive Map Modification Order - Piddletrenthide, Dorset
Ordnance Survey Mapping Data**

Thank you for your letter dated 4th November. Please accept my apologies for the delay in responding to your enquiries.

In the third paragraph of your letter, you say that your applicant has stated that "the concept of scale does not become an issue until such time as the map is actually printed". The issue of scale is relevant whether you are viewing a map on screen or on paper. For example, in relation to the map extract enclosed with your letter, you say this has been enlarged to 1:15 000 scale. This enlarged scale applies both to the printed extract and to the image which your applicant would have viewed on screen before printing.

In the same paragraph, you mention the information available on our web site regarding the viewing scales for 1:50 000 Scale Colour Raster as an example. These minimum and maximum viewing scales are suggested as scales at which the product can be viewed with the best clarity. Being a raster product, the product would appear pixellated and/or distorted if viewed at any larger or smaller scale than those recommended.

In the next paragraph of your letter, you refer back to my letter of 19th March, in which I said that the 1:25 000 scale extract submitted to you was an enlargement of 1:50 000 Scale Raster data. You ask whether this would be regarded as a 'photographic enlargement'. This is not a term which would be used by Ordnance Survey in this case, and we do not have a specific term for this type of enlargement, other than enlargement. However, the term 'photographic enlargement' would be an acceptable term to use.

You also ask whether it would be true to say that all data, whatever the nominal scale of the raster data used, would have originally been captured at a scale of 1:1250 or 1:2500, as advised to you by one of my colleagues. This is partially true, but we also capture data at 1:10 000 scale. For your information, the process used for producing smaller scale maps from the large scale data is a manual, rather than automatic process. Technicians examine the large scale data and decide which features need to be shown on the smaller scale mapping based upon the specifications of that scale. Many features are enhanced from the detail of the large scale data so they show prominently on smaller scale mapping. Therefore, the accuracies that apply to our large scale data do not apply to scales such as 1:50 000 and 1:25 000 scale mapping, which are a more generalised representation of the landscape.

We are proud to be holders of the Information Fair Trader Scheme, Investor in People and Disability Symbol accreditations.



Finally, you ask about the term 'drawn' in relation to modern digitally produced maps. This is not a term that is used by Ordnance Survey in relation to digital mapping. Digital mapping is produced, rather than drawn, and this process refers to the initial production of the map at Ordnance Survey, rather than the time at which a paper copy is printed. When a map is printed, we would use the terms 'facsimile' or 'redrawn'. Facsimile refers to an image which is printed or copied, where the mapping is identical to that produced by Ordnance Survey, albeit that the mapping has been enlarged or reduced in size or has additional information added by a third party (such as highlighting a line in yellow, as on the extract included in your letter). Redrawn refers to mapping that is based upon Ordnance Survey but which has been redrawn to a third party's specifications; it is not necessarily instantly recognisable as an Ordnance Survey map.

In conclusion, the map extract which you enclosed with your letter is a facsimile copy of an enlarged image taken from our digital raster mapping originally produced at 1:50 000 scale. Ordnance Survey can add no further information regarding the meaning of the terms 'photographically enlarged' and 'drawn' in relation to our mapping. I hope this information will help you to decide whether the mapping supplied by your applicant is suitable for the purpose for which it has been submitted.

Yours sincerely



Jane Chiplin
Customer Service Advisor
C454

Roads and Rights of Way Committee

Minutes of the meeting held on 7 October 2010

The Roads and Rights of Way Committee met at County Hall, Colliton Park, Dorchester on Thursday 7 October 2010.

Present:-

Rebecca Knox (Vice-Chairman in the Chair)
David Budd, David C Fox, Ian Gardner, David Jones and Peter Richardson

The following members attended by invitation:

Michael Bevan (minutes 125 to 127).

Officers attending:

Jonathan Mair (Head of Legal and Democratic Services), Vanessa Penny (Senior Rights of Way Officer - Definitive Map Team), Sarah Meggs (Senior Legal Executive) and Paul Goodchild (Democratic Services Officer).

Public Speakers – Minutes 125 to 127

Mr S Milne, Piddle Valley Parish Council

Ms N Barker, West Dorset District Councillor for Piddle Valley ward

Apologies for Absence

122. Apologies for absence were received from Alex Brenton and Tim Munro.

Code of Conduct

123. There were no declarations by members of any personal or prejudicial interest under the Code of Conduct.

Minutes

124. The minutes of the meeting held on 6 September 2010 were confirmed and signed.

Determination of Applications to Modify the Definitive Map and Statement of Rights of Way to Record Byways Open to All Traffic

125.1 The Committee considered a report by the Director for Corporate Resources which considered the arguments of the applicant and objectors in respect of five applications to modify the definitive map and statement of rights of way to record Byways Open to All Traffic (BOAT). The report also asked members to agree that applications on which the County Council had already made a decision, and which were supported by computer generated enlarged versions of Ordnance Survey maps, were not in strict compliance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

125.2 The Head of Legal and Democratic Services explained that he had received a series of representations from the applicant for the five undetermined applications, Mr Stuart, and Mr Tilbury of the Trail Riders' Fellowship, who had subsequently taken responsibility for the management of the applications. Mr Stuart and Mr Tilbury maintained that they had not been given enough time to comment on the report and that in the interests of natural justice consideration of the report should be deferred.

125.3 In presenting the report the Head of Legal and Democratic Services invited the Committee first of all to consider the request for a deferral. He explained that Mr Stuart had been unavailable to attend a meeting held on 24 May 2010 between representatives of

the Green Lanes Protection Group (GLPG) and County Council officers, but he had sent representations which were included in the report to the Committee at Appendix 3. Although the minutes of the 24 May meeting were not distributed until 2 August 2010, it was the view of the Head of Legal and Democratic Services that Mr Stuart had been given sufficient time to make representations. The applicant had known for some time that a report was to be presented to the committee and the report before members had been circulated in draft both to GLPG and to Mr Stuart. Both interested parties had been invited to comment but Mr Stuart had not done so. However as recommendation 2b of the report, was a new point which had not been included in the draft report when circulated for comment the Head of Service withdrew that recommendation.

125.4 The Committee did not agree to defer consideration of the report. Members felt that a sufficient opportunity had been given to comment and that the recent appointment of Mr Tilbury to manage the applications did not justify deferral.

125.5 Having decided that the report should not be deferred members went on to consider the validity of the undetermined applications. Members were asked to consider whether the applications were 'Winchester compliant', and benefited from the transitional provisions in section 67 (3) of the Natural Environment and Rural Communities Act 2006.

125.6 The Head of Legal and Democratic Services referred members to the requirement for an application to be accompanied by a map drawn to a scale of not less than 1:25,000. Officers had considered the positions advanced by the applicant and GLPG and for the reasons set out in the report the Head of Service advised that he did not believe the maps which accompanied the applications to have been drawn to a scale of not less than 1:25,000. Members were referred to letters provided by the Ordnance Survey setting out their comments and in particular to their description of an application map as a facsimile copy of an enlarged image taken from the Ordnance Survey digital raster mapping originally produced at a 1:50,000 scale.

125.7 The Committee received a written representation from Mr Plumbe, Vice-Chairman of the GLPG, in support of the recommendations in the officer's report.

125.8 The Committee received written representations from Mr Stuart, the applicant, which asked that the County Council should not make a definitive decision on the validity of the maps used by the applicant, and that the issue should be resolved in the Courts.

125.9 Mr Milne, representative of Piddle Valley Parish Council, spoke in support of the recommendations in the report.

125.10 Ms Barker, West Dorset District Councillor for the Piddle Valley ward, spoke in support of the recommendations in the report. She agreed that enlarged images of maps originally produced at a 1:50,000 scale were not 'Winchester complaint', and that 1:25,000 maps should be used as they showed a level of detail useful in determining the position of rights of way.

125.11 The Local Member for Sherborne Rural spoke in support of the recommendations in the report. He reported that Leigh Parish Council were also in favour of the recommendations, and encouraged the Committee to support them.

125.12 After discussion and having considered all of the evidence, it was proposed, and seconded, that the applications be refused, and that the Committee agree to recommendation 2a, and to the withdrawal of recommendation 2b.

Resolved

126.1 That the following applications all be refused:

- i) byway open to all traffic at Bailey Drove, Batcombe/Leigh;
- ii) upgrade Bridleway 8 (part) Cheselbourne and Bridleway 18, Dewlish to byway open to all traffic (Doles Hill Plantation east to Chebbard Gate);
- iii) upgrade Bridleway 12, Tarrant Gunville to byway open to all traffic and add an unclassified road in Chettle as byway open to all traffic (one continuous route);
- iv) upgrade Bridleway 14, Beaminster to byway open to all traffic (Meerhay to Beaminster Down); and
- v) upgrade Bridleways 17 and 35 to byway open to all traffic and to add an unclassified road as byway open to all traffic (one continuous route – Crabbs Barn Lane).

126.2 That for all other pre 20 January 2005 applications for byways open to all traffic where the County Council had already made a decision the County Council's stance in any further local inquiry or other process be modified to reflect the Committee's view that applications supported by computer generated enlarged versions of ordnance survey maps were not in strict compliance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

Reason for Recommendation

127.1 For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that the public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question were accompanied by computer generated enlargements of ordnance survey maps and not by maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused.

127.2 The question of compliance is in all respects an overriding factor in the determination of any application in relation to rights for mechanically propelled vehicles.

Questions

128. There were no questions received in writing by the Chief Executive.