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To all local authorities in England.

Sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 – compliance of definitive map modification order applications with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981

1. We have been asked by several authorities for urgent advice on what constitutes an application that is compliant with schedule 14, paragraph 1(b) of the Wildlife & Countryside Act 1981, with regard to sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006. These requests were made in light of an opinion commissioned from George Laurence and Ross Crail by the Green Lanes Protection Group.

2. We have therefore decided to write to all local highway authorities in England with advice on this matter. This advice will be reflected in the Defra online guidance on Part 6 of the Natural Environment and Rural Communities Act 2006 when the next version is published. Defra's advice is as follows.

3. The intention behind the provisions in section 67(3) of the NERC Act was to deal equitably with long outstanding BOAT claims, where they had been properly prepared and made in good faith.

4. The issue under scrutiny here is whether, in those cases where an applicant has supplied a list or summary analysis of the documentary evidence supporting an application under section 53(5) of the Wildlife & Countryside Act 1981, this is sufficient to constitute an application that is compliant with schedule 14, paragraph 1 (and in particular sub-paragraph (b)) and therefore satisfies the requirements of sections 67(3)(a) and 67(6) of the Natural Environment and Rural Communities Act 2006 (that 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).

5. Schedule 14 paragraph (1)(b) of the 1981 Act requires that: "An application shall...be accompanied by...copies of **any** documentary evidence...which the appellant **wishes** to adduce in support of the **application**." (our emphasis)

6. In our view, the use of the words: "any" and "wishes" allows for an element of discretion in the provision of copies of the documentary evidence. In this way the legislation provides for the applicant to adduce evidence sufficient to support the **application**.

7. For, example, in many cases, the applicant will have an agreement with the surveying authority as to what evidence shall be provided with the application. In one particular case at issue here, the surveying authority did not want the applicant to provide copies of the documentary evidence because the surveying authority already had custody of the originals. Why, in such a case, would an applicant wish to adduce copies of the documentary evidence in support of the application?

8. Furthermore, the evidence provided under schedule 14, paragraph 1(b) is "in support of the **application**", not in support of the Order and therefore we believe that the function of the application is to make a credible case that a public right of way exists to the surveying authority. Once this is done, it triggers the surveying authority's duty, under paragraph 3(1) of Schedule 14 and section 53(2) of the Wildlife & Countryside Act 1981, to investigate matters stated in the application and ensure that the way is correctly recorded, i.e. with the appropriate status, on the definitive map and statement.

9. Moreover, as Counsel's opinion points out (at the end of paragraph 16): "a court or other tribunal would be slow to infer against an applicant who had provided inadequate or irrelevant material, that he was acting in bad faith (e.g. 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.". Paragraph 17 of the Opinion goes on to say: "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.". It seems to us that what the applicant has done in the example quoted in paragraph 7 above is to act in good faith by having conducted research into the history of the claimed route and supplied the surveying authority with a list of all the evidence, which the surveying authority already holds.

10. For the reasons set out above, we do not share the view that "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...be regarded as having complied with the statute" or that ""any documentary evidence" must in the context of paragraph 1 be read as equivalent to "all documentary evidence". We believe that where an application under section 53(5) of the Wildlife & Countryside Act 1981 is accompanied by a

list or summary analysis of documentary evidence sufficient to make a credible case for an Order under section 53(2) of the '81 Act, then this constitutes an application that is compliant with schedule 14, paragraph 1, and hence with sections 67(3)(a) and (6) of the NERC Act.

Yours faithfully

Dave Waterman
Head of Rights of Way Policy and Legislation

The application process in s.53 of the Wildlife & Countryside Act 1981

S.53 of the Wildlife and Countryside Act 1981 introduced a duty on local authorities to get their definitive map and statement (DMS) up to date and keep it up to date by making definitive map modification orders (DMMO) consequent on: a legal event, a qualifying period of use and/or discovery of other evidence. It also provided for any person to make an application for a DMMO "which makes such modifications as appear to the authority to be requisite in consequence of" a qualifying period of use and/or discovery of evidence. The form of words used here clearly places the decision on whether a DMMO is to be made with the local authority.

Therefore the duty to make orders and the decision as whether an order is needed rests firmly with the local authority and with it the onus to ensure that the DMS is accurate. It follows therefore, that the burden of establishing whether a right of way exists, or that an existing right of way is wrongly recorded does not rest solely with the applicant and there is no part of section 53 that suggests it does.

It seems clear that the provision in s.53(5) for any person to make application for a DMMO is an adjunct to s.53, which enables that person to trigger action by the local authority by bringing to the authority's attention the fact that a qualifying period of use has taken place or evidence has been discovered. And since the burden of proving that a right of way exists, or that an existing right of way is wrongly recorded does not rest solely with the applicant, there is no reason why the applicant should have to provide all the evidence as part of his/her application. All that the applicant needs to do is to put forward a case that is sufficient to persuade the local authority that there is a case for the local authority to investigate. This is underlined by the fact that "any documentary evidence...which the applicant wishes to adduce" is "in support of the application", not in support of the order.

Moreover, schedule 14 provides for a process of appeal in a case where the local authority does not make an order as a consequence of the application. The legislation therefore acknowledges that there is scope for the local authority not to act where they are not persuaded by the application. This further underlines the principle that the purpose of the application is to persuade the local authority that there is sufficient doubt about the accuracy of the DMS to persuade them of the need to investigate the matter further and not necessarily to, of itself, be sufficient to support an order.

Issue - an application has to be made to the best of the applicant's ability.

The legislation does not provide for any such test, but clearly the application has to be sound if it is to persuade the local authority. The local authority has the option of not making the order applied for, where the modifications do not "appear to the authority to be requisite" (i.e. they are not persuaded), as provided for in s.53(5) and the applicant can appeal if they feel aggrieved by this, or make another, more robust application.

When is an application under section 53(3) of the Wildlife & Countryside Act 1981 made, in terms of section 67(6) of the Natural Environment and Rural Communities Act 2006? Further consideration of points made by the Green Lanes Protection Group.

Issue - interpretation of the wording of schedule 14, paragraph 1, including use of the word "shall"

The word "shall" is used in relation to both the prescribed form and what is to accompany the application, the latter being specified in paragraphs (a) and (b). The second "shall" in the provision applies to both paragraphs (a) and (b), but each paragraph is worded quite differently.

Paragraph (a) is unequivocal: "An application…shall be accompanied by…a map drawn to the prescribed scale and showing the way or ways to which the application relates". So it is clear that such a map must be provided.

Paragraph (b) is not unequivocal: "An application…shall be accompanied by…copies of any documentary evidence…which the applicant wishes to adduce in support of the application".

Where words used in legislation are not defined in that legislation, it is normal practice to rely on the normal, everyday meaning of those words.

"Any" can mean "every", e.g. 'any person you asked would agree' and can mean "without limit", e.g. 'he has any amount of money', but the grammatical construction here doesn't lend any weight to these interpretations. All the other meanings of "any" indicate one, some or several where the number is not important, e.g. 'Do you have any?', or a minimal amount e.g. 'hardly any difference'. So the use of the word "any" is at best ambiguous, but seems unlikely to mean "all"

"Wishes" can only be interpreted as meaning a desire or demand on the part of the applicant and therefore introduces an element of discretion on his/her part. This would give the applicant a choice as to which documentary evidence to provide copies of in support of the application.

If the intention was to make paragraph (b) unequivocal, why was it worded so differently from paragraph (a)? And if it was in the mind of the drafter to require the submission of copies of "all the evidence" the applicant is aware of, the use of the words "any" and "wishes" in combination is an odd one. If the drafter meant "all the evidence", why not simply use the word "all", or why not leave out the qualifier and say simply "the evidence" and why use the word "wishes"? If the intention had been as expressed in the Counsel's Opinion, it could easily have been expressed, for example, as follows: "An application…shall be accompanied by…copies of <u>all the</u> documentary evidence…which the applicant <u>is able</u> to adduce in support of the application".

Of further significance here is that any evidence to be adduced is in support of the <u>application</u> not the order, as considered in the following paragraphs.

Moreover, since many rights of way sections in local authorities are hard pressed for resources, it is in the applicant's interests to provide as much evidence as possible if they want an order to be made.

Issue - it is arguable that applications are properly made where they are well-researched but do not provide copies of the evidence because there is a "side" agreement with the local authority, but not where the applicant has made no effort to provide evidence.

The legislation in the Wildlife & Countryside Act 1981 does not provide for applications to be judged 'valid' or 'invalid' by the local authority. Instead the local authority has the option of not considering the application where it does not meet the required standards or does not provide the right evidence or enough evidence to persuade the local authority that there is a case for them to investigate. The appeal process provides for the local authority to argue its case if challenged. There is no scope for interpreting the legislation, in either in the Wildlife & Countryside Act 1981 or in the Natural Environment and Rural Communities Act 2006, as providing for a line to be drawn, either by Defra in guidance or by the local authority on a case by case basis, between applications that are made in good faith and those that are not. The local authority can only act as if all applications that meet the requirements of schedule 14, paragraph 1 are made in good faith and exercise discretion not to investigate where the evidence provided does support the need to.

The case alluded to in the recent Defra advice to local authorities, was simply to illustrate a case where the applicant might, quite reasonably, wish not to provide copies of all the evidence with the application.

Issue - although the 'validity' of s.53(5) applications in terms of schedule 14, paragraph 1 may not matter with most applications, it is critical where those applications could fall under s.67(3)(a) and s.67(6) of the NERC Act, because it involves people's rights.

This is agreed, but this works both ways. Although it affects a landowner because he/she may have a public right of way for motor vehicles established across their land, it also affects the public because a public right of way may be lost. There is no legal basis here for a presumption that landowners' rights take precedence over those of the public, because rights of way for motor vehicles are involved.

Issue - What about the wider implications of Defra's advice for other s.53(5) applications. Does it mean that applicants need not bother to submit copies of evidence?

Where exceptions to s.67(1) of the NERC Act are not involved, then it is not critical to the ultimate establishment of the right of way whether applications are well or poorly made, since applications could be supplemented or re-made at a later date. As set out above, it is in the applicant's interests to put forward a convincing application, if he/she wants the local authority to make the order

applied for, as the local authority has the option of not making the order, where the modifications do not "appear to the authority to be requisite" (as provided for in s.53(5)).

Issue - if the applicant does not submit copies of the evidence with the application, then how will the landowner get to see the evidence and contest it?

As set out above, the application process is an adjunct to the local authority's duty to keep the map up to date and accurate under section 53 and only a proportion of DMMOs will arise from applications. Therefore, the question is equally: how does the landowner get to see the evidence where the order arises through the duty to keep the DMS under continuous review? This is provided for in paragraph 3(1) of schedule 15, which requires surveying authorities to give notice to landowners and paragraph 3(8), which enables any person to ask to see copies of the evidence.

Paragraph 3(9) of schedule 15 goes on to say that: "nothing in sub-paragraph (8) shall be construed as limiting the documentary or other evidence which may be adduced at any local inquiry or hearing held under paragraph 7 or 8". This tends to further support the view that the applicant does not necessarily have to have adduced copies of <u>all</u> the evidence in support of an application.

Issue - the form of application in schedule 7 of the Wildlife & Countryside (Definitive Maps & Statements) Regulations 1993) includes the statement: "I/we attach copies of the following documentary evidence (including statements of witnesses) in support of this application;"

Schedule 7 simply sets out the form of application; there is nothing in the Regulations that indicates that it is mandatory to attach copies of documentary evidence.

Issue – when an applicant attaches a list of documents or a summary assessment of the evidence, that suggests that he or she must be seeking to adduce that evidence in support of the application. As such, schedule 14 paragraph 1 (b) requires that the application shall be accompanied by copies of that documentary evidence.

This point depends on the construction placed on: "shall be accompanied by…copies of any documentary evidence…which the applicant wishes to adduce in support of the application". That is to say does it mean: *shall be accompanied by copies, of any documentary evidence which the applicant wishes to adduce*, or: *shall be accompanied by, copies of any documentary evidence which the applicant wishes to adduce*?

The former construction suggests that, once the applicant has indicated - by listing or summarising the evidence - that this is the documentary evidence that they wish to adduce, then they must therefore provide copies of all that documentary evidence in order for the application to have been made in

accordance with paragraph 1 of schedule 14. The latter suggests that the applicant need provide copies of the documentary evidence only where they believe that it will support their application (or that they may be selective about which copies they do provide).

There is no punctuation in this provision to provide clear grounds for favouring the former construction over the latter and so again it is necessary to go back to the basic principles of how the application process sits within the legislative framework governing the DMMO process. This provides several reasons why the former construction does not stand up to scrutiny.

Firstly, the former construction suggests that an application that is accompanied by a comprehensive list of all the evidence and/or a summary analysis may be, because it does not provide copies of the documentary evidence, less valid than an application that provides little or no documentary evidence. This does not appear logical and would, arguably in some cases, be a disincentive to applicant to provide a comprehensive case to the local authority.

Secondly, this construction also suggests that where an applicant has listed documentary evidence but has omitted, for whatever reason, to provide copies of one or more of the documents, this would fail to comply with the requirements of schedule 14, paragraph 1. And yet Counsels' opinion [paragraph 12] acknowledges that there may be documents that for good reason (e.g. because of the fragile state of the original) the applicant cannot provide copies. A good reason might be, as is sometimes the case, where the local authority has asked the applicant not to provide copies.

Thirdly, this line of argument makes the assumption that "copies of any documentary evidence" necessarily means photocopies of statements or historic documents. This is a narrow interpretation of what "documentary evidence" means and ignores the possibility that the list and/or summary analysis could itself be regarded as documentary evidence.

In addition, the intention behind paragraph 1 of Schedule 14 appears to be to give the applicant some discretion over firstly which evidence he adduces in support of his application, and secondly, which evidence he provides copies of. The aim of the paragraph is to enable the applicant to set out his case as he "wishes" without placing unnecessarily burdensome obligations upon him. It is open to the authority to ask for additional information/ copies as they process the application. It would seem inequitable to rule that an application has not satisfied schedule 14, paragraph 1 if the applicant has simply failed to provide copies of one or more of the items on his list, but otherwise has provided a thorough and convincing application. That cannot have been the intention of the legislators.

For the reasons set out above, we believe that the this provision was not intended to be construed in the way suggested as this would be at odds with the purpose of the application process, which is to persuade the local

authority, within their underlying duty to keep the DMS up to date, that there is a case to investigate.

In summary

On re-examination of the requirements of section 67(6) of the NERC Act, in light of the issues set out above, Defra re-affirms its view, that in order for an application to be made in accordance with paragraph 1 of schedule 14 of the Wildlife & Countryside Act 1981, it does not necessarily have to be accompanied by copies of all the documentary evidence the applicant is relying on.

Defra
8 May 2007