IPROW

Waymark

IPROW – working for access professionals

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Photo: © Durham County Council

A fence too far

Audrey Christie, Senior Rights of Way Officer with Durham County Council, looks at an encroachment case.

Audrey Christie
Durham County Council

Last summer our team was alerted to a fence encroachment on a footpath in Durham City. A common scenario for rights of way officers but, nevertheless, one that evolved into an unusual affair. We all know that dealing with obstructions is in theory straightforward; satisfy yourself that there is an obstruction or encroachment, communicate with the person/s responsible to try and secure removal; and, as a last resort, serve a s143 notice. Life is rarely that straightforward and no one likes explaining to a householder that £2000 worth of fence has been erected within a highway.

In this case, initial discussions with the householders did not prove fruitful. They insisted that the extra strip added to their garden was owned by them and map evidence supported their assertion. We explained that the footpath's boundary hawthorn hedge was now well inside their garden, parallel to their new fence. We provided a detailed assessment of our position and offered further meetings but these were declined. Having reached a stalemate we offered to meet again but stated that if this wasn't going to happen then the only option left for us would be to serve a s143 notice.

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IPROW

Waymark

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Spending time in Court

Sue Rumfitt
Editor

I had the opportunity to sit at the back of the High Court in London for two days in February to listen to the arguments put in the Andrews 2 case by George Laurence QC and Edwin Simpson, on behalf of The Ramblers, and Jonathan Moffett, on behalf of the Secretary of State for Environment, Food and Rural Affairs. It was fascinating listening to the arguments on the proper construction of the 1801 Act, whether or not there was a consistency of practice by Inclosure Commissioners in awarding footpaths and bridleways without there being additional powers in the local Act and whether or not the provisions of the 1801 Act prevented the Secretary of State from now arguing that a bridleway had not been set out in the Award. Andrews 2 is in the nature of a test case and whilst we were in court a number of visitors came in to hear the arguments and often swiftly went. I often speculate why people listen to a court case for 15 minutes or so and then leave. In this case, given the complexity of the issues in the case, it may well have been that unless you had some idea of what was being argued about it was very difficult to understand. Fortunately for us we have Janet Davis on hand to explain the background to Andrews 2 and you can rest assured that once judgment is handed down we will be covering the result in detail too.

Threatening to resort to court action is a common tactic that enforcement officers face when trying to deal with obstructions and encroachments on public rights of way. Sometimes the mere threat is enough to persuade senior management or members that the Council should back down, and yet again the rights of way officer finds themselves having to do what may be politically expedient, rather than what their professional judgment tells them is the correct thing to do. The threat of injunction is quite often used, but rarely do owners or occupiers actually go to court. Audrey Christie writes about her experience of facing injunction proceedings, which I am sure will be of interest to enforcement officers and their managers.

We also have Alison Newbould on Public Space Protection Orders, something Richard touches on in his letter, Chris Beney on potential revisions to BS 5709, as well as part two of Janet Briscoe's look at highway trees. Our diarist is having trouble with laminators, Network Rail and the weather. She is not the only one; my thanks to Graham Rusling for this picture as he says, "not so much a barrier suitable for BOATs, as a boat being successfully employed as a barrier". We have decision reports and membership news and a sneak preview of what will be happening at the Annual Update (book now for discounted places).

I would like to thank all those who have contributed to this issue and our advertisers who continue to support us; do please mention Waymark when responding to advertisements.

Photo: Graham Rusling

Public footpath MU32 Tonbridge

Letter from the President

Happy Easter to everyone

Richard Cuthbert
IPROW President
iprow@iprow.co.uk

Seems that the acronyms are taking over again! Love them or hate them (see below). The good news is that it feels like IPROW is getting its voice heard in the right places and in the relevant circles, and that is a large part of what we are about.

This quarter started off with the Rural Development Programme England (RDPE) review of Rural and Farm Networks (RFNs); not so useful if you are in a City or urban Met authority perhaps, but something where an awareness of public rights of way needs to be seeded.

At the last ADEPT ROW Managers Working Group (ROWMWG) meeting, I asked how HAs could integrate with networks such as the Rural and Farming Network and RDPE and I have been given a contact to follow this up (John Coleman at Defra). John heads the team responsible for RFNs, and may be able to help, so watch this space or the IPROW Members' Forum.

We were keeping Defra busy this quarter or was it them keeping us busy? As well as RFNs they were consulting on CAP reform, especially the review of Cross Compliance (XC) and the GAECs; Good Agricultural and Environmental Conditions which farmers were required to meet under the old scheme and which have been reviewed, reduced in number and scope by the EU and now Defra needs to 'translate' that into UK regulations for XC. We and the Ramblers supported the public rights of way (PROW) GAEC being retained and gave strong arguments for its continued existence.

And of course I can't go much further without a mention of the now rapidly moving Deregulation Bill. No longer draft and now being pulled in all directions by politics and lobby groups, with rather spurious amendments being proposed one day then dropped the next. Is it the illusion of democracy or the indecision of politicians trying to please all people at all times? We continue to have a strong voice in steering the next steps once the bill is through, with the Stakeholder Working Group (SWG) still being the key forum for developing the Regulations and guidance to follow.

If that wasn't enough, the potential outcome of those spurious proposed amendments is a new SWG, to review the real costs of recreational MPV use in the countryside on the unsurfaced network of PRoW and UCRs (Unclassified County Roads).

Further advanced is the Anti-Social Behaviour Police and Crime legislation, which as you will see from Alison Newbould's article is now an Act. We have Tony Thomas, from the Home Office attending the next ADEPT meeting to discuss the draft Regulations for the new Public Spaces Protection Orders (PSPOs). We have a thread on the Members' Forum for issues, comments and concerns on this and, as mentioned before, the main issue is the potentially large amount of work it may bring in reviewing existing Gating Orders (GO): something that City or urban Met authority colleagues may feel more keenly. Draft regulations have been published. I like the suggested idea of a series of flowcharts to end up with the appropriate solution from the Act, rather than trying to wade through reams of guidance.

Add to all that getting into Network Rail (NR), as a follow up to the presentation they gave at the Rights of Way Review Committee (RWRC) on the national Level Crossing (LXing) Closure Programme and we have a full house!

continued over

Letter from the President

NB: Just a reminder about the rules on posting a job vacancy on the Forum or IPROW's Facebook page, especially if you cannot also pay for proper advertising through the IPROW Jobs Service. While we understand the desire for a better chance of reaching someone more appropriate for the vacancy than you get with the local paper or council website, I need to bring to your attention / remind you that advertising posts is essential income for the overall health of the Institute. Income from the Job Service subsidises membership fees. I can of course understand that members may see one of the benefits of membership as being able to reach other members via a Forum post, but please don't undermine the very income we need to continue as an organisation. All posts are monitored and such posts are taken down. *Thank you.*

Board news: We have now recruited a new Director; Claire Goodman in Wales and we are very pleased that she has offered to bring her experience to the Board to help run the Institute. We also welcome volunteers to get involved in groups or other ways, so if you are interested do still make contact.

In the final forecast for our expenditure and income, before we get the real end of year 'out-turn' we are still looking to balance the books this year. This is a far more positive position for the Institute than the past few years of having a rather large and worrying deficit and needing to raid our reserves to cover the difference.

Membership fees have risen with inflation, which I trust you can all understand the need for, but we'll be working with other organisations to develop training opportunities and help keep prices affordable given the current squeeze.

Right I count that as at least 20 acronyms, which is enough for anyone, so I'm off for a huge chocolate Easter egg now, to keep the sugar levels up (vegan of course!).

Photo: Robert Lee

Good cross-field path through late spring oil seed rape

A fence too far

This all sounds fairly familiar?..

...But, this is where the issue took a twist. Within a few days the householders had made an application to the County Court for an injunction to prevent us from serving a s143 notice until the conclusion of the 'pending boundary dispute'. The basis for the injunction application being that the encroachment had not been established and likewise there could be no wilful obstruction therefore there could be no basis for us serving a s143 notice. The claimants stated that they were being deprived of a fair hearing and the issue of a s143 notice was an abuse of process.

With the hearing date set for two days later there was no time to waste and a robust defence was swiftly pulled together by our solicitor. A Judge sitting in Durham decided that the case should be referred to Newcastle County Court, where the case was duly heard a few weeks later by a circuit Judge in Chambers. The main thrust of our prepared case was that there was nothing to injunct; this was an impermissible use of an injunction remedy and any future discretionary exercise of a statutory power by a public body could not be restricted or fettered. Additionally, the tests for granting an injunction had not been met and the application was a completely disproportionate response to the dispute.

We did not get too far into the proceedings before the Judge made it clear that he felt very uncomfortable with what the claimants were attempting by their application. Some discussion ensued between the Judge, the claimants' barrister and our solicitor as to what the appropriate legal remedy should be. The Judge was easily persuaded by our argument that the injunction application was impermissible and that the claimants' remedy should be via them seeking a Court Declaration as to the extent of the highway.

The injunction application was duly dismissed, and a date set for us to have a meeting with the claimants at which to find a solution. The Court Order also included provision that if no solution were reached, the claimants had a 28 day period to seek a Court Declaration, after which, if no application had been made for a declaration, we would be free to serve a s143 notice. Costs of the injunction application proceedings were also awarded to us.

We met with the householders who at the end of a lengthy meeting agreed to move their fence to follow the old hedge line and a couple of weeks later the work was done and we were able to close our file: just five months from the initial report.

Although a rather intense case to deal with, the experience was re-affirming. When tested in such a dramatic way you do question yourself and I had a number of challenging discussions with managers and our solicitor as to whether pursuing the encroachment was worth it (even before the injunction application was served). The fence jutted out almost one metre into the path width but our overriding concern was that there are numerous householders' fences on both sides of the path, and on others nearby, and if we let this one go it would compromise our future position when dealing with similar cases. Thankfully, we got the support we needed despite concerns raised about the bad press that it might invite and possible costs.

In conclusion, the experience seems to have had a positive impact on our team's motivation and purpose; it was re-assuring that the Court's decision was so clear and decisive.

Audrey can be contacted on audrey.christie@durham.gov.uk or on 03000 265332

Andrews 2

Janet Davis, Senior Policy Officer with The Ramblers, explains the background to R (on the application of) Andrews v The Secretary of State for Environment, Food and Rural Affairs 2014

Janet Davis
The Ramblers

As many readers will know, the long-discussed 're-run' of the 'Andrews' case was heard earlier this year; we await the judgment. For those who were not around for the first 'Andrews' case, this article sets out the background to the issue and explains why The Ramblers considered it necessary to take a case back to Court.

The first 'Andrews' case

John Andrews was for many years the Suffolk Area Footpath Secretary. John had applied to Suffolk County Council for a footpath at Great Barton to be added to the map on the basis that it had been created by the Inclosure Award of 1805. It was a pre-existing footpath, set out by the Commissioners on a slightly different alignment to the old route. Suffolk County Council rejected the application on the basis that there was no evidence that the path had been actually set out as directed by the Award, or that it had subsequently been accepted by the public. John appealed to the Secretary of State against that decision, but the Secretary of State rejected the appeal, relying on the additional ground that the Commissioners had no power to set out a public footpath either under the General Act of 1801, or the relevant Local Act of 1802. Consequently, the Commissioners had been acting ultra vires, and the award of the footpath was therefore invalid.

The point at issue in the Great Barton case had not previously been considered by the Courts, but it arose following the publication of a Planning Inspectorate advice note which expressed the opinion that the 1801 Act did not provide Commissioners with the authority to set out footpaths or bridleways unless they were, somewhat improbably, at least 30 feet wide.

The Ramblers sought judicial review of the Secretary of State's decision. Unfortunately for us, the judge, Mr Justice Schiemann, found in favour of the Secretary of State. The consequences of that ruling were, in our view, far-reaching and serious because of the large number of still unrecorded footpaths and bridleways which were the subject of an apparently unlawful setting out procedure. Since that 1993 judgment local authorities determining cases have had no choice but to reject any applications which relied on this type of evidence. The Ramblers consider that this state of affairs has been rendered even more serious by the threat, introduced by the Countryside and Rights of Way Act 2000, of the permanent extinguishment of those unrecorded rights in 2026.

Overturning the ruling

In 2001, John approached The Ramblers. He had undertaken investigations and spoken to other experts and wrote that he was by no means the only person to believe that the 1993 case was wrongly decided. He therefore sought The Ramblers' assistance in trying to get it overturned. He had found a suitable case (at Hinderclay), and proposed to claim the path, Suffolk County Council would reject it (following the 1993 Court ruling) and that would be the first step to getting the case re-examined in the courts.

In July 2002 Suffolk County Council refused to make the order so a Schedule 14 appeal was submitted to the Secretary of State. In May 2003 the Secretary of State declined to direct the Council to make the order

Andrews 2

so instructions were prepared for George Laurence QC to deal with the matter. In July 2003 a favourable opinion was received from George Laurence and proceedings for Judicial Review commenced. However, during the course of the case Defra engaged the expert witness services of Dr Steven Hollowell and it became apparent that The Ramblers would need to commission comprehensive and detailed research from a suitably qualified expert of our own. Doing this mid court proceedings would have proved difficult and expensive so it was decided to withdraw from the case to give us time to engage our own expert to carry out the necessary research, with a view to awaiting some other failed definitive map modification order application over which to bring an action to overturn the Andrews case.

A plan of action was drawn up which involved John putting together a team of volunteers to research key information from a sample of Inclosure Awards from around the country and we were fortunate to be able to instruct leading map historian, Dr Yolande Hodson, to co-ordinate and interpret the findings. In September 2011, Dr Hodson's research report was finalised and published in the Rights of Way Law Review (9.3 p179-197). A path in Wiltshire was claimed by John as a vehicle for court action to overturn the ruling. Both Wiltshire Council, and the Secretary of State on appeal, had no alternative but to cite the 1993 Andrews case as the reason for not making the order, or directing that the order be made. Judicial Review of the Secretary of State's decision was commenced in 2012 and we finally found ourselves in Court in February.

Janet may be contacted on
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Waymark will be returning to this case when the judgment is handed down.

Falling standards?

Chris Beney, Chartered Engineer, trustee of the Open Spaces Society etc., and more relevantly convenor [chair] of British Standards panel responsible for BS 5709:2006 on Gaps, Gates and Stiles, asks for comment on two issues involving path structures.

Chris Beney
Chartered Engineer

It has been gratifying generally how in recent years the appearance of a modern function-centred standard for path structures, BS 5709:2006, has increasingly been used where structures are specified in orders and in Highways Act s147 permissions for structures to control animals. This was greatly boosted by Defra publishing their Equality Act guidance on structures on rights of way. I was privileged to have been on the Rights of Way Review Committee working party which led to that guidance, and I acknowledge IPROW's influence in helping persuade Defra to process and publish it.

The British Standards committee B/201 deals with fences and gates. It is about to review its quiver of standards, one of which is Gaps Gates & Stiles BS 5709:2006. The working party responsible for that has some revisions nearly ready to go to the main committee perhaps leading to a revised standard near the year end. Waymark readers' views are sought.

1. Simpler and more logical specification of structures. 'A structure to BS5709'

There is one radical but important concept that I would like to float.

I had a stab at describing a simplification of the specification of structures at the end of the Pittecroft Trust 'Understanding the Defra Guidance on…Structures', (page 9) thus:

> *"There is a case to be made for saying that all that is needed in orders or in authorisations is e.g. "A structure to BS 5709 at point X". The logic is that the BS inherently requires the least restrictive option and is an ongoing functional standard, not an installation standard. If for a HA80s147 authorisation the stock control need ceases, then after a reasonable time a kissing gate would fail the least restrictive option requirement of BS 5709 and would have to be modified or removed. An added bonus is that Recommendation C ['3' in Defra's document] about linking the approval to the actual on-the-ground need as it changes over time becomes virtually unnecessary, at the most a standard phrase could be added to put it beyond doubt. This implication of BS 5709 is not well understood at present. It did not make it explicitly into the Guidance, so this may be a step too far in the short term. Its time may come."*

In case the point is not yet fully clear, one must understand that to be BS compliant a structure is required to be the least restrictive practicable option. One must also remember that it is not a compliant-at-time-of-supply standard, but an ongoing one; any one-time-compliant BS structure that fails to continue to comply is no longer to the BS. It follows that if the 'least restrictive necessary' specification changes with the agricultural need, the particular requirements for the structure change with it if it is to continue to be described as 'to BS'. Thus 'A structure to BS 5709' is actually all that is needed for a gate to control animals and if the animal control need ceased then the gate would become unlawful and a BS Gap is automatically the maximum restriction allowed (often in practice easily done by removing the swinging gate part).

Defra recommends putting a clause in orders and permissions explicitly changing the specification when the actual reasonable needs change (e.g. stock to arable). But as outlined above, that change is inherently required by the BS so as to remain the least restrictive structure necessary. And specifying a particular

Falling standards?

structure in the order, e.g. kissing gate, and then ensuring that all possible changed needs are covered by further words in the order requires almost impossible prescience and considerable areas of paper.

So what to do? Simplest is just 'A structure to BS 5709' in both orders and in authorisations. That is automatically the least restrictive. But too few people would understand the implications. *Pity: so, now what?*

One solution would be to put e.g. 'A structure reasonably considered by the Highway Authority to be to BS 5709'. This would give the Authority, in effect, the right to say what, in any given agricultural situation, was least restrictive (so as to comply). This is better, and is in line with the Authority's asserting duty, but might still lead to misunderstanding and argument.

It might give more certainty, and the public an idea of what is proposed in practice, if the word 'initially a kissing gate [or whatever]' was added. 'Reasonably considered' would not then be needed, as any change from the initial stated structure would clearly have to be judged against BS 5709.

So if s147 authorisations said, *'A structure to BS 5709; initially a [kissing gate]'* this would be a considerable simplification, and more likely than present practice to be Equality Act and Highways Act 1980 s130(1) compliant. The same phrase could be used in orders but unlike s147 authorisations which are limited to the control of animals in-order authorisations may be for other reasons and probably these would need to be stated in the order.

Even a gap can be to BS

I think BS 5709 could quite easily be tweaked to support this approach more explicitly, but before doing so the considered views of Waymark readers are sought. Comment or queries please to chrisbeney@aol.com

2. *Checking compliance.* BS 5709:2006 makes it clear that not just initial installations must comply, but that they must continue to apply.

It would be useful to know how commonly structures are currently inspected for compliance after being specified in orders or s147 etc? And where they are so checked, how often is the checker actually trained in checking to standards? And how often is enforcement action taken, perhaps through s143 or in exercise of common law powers?

Photos: Sue Rumfitt

User groups want gates to the best possible standard

The BS doesn't contain detailed instructions for inspection or a check list, though most checks after 'is it least restrictive?' are just dimensional, e.g. Gap width, visual (e.g. sharp corners or shearing risk), or force (e.g. gate opening effort). It might be possible to provide checklists either within or outside of the BS. Would that be helpful?

Questions, questions, so here is another one: Might a sample survey-to-standards of structures that have been actually specified to a standard be a good start? Is there anywhere where this is actually done? I would love to hear.

Chris may be contacted on chrisbeney@aol.com or on 01923 211113

'Ping Pong' game over, now for the hard stuff!

Alison Newbould, Rights of Way Officer with the City of York Council, looks at the general effect of Public Space Protection Orders and their use in restricting access to rights of way.

Alison Newbold
City of York Council

Since my last review of the Antisocial Behaviour, Crime and Policing Bill's passage through Parliament (Waymark Summer 2013), there has been some lively and at times exasperating debate as I have followed the Bill's somewhat bumpy ride through the House of Lords. Finally, after a short period of 'Ping Pong', which thankfully did not affect Public Space Protection Orders (PSPOs), agreement was reached by both Houses on the text of the Bill and it received Royal Assent on 13 March. The Bill is now an Act of Parliament and the timetable for commencement is likely to begin summer 2014 with a view to having it all in by October/ November of this year.

On following the Bill's passage through the House of Lords I must admit to holding my breath on more than one occasion as the Lords debated whether or not PSPOs should be reviewed once every six months, every year or every three years; whether the time period for Orders could be extended or not, and whether anything shown on the definitive map could be gated at all!

Bearing in mind that all paths that are shown on the list of streets most probably carry, at minimum, public footpath rights and should therefore be recorded on the Definitive Map and that all publicly maintainable rights of way should be on the list of streets, this proposed amendment would possibly have resulted in local authorities not being able to gate any further alleyways. It could even have required the removal of any gates that have already been installed using Gating Order legislation.

I felt so strongly about this last possibility that I emailed Lord Greaves, who had proposed this particular amendment, to point this out. I received back a most helpful and reassuring reply that stated that the object of the proposed amendment was to somehow bring attention to the negative affects that abuse of this 'quick and rather easy procedure' to close rights of way, could have on 'definitive map' rights of way and that there was a need to differentiate between this possible 'threat' to rights of way and 'fairly routine alley-gating'.

And that, as I see it, is where the main issue with this new legislation lies. The new powers have been purposefully designed to be exceedingly broad in order to focus on the impact anti-social behaviour (ASB) is having on victims and communities, and possibly therein lies the danger. An authority could be pressured into restricting access to almost any public space including rear alleyways and rights of way.

(1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.
(2) The first condition is that—
(a) **activities** carried on in a public place within the authority's area have had a **detrimental effect** on the quality of life of those in the locality, or
(b) it is **likely** that activities will be carried on in a public place within that area and that they will have such an effect.
(3) The second condition is that the effect, or **likely** effect, of the activities—
(a) is, or is **likely** to be, of a **persistent** or **continuing** nature,
(b) is, or is **likely** to be, such as to make the activities unreasonable, and
(c) justifies the restrictions imposed by the notice.

'Ping Pong' game over

There is no guidance on what constitutes an 'activity' or what is considered to be a 'detrimental effect'; perhaps one person's detrimental effect is another's positive social activity? Equally, what is 'persistent or continuing' to some, is normal and acceptable behaviour to others. And how does an authority predict the likelihood of an activity occurring and whether that activity is likely to be persistent or continuing? I feel the Public Rights of Way Team's crystal ball is going to get some hammering this year!

What is clear, however, is that detailed Regulations and thorough Home Office Guidance is needed to aid authorities who are planning to use PSPOs to gate problem paths. Authorities also need to ensure that they have robust policies in place to temper public expectation and deflect pressure from elected members, especially leading up to local elections. Strong policy and procedure will be especially important for County Councils where District Council will have the power to make PSPOs, so that a consistent approach is adopted across the county when PSPOs are being considered.

Some good news for those authorities, such as City of York Council, which have a fair number of current Gating Orders in place, is that Gating Orders will automatically convert to PSPOs after three years. Once converted each PSPO, and every new PSPO made by the council, will be required to be reviewed every three years (not every six months or every year as was proposed in amendments) and can also be extended more than once.

Additionally, PSPOs appear to be very flexible and can be varied at any point by increasing or reducing the restricted area and/or by altering or removing a prohibition or requirement included in the order, or adding a new one. Also, an authority may also discharge an order at any time. Both options require a Notice to be published. However, given that on review, consultation remains very wide, this will still be quite an onerous task.

It is clear that partnership working is key when working towards putting a PSPO in place. During the current economic crisis and with most now working with reduced resources this is perhaps becoming more and more important in order to get services delivered effectively and on time. One key partner is the police. Before making a PSPO, the council must consult with the local police. This should be done formally through the chief officer of police and the Police and Crime Commissioner, although no doubt the responsibility for reply will be delegated..

In York we currently work very closely with Safer York Partnership, who supply crime and ASB statistics and generally bolster any budget the authority might have to carry out gating schemes to meet local policing objectives. We also work closely with Waste Services, as a gating scheme often requires a change in refuse collection and with Neighbourhood Services, who may have more background information to either bolster or refute a scheme, and with Elected Members.

An authority must also consult with whatever community representatives they think appropriate. This could be a specific group, for instance a residents' association, or an individual, or group of individuals who may use the public space that is to be affected. There is now no specific requirement to consult with the likes of The Ramblers and Open Spaces Society or even utility companies.

Home Office draft guidance, however, suggests that an authority should consider consulting with relevant user groups where it is proposed to put a PSPO on certain types of land such as registered common land,

town or village green and Open Access Land. No mention is yet made of Lord Greaves' 'definitive map rights of way' but I have little doubt that this will appear in a later version.

Additionally, District Councils that make a PSPO will be required to 'notify' the County Council (if any) for the area that includes the restricted area. Note the use of 'notify' rather than consult here. It is hoped that in the case of the restriction being placed on a highway, then the views of the highway authority will be taken into consideration before any decision is made.

With regards to PSPOs affecting alleyways/public rights of way there are further consultation requirements that include notifying potentially affected persons of the possible restrictions. As well as landowners/occupiers of the land affected by the order, this is also likely to include people who live nearby as well as people who regularly use the right of way in their day-to-day travel. How this should be done is currently not specified but will probably include the posting of notices on site, giving information on how to view a copy of the order and details of how and by when representations can be made. Other possible methods of consultation include publishing the Notice on the council's website, holding a public meeting, officers going door to door and using social media.

Unlike Gating Orders, it will be an offence to breach the prohibitions/requirements of the PSPO (without reasonable excuse). A person guilty of an offence will be liable on summary conviction to a fine not exceeding £1,000. Depending on the behaviour in question, the enforcing officer, who could be a police officer, PSCO, council officer or other person designated by the council, could impose a Fixed Penalty Notice (FPN).

Any interested person will be able to challenge a new or varied PSPO in the High Court within six weeks of it being made. An interested person is someone who lives in, regularly works in, or visits the restricted area. For our purposes this will most likely include those living adjoining or adjacent to the alleyway in question or those who use it to travel on a regular basis. The validity of a PSPO can be challenged on two grounds. Firstly, that the authority did not have the power to make the order or to include particular prohibitions or requirements. Secondly, that one of the legislative requirements had not been complied with, for example consultation had not been carried out. Whether the prospect of taking an appeal to the High Court will put the ordinary person on the street off appealing against a PSPO remains to be seen.

So, after much debate, the Bill has now become law and we await the Regulations and the promised guidance, with fingers crossed that questions that have been raised will be answered and the, at times very subjective, content clarified. One thing that is clear in York however, is that the work to review our 60 current Gating Orders, probably on a three year rolling programme, will need to start soon and the further four draft Gating Orders that have recently been advertised will need to be sealed, sooner rather than later.

Alison may be contacted on 01904 551481 or on Alison.Newbould@york.gov.uk

Highway trees

In the second part of a two-part article, Janet Briscoe, IPROW member and Solicitor at Hertfordshire County Council, looks at the powers of highway authorities in respect of highway trees.

Janet Briscoe
Hertfordshire County Council

The Highways Act 1980 ("the 1980 Act") Act sets out a number of powers in respect of highway trees.

- Section 96(1): power to plant trees

This section provides that a highway authority may, in a highway maintainable at the public expense, plant trees and shrubs and lay out grass verges, and may erect and maintain guards or fences and otherwise do anything expedient for the maintenance or protection of trees, shrubs and grass verges planted or laid out, whether or not by them, in such a highway.

However, section 96(6) provides that no tree, shrub, grass verge, guard or fence shall be planted, laid out or erected under this section, or, if planted, laid out or erected under this section, allowed to remain, in such a situation as to hinder the reasonable use of the highway by any person entitled to use it, or so as to be a nuisance or injurious to the owner or occupier of premises adjacent to the highway.
Section 96(7) states that if damage is caused to the property of any person by anything done in exercise of the powers conferred by this section, that person is entitled to recover compensation for it from the authority who exercised the power. However, a person is not entitled to compensation if his negligence caused the damage; and if his negligence contributed to the damage the compensation will be reduced accordingly.

- Section 154: power to require owner of a tree to remove overhanging branches

This section provides that where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians, or obstructs or interferes with the view of drivers of vehicles or the light from a public lamp, or overhangs a highway so as to endanger or obstruct the passage of horse-riders, a competent authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is growing, require him within 14 days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference.

Photos: Lisa Smith

The section also provides that where it appears to a competent authority for any highway, or for any other road or footpath to which the public has access (a) that any hedge, tree or shrub is dead, diseased, damaged or insecurely rooted, and (b) that by reason of its condition it, or part of it, is likely to cause danger by falling on the highway, road or footpath, the authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is situated, require him within 14 days from the date of service of the notice so to cut or fell it as to remove the likelihood of danger. A person aggrieved by such a notice may appeal to a magistrates' court.

If a person on whom a notice is served fails to comply with it within the period specified the authority who served the notice may carry out the work required by the notice and recover the expenses reasonably incurred by them in so doing from the person in default.

Highway trees

Photo: Lisa Smith

Private streets

Where there is no known owner, the street works authority has power to carry out emergency works on a private street (which includes a footpath or bridleway) by virtue of section 230(7) of the 1980 Act.

Trees and rights of way

In addition to the general highway matters discussed above (which apply to trees and rights of way) and in my previous article there are some particular situations that arise in respect of rights of way.

Where a diversion order is made under section 119 of the 1980 Act, then section 36(2)(d) provides that any new route is maintainable at public expense. In which case, any trees in the new route would become the responsibility of the highway authority. The same would apply to trees growing in routes that are the subject of creation orders made under section 26 and creation agreements made under section 25.

Footpaths and bridleways which come into existence, other than those caught by section 36(2)(d) of the 1980 Act e.g. a creation agreement under section 25 or are created by virtue of section 38 of the 1980 Act, are not maintainable at public expense. A new path which came into existence as a result of purely user evidence either by virtue of common law or under section 31 of the 1980 Act would not be maintainable at public expense. Thus section 263 of the 1980 Act would not apply and, presumably, responsibility for the trees would remain with the owner of the land.

Janet may be contacted on Janet.Briscoe@hertfordshire.gov.uk

Membership News

Lisa Smith
Executive Officer

A warm welcome to the following new full members:

Jonathan Bibby, an Area PROW Officer for Kent County Council
Jonathan has worked for Kent County Council PROW for 10 years as a public rights of way officer. He deals with the day to day maintenance and enforcement issues and has the fortune to cover the area of Tunbridge Wells Borough, a mixture of rural and urban areas with the picturesque High Weald AONB within part of the area. With recent re-organisations IPROW membership has been one of the criteria assessed and membership will help with future career progression.

Jonathan Cheal, Solicitor, Dyne Drewett, Somerset
Jonathan is a solicitor with many years' experience in acting for clients in public rights of way cases in the south west of England, but also further afield. He has an extensive case load in this most interesting, unusual and challenging subject. Jonathan has been in practice for 27 years, and before that was in an advisory capacity in London for five years, and was also an articled clerk in the Public Rights of Way Department of a County Council, 'many moons ago'.

It is a subject in which very few solicitors have any experience at all, so Jonathan's specialism is an unusual one. He helps owners/occupiers/managers of land and property deal with claims which affect the land, and he is also particularly concerned in helping his clients manage their public access concerns.

Helen Clayton, Public Rights of Way Senior Officer with Devon County Council
Helen started with Devon County Council's Public Rights of Way Team in 2003 as a Definitive Map Officer dealing with Definitive Map Modification Orders and Public Path Orders. She started in her current role last year, and now leads the Public Rights of Way Legal and Development Team, covering a range of functions including the Definitive Map Review, ROWIP, Parish Paths Partnership scheme, GIS mapping, and the Devon Countryside Access Forum. Helen decided that it was long past time she applied for membership of IPROW. In her new post she felt it was even more important to have access to the wealth of information and support it provides, and to be able to share experiences with others.

Lindsay Saunders, a Public Rights of Way Officer for South Gloucestershire Council
Lindsay covers all aspects of rights of way work (maintenance, legal, DMMOs and planning) in her job as a public rights of way officer for South Gloucestershire Council

Like many people she got into ROW work by accident; she worked in the Planning Inspectorate and a secondment opportunity arose in what was then the Department of Environment south west regional office (later GOSW) to do DMMO appeal work for the south west region. That was in 1992 and within a couple of months she was completely hooked; so was asked to stay. Fourteen years later Lindsay was made redundant but was keen to stay in rights of way work because by that time she had met so many lovely people in the different Councils! She was then lucky enough to be offered a temporary admin position by South Gloucestershire Council learning the job from the other side before a permanent position arose in 2008. Lindsay says, “Joining IPROW was the final step in becoming a fully-fledged PROW person”.

As a keen horserider promoting new bridleway/multi user links is always high on Lyndsay's agenda when large developments take place in the area that she looks after. But building good relationships with landowners, who see PROW officers with different approaches come and go, is also important to her because their trust that we want to work in partnership with them enables improvements to be made which allows the public better access.

Membership News

And a further warm welcome to the following new associate members:

Hannah Brennen, a Landscape Surveyor with TEP (The Environment Partnership)
Hannah joined IPROW on the recommendation of her manager. She helps to manage the surplus development land owned by the Homes and Communities Agency, in line with the Commons Act. Hannah says, "Hopefully, IPROW will help me to correctly identify public rights of way, which can be correctly signed allowing public access onto the otherwise private landholdings". She surveys landholdings across the north of England and the Midlands and spends the majority of her time on site completing Use and Access, Water Safety and Health and Safety surveys. When in the office she helps the Landscape Management team by producing drawings using GIS.

Alex Couszins, a Rights of Way Technician at Rotherham Metropolitan Borough Council
Alex started work in rights of way in 2007 working on the maintenance and enforcement side of rights of way. She then became involved in delivering the Connect 2 project for Rotherham, delivering the largest schemes the team has ever undertaken to provide important links for communities; also carrying out diversions, upgrades and liaising with landowners and the public. Alex has recently become involved in the review of the definitive map after the Council lost its Definitive Map officer. She says, "This is a huge challenge and joining IPROW will provide me with the help and support that I need to carry out this role. The great thing about rights of way is that you never stop learning about the job!"

Vincent Healy, Line Manager, Planning and Highways at the London Borough of Havering
Vincent specialises in planning, highways, public rights of way and property. The London Borough of Havering has substantial areas of open land and green belt with an extensive network of footpaths and bridleways. Vincent deals with village green applications, highways orders, s 25 agreements, s 26 orders, s 53 applications, stopping up orders, statements of case and public inquiries.

Chantelle Hoppe, a Ranger with Brighton and Hove City Council
Chantelle joined the authority three years ago, prior to that she was with East Sussex County Council for a year as a trainee ranger and carried out practical rights of way tasks with their team of Access Rangers. Brighton and Hove City Council is the land owner as well as the Highway Authority for much of the South Downs surrounding the City. This provides an interesting context for the management of countryside and rights of way in the area. Chantelle's current duties are wide ranging, including: mapping public rights of way on GIS, liaising with the legal team on DMMOs and updating the Definitive Map, carrying out inspections, overseeing rights of way maintenance, reviewing the ROWIP, as well as countryside management work and engaging with local communities around green spaces. She hopes to use IPROW membership to learn from the wide network of practitioners to help improve her knowledge in this area.

Hayley McCulloch, a Rights of Way Assistant with Birketts LLP
Hayley joined Birketts LLP in March 2012. With a background in commercial property law, she worked for the firm in an administrative capacity covering a wide range of legal specialties. In January 2014 she joined Birketts' rights of way team as a Rights of Way Assistant. She is focusing on preparing deposits to be made under s 31(6) of the Highways Act 1980 and s 15A of the Commons Act 2006 and supports the firm's national practice in public path order and definitive map modification order work. She has already attended an IPROW training event and is looking forward to meeting many other members and expanding her knowledge further.

Membership News

Samantha McGivern, a Consultant with Brook McGivern Green Space Consulting Sam came to work in public rights of way following broader roles in land management as a Countryside Ranger and Assistant National Nature Reserve Manager. Her role as Open Access Officer within Doncaster Council's public rights of way team was fascinating, challenging and enjoyable and she gained a great deal of experience and satisfaction from the contributions she was able to make to the authority's ROWIP and Access land management. Sam has now moved on to become trustee of a conservation charity and is taking a lead role in access and community engagement projects as well as working freelance on green space management ventures. In addition to this she is a member of her local LAF. Joining IPROW has long been a goal and she says, "I intend to utilise every opportunity to enhance and develop my skills and my passion for countryside access and rights of way".

Appointment Service

IPROW's Appointment Service is consistently praised for its effectiveness and reliability. If you have a vacant post to advertise do encourage your authority to use it, and even better, to state in the advert that IPROW membership is desirable.

For more information on using the IPROW Appointment Service contact Lisa Smith membership@iprow.co.uk or 01768 840428

Is this your copy of Waymark? Are you a member of IPROW?

If you answer no to the above questions but you work in rights of way or broader countryside access management then contact Lisa Smith 01768 840428 or membership@iprow.co.uk or apply online Just a little effort will result in a host of benefits available only to IPROW members.

If you don't qualify for membership but wish to subscribe to Waymark contact Lisa for subscription details.

Welcome to new Director Claire Goodman

Having graduated from Aberystwyth University, Wales with a Bsc (Hons) in Countryside Management in 2001, Claire worked initially for the Welsh Government and also the former Forestry Commission Wales on various countryside management projects. Since then she has gained over ten years' experience in public rights of way management; firstly working for Powys County Council in their Countryside Services Section for five years, covering a large area of Wales dealing with public path orders which involved a lot of landowner negotiation and contract management as well as legal processes. For the last five years she has been the Definitive Map Officer for Ceredigion County Council, covering all aspects of Definitive Map work and leading a small team which also covers Common Land and Village Green case work. In addition, she lectures on professional training courses in Wales, and is the Vice Chair of the Welsh Rights of Way Working Group. Claire says, "I look forward to my additional role as one of the IPROW Directors and hope to assist others in raising the profile of the good work being carried out in Wales, but also to sharpening my knowledge on the legal changes that are rapidly taking place in both England and Wales in order to assist and support members and the public in these challenging times".

Hanging on the telephone?

Do you have non-member colleagues who don't want to submit written work as part of their application for Full membership? Two recent recruits to IPROW share their experience of the telephone interview; please feel free to share this with those you know who are still toying with applying….

Looking at this blank page on the computer and trying to think what to write reminds me of the daunted feeling that I got when I was trying to decide what title to choose from IPROW's suggested list of essays. None of them quite seemed to be the right one for me. Either the topic bore no relation to my job as Area Rights of Way Officer for north east Nottinghamshire or I did not have sufficient working knowledge of the topic to be able to include my own case studies. Also publications about rights of way do not fill the shelves of libraries and bookshops. Yes, there is the internet and the various journals that are related to public rights of way, but I was not sure how easy it would be to find the relevant information from these sources. As a result several years passed between the completion of my application form and the presentation of a piece of work to IPROW.

The recession years and the relentless job cutbacks were the turning point for me. It seemed a no-brainer that joining IPROW was going to either help me to keep my job or help me to get another one. My husband, sick and tired of hearing me talking about it, contacted IPROW and spoke to Lisa Smith. She confirmed that there was still time for me to produce a piece of work and suggested the possibility of a telephone interview.

Initially I baulked at this, because my preference was to join IPROW via the essay route, but discussions with Lisa were very helpful and encouraging. She explained about the telephone interview and that I would need to prepare a topic that would be the subject of discussion with the interviewers. After careful thought I realised that this would be an ideal way for me to present my piece of work.

The topic that I chose was the history of an enforcement issue that I was in the process of dealing with. Fortunately this matter reached its conclusion whilst I was preparing the background information for my interview. This meant that the topic had a beginning, middle and end. Also I hoped that it had sufficient breadth to enable the interviewers to get a good insight into both my knowledge of rights of way in general and of the legal framework surrounding the enforcement issue. On the practical side I hoped that it gave an idea of how I handle rights of way issues on the ground.

It was necessary to ensure that the interviewers had sufficient information about my topic prior to the interview, so I supplied each of them with a full report about the enforcement issue and this was accompanied by supporting photographs and documents.

The interview date was set and on that day at the appropriate time I phoned the number that I had been given. When prompted I entered a PIN, which led to a three way conversation between myself and the two interviewers. This was a new experience for me, but the interviewers made me feel at ease. From my point of view the interview was useful because it enabled me to provide information, which I hope, helped to clarify my report. It also enabled me to provide more information about myself. The whole interview lasted about 25 minutes.

In conclusion, the telephone interview worked for me, because I was able to choose a topic which was based on the rights of way work that I actually do. In hindsight, which of course is a wonderful thing, I am sure that this could have been translated into an essay format. If only I could have thought of the right title!

Laura Summers

Hanging on the telephone?

Although I was initially unsure as to the best entry option to take, following reassurances from Lisa, I decided to go for the telephone interview, at least it would be over and done with, in a short space of time, and time is in limited supply both at work and at home.

It was certainly the best choice I could have made. Prior to the interview, I arranged to have a quiet room set aside. When the day arrived, I telephoned the given number, tapped in the PIN and was greeted with a friendly welcome. What followed, in my opinion, was a pleasant, quite informal chat and both Fiona and Bob put me at ease straight away. Before I knew it, the 'interview' was over.
I didn't have to wait long to be informed that I had been successful in my application.
For anyone considering membership and worrying about the process, I would say to have a chat with Lisa beforehand and you will arrive at the best option to suit you.
Carole Kertesz

And on the other end of the line....

For many years the option of giving a verbal presentation on an agreed topic has been available to applicants for Full membership, as an alternative to writing a paper from the list of suggested topics, or the more recent option of submitting a recent piece of their own work.

The Institute has moved towards conducting much more business by telephone conference call rather than face to face meetings in a bid to save time and money. As the Membership Group has become more accustomed to this way of working the suggestion was made that we could try offering the option of a telephone interview to candidates rather than a face to face presentation. It was felt this may be more efficient for both the applicant and the Membership Group, with no one having to travel.

A number of telephone interviews have now been successfully carried out. Usually these involve a conversation between the applicant and two or three members of the Membership Group. We try to keep these fairly informal as we get much better information from a relaxed applicant than from a bundle of nerves on the other end of the phone.

Telephone interviews are particularly suited to applicants who are not confident about writing a paper from the topic list or those who have no recent suitable piece of their own work they can submit.

The amount of information submitted in advance of the interview by the applicant has varied considerably. From the interviewers' viewpoint it is helpful for us to have at least a brief outline of the topic the applicant would like to discuss to showcase their experience and knowledge.

As both Laura and Carole have indicated, if you are not sure which is the best route for you to follow please do give Lisa a ring to discuss the options. She will be very happy to guide you through the process.
Fiona Plane

Your Professional Development

Law Society Accreditation

Geri Coop
Executive Officer

PROW courses have now achieved accreditation by the Law Society, with a glowing commendation for the quality of the sample courses. Many solicitors and paralegals have expressed interest in IPROW courses recently and, now they can gain accredited CPD points by attending, even more may be interested so there is the potential for more courses spread over the country on new topics. Please make sure your legal team is aware of this development and send any email addresses to be added to the mailing list for courses to training@iprow.co.uk.

Training and Local Courses

Courses are accredited by the Solicitors' Regulation Authority for the Law Society CPD

24 June *Tree Risk Management Planning,* Eynsham Oxfordshire. A repeat of this course in Leeds (or any other venue on offer) is proposed if there is enough interest.
Whose tree is it, what are the liabilities, what to do about them? A new course addressing concerns about highway trees and creating a defendable tree risk management plan.

3 July *Writing Statements of Case,* Knuston, Northamptonshire.
A good statement of case is crucial for an opposed order yet many authorities falter at this point with inadequate statements. Find out what should be in your statement and how to manage the process of referral with maximum efficiency.

9 October *IPROW Annual Update 2014,* Derby. Book Now for Early Discount (from £120 for immediate booking)
The programme for this event will grow over the next few months. Already scheduled are: George Laurence QC on latest case law and other current questions; Alan Kind on influencing public expectations as you do more with less; plus flood damage management, effects of the Crime and Antisocial Behaviour Act, coping without a definitive map officer, effect of SUDS on access.

4 November *Tithe and Finance Act Records,* The National Archives, Kew
Full awareness of the history of the records used in evidence, their interpretation and caveats are all essential for evaluating cases and avoiding costly errors.

Members £235, non-members £330, (except for the Update).

Courses in planning:

- Principles of a successful volunteer force, what will work for you and how to produce it, including recruitment, managing and retaining volunteers; Risk Assessment, Health and Safety, equipment, insurance and quality control.

- Structures: Design, balancing access for all with antisocial behaviour, policies, enforcement, British Standards compliance, making structures 'attack proof'

- Public Inquiries: preparing for Inquiry, including the valuable opportunity to test yourself in the popular role play of an Inquiry. This course has received the highest accolades from previous participants who have found it immensely beneficial. Intensive two day residential course with required preparation time. Previous attendance at Opposed Orders (2012) or earlier Statements of Case and Proofs of Evidence courses is strongly recommended.

Remember that any previously run course can repeat with enough support, in any region.

Your Professional Development

Local Courses

Do you want IPROW events in your region?

With a small market, IPROW courses tend to be arranged centrally to give opportunity to the majority to attend but obviously this is more difficult for those further away.

If there are others in your region interested in a course, remember you can arrange many IPROW courses local to you. All you need to do is provide or recommend a venue.

If your budget cannot fund you on a course you want, can you provide a room, printing and refreshments in return for a place? All you need to do is offer to host any course you wish and so long as enough participants can be found, it will happen. A course of your choice at your site!

Courses can be selected from a standard format or a selection of sessions.

There are decreased budgets for training but high demand with people taking on new roles and a greater need to ensure accuracy, efficiency and good practice, so you may find it more cost effective to supply IPROW training at your authority for several of your team, rather than picking one person to go away to a course.

IPROW courses are continually updated and we offer an extensive selection of sessions. You can pick your ideal content from the menu for an in-house course and get everyone up to date at once. For a small team, why not see if your neighbouring authorities would be interested in sending some colleagues to join you? Or IPROW can publicise the course to others with a view to finding enough for it to be viable.

More information online or contact training@iprow.co.uk. 01536 514749 to discuss your needs.

From rights of way to Bosnia's street dogs

Where can a career in rights of way take you? IPROW member and former editor of Waymark Stephen Jenkinson has recently featured in 'Your Dog' magazine, which featured his work with the International Fund for Animal Welfare and the United Nations' Development Fund looking at a humane and effective dog control plan for Bosnia. Like many countries Bosnia has always had 'street dogs', but an increase in their numbers has led to them becoming a threat to safety. Local people are genuinely concerned about attacks, particularly to children and the dogs become a nuisance chasing cars and bikes.

Here in the UK Stephen is looking for partner authorities to pilot a national Kennel Club 'dog walker' accreditation scheme If this is of interest to you please contact Stephen.

Local public inquiry rules: two cautionary tales

Imagine that you are the Definitive Map Officer for an Order Making Authority ("OMA") and you have a contested DMMO. A difficult case, where the objectors have raised complex legal arguments invoking the terms of a private Act of Parliament. You've engaged an external rights of way consultant and assembled a team to support the case to public inquiry. You submit the Order and an inquiry is arranged for the 23 July. As is required under the rules, the Planning Inspectorate set out the timescale for documents to be submitted and as an OMA in support of the confirmation of the Order you have to submit your statement of case and supporting documents by 26 March. However, aware that this is a complex case you have already submitted your Statement of Case and four lever-arch files of supporting documents; you did this when you sent in the contested DMMO.

Looking at the timescale for the submission of the objector's statement of case (7 May) and the submission of proofs (25 June) you make sure that all your team members will be available to respond to the objector's Statement of Case when it is received and will be on hand to work on and finalise proofs of evidence. Holidays are booked around the deadlines and annual leave scheduled so that the team will be able to work on the case in time to meet the set and published deadlines.

May arrives and you do not receive the objector's statement of case from the Planning Inspectorate as anticipated. Upon enquiry you find out that without any consultation whatsoever the Planning Inspectorate has allowed the objector (who had changed solicitor from the firm that had made the original objection) an extension of two weeks. Instead of the anticipated seven weeks during which you intended to prepare and finalise proofs of evidence the time period is reduced to five.

This happened to IPROW member John Lee last year. The inquiry has now been held and the Order determined and John now feels able to share his experience with Waymark. John says, *"I was not only concerned that the reduced timescale affected me and other members of our inquiry team, but obviously other parties to inquiries who are volunteers who prepare for inquiries in their 'spare-time' could be seriously prejudiced by a sudden shortening of the timescales in this way."*

John raised this matter with the Planning Inspectorate which responded: *"We do not consult on whether to grant extensions to statements of case or proofs of evidence. There may be occasions when a person requests an extension for personal reasons. In these circumstances other parties might consider it advantageous not to agree and, given the large number of parties involved in such cases, can be considered impractical if we consulted with them all. However, we have reviewed our policy on extensions in light of your complaint and accept that we should now notify all parties of extensions."*
John was also advised that had he felt that the OMA's case was prejudiced by the granting of the extension then the OMA could have made representations to the Inspectorate (though it is rather difficult to see how the OMA could have made timely representations in this case, since until John asked why he had not received the objector's Statement of Case the OMA was unaware that an extension of time had been granted). The Inspectorate has revised its guidance and in the very rare circumstances where extensions of time are granted to parties, all other parties will be informed that an extension has been given.

John also had the not uncommon experience of being asked for the OMA's Statement of Case when it had already been submitted (with the initial DMMO submission). IPROW advises that if as OMA you chose to send your Statement of Case 'up-front' then it is good practice to make this clear in your covering documents AND to confirm with the Planning Inspectorate on the due date (for submission of the OMA Statement of Case) that you have no additional documentation to submit.

But what if you do not support your Order?

In John's case the OMA supported confirmation of its Order (and that was the outcome of the inquiry). However, as East Sussex County Council found last year, if as OMA you oppose confirmation of your own Order (in this case a DMMO made on the direction of the Secretary of State) you still have to submit your Statement of Case first. This means that the OMA and any other objecting parties have to make their case without seeing the case in support of the confirmation of the Order. As the rules presently stand the Planning Inspectorate has no power, in these circumstances, to compel a party in support of an Order to submit its case before the opposing parties submit theirs. Whilst it is uncommon for OMAs to oppose the confirmation of their own DMMOs it is not unheard of, particularly where an Order has been made on the direction of the Secretary of State.

Reports of Order and Cost decisions

An Inspector declines to confirm a downgrading from restricted byway to footpath

The difficult questions of the meaning of RUPP and the weight to be given to it and the validity of a 2002 application to downgrade a RUPP (now RB) to footpath are carefully considered.

Inspector Mr Peter Millman

FPS/G1440/7/29

2 January 2014

Précis

The East Sussex County Council made the Order following a direction by the Secretary of State. At the inquiry the Council opposed the confirmation of its Order. The Inspector considers whether the Order route is capable of being downgraded to footpath and whether the 2002 application was a qualifying application for the purposes of section 48(9) of CROW. Having concluded that it is, the Inspector considers the weight to be given to the presumption arising from the original depiction of the Order route on the definitive map as a RUPP, weighing this against the evidence in the case both for and against restricted byway status. Applying *Trevelyan* the Order is not confirmed.
At the time of going to press an application for judicial review of this decision has been made.

An Inspector declines to confirm the extinguishment of a footpath

Although the footpath had not been used for 40 years because of an obstruction, the public would benefit from its being made available again.

Inspector Michael R Lowe

FPS/M4510/3/1

24 January 2014

Précis

The 'temporary' obstruction of a footpath in about 1970 led to it not being used for approximately 40 years. Whilst there were possible alternative routes, the Inspector was of the view that the Order route provided an alternative to these other paths and the public would find it a more attractive alternative. In declining to confirm the Order, the Inspector commented on the OMA's Rights of Way Improvement Plan in which they intended to improve their rights of way network, his view being that the Order route would be a valuable link to the local network.

An Inspector considers whether a DMMO to add a previously unrecorded route as BOAT can be confirmed

Failure to adopt an urban route when routes connected to it were adopted results in rights for mechanically propelled vehicles being lost under the operation of the Natural Environment and Rural Communities Act. Width evidence is also considered

Inspector Mrs Helen Slade

FPS/B5480/7/1M1

19 November 2013

Précis

The Order was made by the London Borough of Havering. It was confirmed with modifications, principally changing the status of Byway Open to All Traffic to Restricted Byway. The applicant originally applied for the way to be added to the DMS as a BOAT based on public rights in mechanically propelled vehicles having been dedicated at common law, but then also relied on the exemptions under s67(2)(a) of the Natural Environment and Rural Communities Act 2006 (“NERC Act”) being that the main lawful use by the public during the period of five years ending 2 May 2006 was use in mechanically propelled vehicles. The Inspector concluded that although the route could have been recorded as a BOAT at some time previously, it was not shown on the Definitive Map and Statement at all prior to 2 May 2006 and, therefore, the extinguishment provisions of the NERC Act applied. If the NERC Act exemptions had applied, the Inspector could not have confirmed the Order, as the route would not have fallen under the definition of a BOAT, in that its principal use by the public then would then have been with mechanically propelled vehicles meaning that the route was a full public vehicular highway "(i.e. an ordinary road).

(R)Amblings

The diary of a rights of way team

We used to have a laminator that we used to encapsulate Order notices before posting them on site. Laminators can be a bit temperamental, but we probably contributed to the downfall of this one. It was noticed that another team in the office was using it; we didn't mind that too much but they were also using our special pouches. So we hid them. The other team were not to be put off by this, but unfortunately the plastic pouches they used were not suitable for our laminator. A member of the other team was spotted with one foot on the laminator frantically heaving at the gooey mess half out of it. So we had to replace it with a cheap one which soon developed a fault and started smoking. When the Manager needed to use it he found that it worked perfectly if he took the case off; as long as he didn't touch the live bits or the hot bits. With the help of another team member with an engineering bent, he fixed the fault by wedging a brick inside one end of the case and it worked perfectly. All was well until an unsuspecting assistant picked up the laminator and the effect of the unexpected, lopsided brick-weight caused it to somersault out of their grasp. So no more laminators, we'll use outdoor paper henceforth.

Unfortunately the corporate purchasing police noticed the word 'paper' in the second or third order and it was intercepted. We were told that it was classed as stationery and had to be ordered through central business support in the interests of more efficient purchasing. We asked them to order some for us; 'no problem' they said. A few days later they rang and asked where they could get some from because none of their usual suppliers knew what it was. We gave them the contact for our supplier and the outdoor paper duly arrived, at a cost of 20% on top of the price we had been paying. That would be 20% added by the support unit for doing the 'more efficient purchasing' for us. Never mind, a friendly supplier will interpret some suitable euphemism if given sufficient explanation. Our first attempt at ordering 'legal order publicity medium' was not subtle enough to avoid blocking, so outdoor paper now gets ordered as some sort of nails.

Mind you, neither outdoor paper nor laminated notices survived the 80 mile an hour winds we had in the first few months of the year. Sadly the notices for our section 119A Order survived long enough for the Order to be objected to. Network Rail seems to think that we can ignore the objections as 'irrelevant' and confirm the Order ourselves without troubling the Secretary of State. It has been suggested to senior management that other authorities have done just this (and that our Manager is just being difficult by not following suit). The argument that we should do this just because someone else already has, sounds to younger team members just like the arguments they tried out with parents when in their mid-teens; the ones about being allowed to stay out late 'because everyone else is'. Funnily enough when Network Rail is actually asked for examples of other authorities that have confirmed opposed Orders, names are not forthcoming. Even senior management is not willing to be the first to experiment with this notion, particularly after our solicitor points out paragraph 5.29 of Circular 1/09.

As you all know having a black sense of humour helps in rights of way. In a neighbouring authority the rights of way team was asked for suggestions for the newly launched corporate scheme whereby people can sponsor items of furniture as memorials or to celebrate special events. Suggestions of 'Where there's a Will there's a Way', 'Cash for Ash' and 'From Cremate to Donate' were turned down as not being 'entirely appropriate' It is perhaps a mark of corporate desperation that the team's final suggestion of 'Pearly Gates' was briefly considered.