APPENDIX 3

Item 1 Appendix 3

LEGAL BACKGROUND AND GUIDANCE FOR DETERMINING MODIFICATION ORDER APPLICATIONS

Effect of the Definitive Map and Statement

Under section 56 of the Wildlife and Countryside Act 1981, the Definitive Map is conclusive proof of the existence and status, at the relevant date of the map, of the rights of way that are shown, but without prejudice to the possibility that further rights may exist. The Definitive Statement is conclusive proof of the details which it contains as to width, position and any conditions or limitations on the rights of way shown on the Definitive Map.

The advice of DEFRA is that everything shown on Definitive Maps and Statements will have gone through a process of challenge and confirmation and that such documents are presumed correct unless there is very cogent evidence that an error was made.

Provisions of Wildlife and Countryside Act 1981 section 53 for modifying the Definitive Map and Statement

The purpose of the Definitive Map and Statement is to record all public footpaths, bridleways (collectively known as public paths), byways and restricted byways within the surveying area of the Isle of Wight.

Under s53 of the Wildlife and Countryside Act 1981 the Council has a duty to keep the Definitive Map and Statement under continuous review by making modification orders when necessary because of certain events specified in section 53 (3).

The events specified in section 53(3)(a) require administrative orders which modify the map to reflect legal events such as path orders made under the Highways Act 1980. These orders do not require the consideration of evidence and are not advertised.

The events specified in section 53(3)(b) and (c) are those which require the Council to consider evidence which may require a path to be added to the Definitive Map and Statement or some other change to be made. In this case the order is made according to the procedure set out in Schedule 15 which requires the order to be advertised to allow a period of public challenge and the possibility of a public inquiry or hearing to test the evidence.

The event specified in section 53(3)(b) is the expiration of any period of time such that public enjoyment of the way gives rise to a presumption of dedication of a public right of way.

The event specified in section 53(3)(c) is the Council's discovery of evidence concerning a public right of way. An order should be made if on balance of probability the evidence, when considered with all other relevant available evidence, shows:

(i) That a right of way which is not shown in the Map and Statement subsists, or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this part applies.

(ii) That a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.

(iii) That there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

Deletion

In the case of the deletion of any public rights currently shown on the Map, the evidence must show that no right of way existed at the relevant date of the Definitive Map on which the right of way was first shown, or of the individual order by which it was first recorded. Everything included in the Definitive Map and Statement has been through due process and is assumed to be correct. The onus is on the applicant to demonstrate otherwise. If the authority itself has evidence of an error, it must similarly demonstrate the fact before making an order.

Applications for modification orders

Under section 53 paragraph (5) and according to the procedure set out in Schedule 14, anyone may apply to the authority for a modification order required under (b) or (c) to bring evidence to the attention of the authority. The authority is then under a duty to investigate that evidence, to consult with other local authorities for the area and then to determine on the basis of evidence whether to make the order.

If determination is not made within 12 months, the applicant may apply to the Secretary of State, who, after consulting with the authority, may direct the authority to do so.

If the authority determines not to make the order, the applicant may appeal to the Secretary of State, who may direct the authority to make the order.

If the Council decides to make a modification order, it must be advertised for not less than 42 days and if there are any objections which are not withdrawn, it must be referred to the Secretary of State for determination and a public inquiry will usually be held.

Dedication of Highways

The question which usually has to be determined by the Council when considering a modification order is whether the evidence shows that a highway exists because dedication has occurred at common law or is deemed by operation of section 31 of the Highways Act 1980. Where this question is a relevant issue, Planning Inspectorate's guidance for inspectors on dedication and user evidence (Section 5 of the Planning Inspectorate Consistency Guidelines) is Item 3 of this Appendix. Evidence concerning dedication should be evaluated in the light of this guidance.

Once public rights are dedicated over a way, that way becomes a highway and exists in perpetuity unless stopped up or diverted by statutory order. The highway does not cease to exist because it is not used, hence the maxim 'once a highway, always a highway'.

Quasi-Judicial Role of the Panel

In considering the evidence, the Council is acting as a tribunal of fact and must meet the following requirements.

The Panel must objectively consider all the available relevant evidence, taking advice as to application of legal principles where necessary, and come to a conclusion, on balance of probability, on matters relating to the existence of a public rights of way in order to determine whether a modification of the Definitive Map and Statement is required.

Such matters may include whether a presumption of dedication is raised, whether such a presumption is negated, whether a right of way subsists, details relating to position and width, or to limits or conditions on a dedication.

The fact which has to be found is the existence of a highway and/or details relating to its dedication. The Panel must disregard all views which are not relevant to this question. Such views may concern for example the effect or desirability of the right of way should it be found to exist.

The Panel must however apply the principles of natural justice. The decision itself will depend upon the facts and law, but in making that decision it is important that persons who will be affected by the order if made, notably landowners and occupiers, have sufficient opportunity to put evidence forward themselves and to comment on the evidence being considered by the Council. The Council should therefore consider only the evidence and comments presented in writing in the report, which all landowners will have seen and had the opportunity to comment on.

31. Dedication of way as highway presumed after public use of 20 years

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes-

(a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council-

(a) a map of the land on a scale of not less than 6 inches to 1 mile; and

(b) a statement indicating what ways (if any) over the land he admits to having been dedicated as highways;

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time-

(i) within six years from the date of deposit; or

(ii) within six years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(7) For the purpose of the foregoing provisions of this section, 'owner', in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above 'the appropriate council' means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.

THE PLANNING INSPECTORATE

Wildlife and Countryside Act 1981

DEFINITIVE MAP ORDERS: CONSISTENCY GUIDELINES

GUIDANCE

Introduction

5.1 Dedication of rights of way to the public can arise under statute law (s31 HA80) and under common law. The references above provide a good basis for understanding a controversial subject. It has given rise to a number of judicial interpretations, with some earlier judgments being superseded.

5.2 These guidelines initially concentrate on issues affecting the interpretation of s31 HA80 and then address some aspects of deemed dedication at common law. Comment on specific related topics is found later on in this section.

Section 31, Highways Act, 1980

5.3 Under s31 HA80 dedication of a route as a public highway is presumed after public use, as of right and without interruption, for 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period runs retrospectively from the date of bringing into question. The main issues to be considered in relation to the statute are therefore:

- when the status of the claimed route was called into question;
- the extent and nature of the claimed use;
- whether there is evidence of a lack of intention to dedicate a public right of way.

'Bringing into Question'

5.4 *House of Lords in R (on the application of Godmanchester and Drain) v SSEFRA [2007] ("Godmanchester")* is the most recent case addressing the meaning of s31(2) HA80 endorsing earlier judgements in regard to what act or acts constitute 'bringing into question.'

5.5 In *R v SSETR ex parte Dorset County Council 1999* Dyson J was not satisfied that a landowner's letter to DoE, passed to the County Council but not communicated to the users, satisfied the spirit of s31(2). The test to be applied is that enunciated by Denning LJ in *Fairey v Southampton County Council 1956*. Dyson J's interpretation of that judgment is that:

> *"Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway."*

5.6 The "bringing into question" does not have to arise from the action of the owner of the land or on their behalf. In *Applegarth v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 487*, the owner of a property whose access was via a track claimed to be a

bridleway, challenged the public use although he did not own the track. Munby J stated: "*Whether someone or something has "brought into question" the "right of the public to use the way" is...a question of fact and degree in every case.*" Thus any action which raises the issue would seem to be sufficient. However, where there is no identifiable event which has brought into question the use of a path or way, s31 ss (7A) and (7B) of HA80 (as amended by s69 of NERC06) provides that the date of an application for a modification order under WCA81 s53 can be used as the date at which use was brought into question.

User Evidence

5.7 Claims for dedication having occurred under s31 HA80 will usually be supported by user evidence forms ("UEFs"). Analysis of UEFs will identify omissions, lack of clarity, inconsistencies and possible collusion, although the completion of common parts of the form by someone organising collection of the evidence is not necessarily indicative of collusion. Analysis allows the rejection of invalid UEFs (e.g. no signature, no clear description of the way or of how it was being used) and to note the questions to raise at inquiry. A similar analysis should be made of other types of user evidence, such as sworn statements, letters and the landowner's evidence. UEFs are not standardised, and pose differing questions of varying pertinence and precision.

5.8 If the potential value of UEFs is to be realised they must be completed with due diligence. All questions should be answered as accurately and as fully as possible. If there are questions which, from the claimed duration and extent of use, appear capable of being answered yet are not, it may be reasonable to assume that the respondent's recall was insufficient to provide this information. This may then lead to a question as to whether the claimed use is accurately recalled. The evidential weight of the form may well be reduced.

5.9 Similarly if an overall picture emerges, from a variety of sources, which differs significantly from the respondents' recollections, or if a particular difficulty which must have been encountered during claimed use is not mentioned, a question may be raised as to whether the use is accurately and honestly recalled.

5.10 Sometimes objectors do not challenge user evidence in cross-examination. If so, the Inspector may question the evidence, in order to be in a position to decide what evidential weight to place on the UEFs. If few, or no, users attend the inquiry, questions may be posed to the party presenting the evidence, so that the evidential weight can be determined. As with other evidence, user evidence tested in cross-examination generally carries significantly more weight than untested evidence.

5.11 Wandering at will (roaming) over an area, including the foreshore (*Dyfed CC v SSW 1989*), cannot establish a public right (Halsbury's Laws of England, Vol.21, paras 2 and 4 refer). Use of an area for recreational activities cannot give rise in itself to a presumption of dedication of a public right over a specific route. Attention should be paid to the maps

attached to UEFs, and any description of the used route, to ensure that the Order route is under discussion.

'The Public'

5.12 There appears to be no legal interpretation of the term 'the public' as used in s31. The dictionary definition is *"the people as a whole, or the community in general"*. Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) in *R v Southampton (Inhabitants) 1887* said that *"user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge."*

5.13 Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local community. It is unlikely that use confined to members of a single family and their friends would be sufficient to represent 'the public'.

5.14 It was held in *Poole v Huskinson (1843)* that *"there may be a dedication to the public for a limited purpose ... but there cannot be a dedication to a limited part of the public"*.

Sufficiency

5.15 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by 'the public' and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)

5.16 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (*Davis v Whitby (1974)*). However, use of a way by trades-people, postmen, estate workers, etc., generally cannot be taken to establish public rights.

5.17 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said:

> *"If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of*

user other than those observed by these six witnesses, might have been a very material addition to the evidence."

5.18 Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. *R. v. SSETR (ex p. Dorset) [1999]* accepted that, although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.

5.19 In *Whitworth* Lord Justice Carnwath thought it arguable that the use of a way by two individuals on bicycles should be treated as an assertion of a private right rather than evidence of use by the public.

5.20 In *R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010)* Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in *Sunningwell* that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. The presumption of dedication arises from acquiescence in the use. Again in *Redcar*, in the Court of Appeal Dyson LJ refers to *Hollins and Verney* and the words of Lindley LJ.

> *"... no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term ... the user is enough at any rate to carry to the mind of a reasonable person...the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended."*

'As of right'

5.21 Use 'as of right' must be without force, secrecy or permission ('nec vi, nec clam, nec precario'). It was once thought that users had to have an honest belief that there was a public right. In *Sunningwell 1999* it was held that there is no requirement to prove any such belief. However, if a user admits to private knowledge that no right exists, it may have a bearing on the intention of the owner not to dedicate.

5.22 Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate.

5.23 In *Sunningwell, 1999,* Lord Hoffman said that s1 of the RWA32[5] was an echo of the Prescription Act 1832, with the purpose of assimilating the law of public rights of way to that of private rights of way. Lord Hoffman goes on to say that the issue of dedication of a highway was how the public using the way would have appeared to the landowner. The use must have been open and in a manner that a person rightfully entitled would have used it, that is not with secrecy. This would allow the landowner the opportunity to challenge the use, should he wish.

[5] The precursor to section 31 of the HA80

5.24 If there is express permission to use a route then the use is not 'as of right'. The issue of implied permission, or toleration by the landowner, is more difficult. In the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Lord Hoffmann, *Sunningwell 1999,* held that toleration by the landowner of use of a way is not inconsistent with user as of right. In R (*Beresford) v Sunderland CC [2003]*, Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Lord Scott stated in the *Beresford* case

> *"I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e., toleration or acquiescence, is consistent with the use being "as of right"."*

5.25 Permission may be implied from the conduct of a landowner in the absence of express words. Lord Bingham, in *Beresford*, stated that

> *"...a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants' use of the land is pursuant to his permission."*

But encouragement to use a way may not equate with permission: As Lord Rodger put it,

> *"the mere fact that a landowner encourages an activity on his land does not indicate ... that it takes place only by virtue of his revocable permission."*

In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented.

'No Intention to Dedicate'

5.26 Once use is established as of right and without interruption, the presumption of dedication arises. Section 31 provides for methods which show that during the period over which the presumption has arisen there was in fact no intention on the landowner's part to dedicate the land as a highway. This would defeat a claim under the statute and is often referred to as 'the proviso'.

5.27 Under s31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under s31(5). Under s31(6), an owner of land may deposit a map and statement of admitted rights of way with "the appropriate council". Provided the necessary declaration is made at twenty year[6] intervals thereafter, the documents are (in the

[6] The Growth and Infrastructure Act 2013 has, with effect from 1 October 2013, increased the interval between highways statements from 10 to 20 years.

absence of evidence to the contrary) "sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways". This is for the period between declarations, or between first deposit of the map and first declaration.

5.28 "Intention to dedicate" was considered in *Godmanchester,* which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgement, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held "*in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate*".

5.29 It is clear from *Godmanchester* that actions satisfying the proviso will, usually, also bring the public right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.

5.30 Lord Hoffmann held that "*upon the true construction of section 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is ... objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him]' of the notion that the way was a public highway*".

5.31 For a landowner to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify actions which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".

5.32 *Godmanchester* upheld the earlier decision of Sullivan J in *Billson* that the phrase "*during that period*" found in s31 (1) did not mean that a lack of intention had to be demonstrated "*during the whole of that period*". The House of Lords did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; what would be considered sufficient would depend upon the facts of a particular case.

5.33 However, if the period is very short, questions of whether it is sufficiently long *('de minimis')* may arise, and would have to be resolved on the facts.

5.34 In the Court of Appeal case *Lewis v Thomas 1949,* Cohen LJ quoted with approval the judgment of MacKinnon J in *Moser v Ambleside UDC 1925*:

> *"It was said, very truly, in the passage of Parke, B in Poole v Huskinson (1843) that a single act of interruption by the owner was*

of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner...himself – and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge.

"The fact that the owner...locks the gates once a year...is, or may be, a periodic intimation...that he is not intending to dedicate a highway, but it must be an effective interruption;...if you have evidence of an interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or...if it is an attempted interruption by a tenant without the...authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication."

5.35 However, in *Rowley v SSTLR & Shropshire County Council May 2002*, Elias J held that the acquiescence of a tenant may bind the landowner on the issue of dedication. Also, in the absence of evidence to the contrary, there is no automatic distinction to be drawn between the actions of a tenant acting in accordance with their rights over the property and that of the landowner in determining matters under s31HA80.

"the conclusion...that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error of law. A similar argument was advanced in Lewis v Thomas [[1950] 1 K.B 438] and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that."

5.36 In cases where a claimed right of way is in more than one ownership, and only one of the owners has demonstrated a lack of intention to dedicate it for public use, it should be considered whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul de sac ways being recorded (*R on application of the Ramblers Association and SSEFRA and interested parties 2008 (CO 2325/2008) this is not decided case law but a consent order where the Secretary of State submitted to judgement).*

5.37 If there is no contradictory evidence in accordance with the proviso to s31(1), deemed dedication is made out and the Order should be confirmed. This is so whether there is an owner who cannot provide sufficient evidence of lack of intention or whether there is no identified owner available to produce such evidence.

Status

5.38 Dedication of a highway of a particular status will depend, amongst other things, on the type of public user. The definitions of minor highways in s66 (1) WCA81 are particularly relevant. In England roads used as public paths, RUPPs, were reclassified to restricted byways under CROW00 following commencement of the relevant section of that Act in 2006. Public vehicular rights have been removed from such routes, although transitional savings may allow the status of some to be reconsidered.

5.39 The definition of a byway open to all traffic, BOAT was settled in the Court of Appeal in *Masters v SSETR* (2000). Roch LJ held:

> *"...Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic."*

5.40 Section 66(1) of NERC06 provides that no public rights of way for mechanically propelled vehicles can be created unless expressly provided for or if the rights relate to a road constructed for the use of mechanically propelled vehicles. S67(1) of NERC06 extinguished, with effect from 2 May 2006 (in England), public motor vehicular rights over every highway that was not shown on the definitive map and statement before that date, or was shown only as a footpath, bridleway or restricted byway. Section 67(2) and (3) provide certain exceptions to that extinguishment of rights for mechanically propelled vehicles.

5.41 For reclassification of RUPPs to BOATs under section 54 of the WCA81, the decision depends on the test of whether public vehicular rights exist and does not require current vehicular (or any other) use. For orders recording BOATs under section 53, public vehicular rights must be shown to exist but to satisfy the description BOAT, the question of use should be addressed, in the light of *Masters*. There are tests to determine whether or not public vehicular rights have been subsequently extinguished under the NERC06.

5.42 Use without lawful authority of mechanically propelled vehicles, adapted or intended for use on the roads, on footpaths, bridleways and elsewhere than on roads became a criminal offence in 1930. However, lawful authority may be granted by a landowner, and Lord Scott, in *Bakewell Management Ltd v Brandwood* [2004] (in the context of the acquisition of an easement to drive over common land) held that if such a grant could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed.

5.43 A grant would not be lawful if, for example, it gave rise to a public nuisance. The granting of vehicular rights over an existing footpath might constitute a public nuisance to pedestrians using that path. In considering the creation of rights for mechanically propelled vehicles before 2 May 2006, subject to any exceptions provided by NERC06, consideration will

need to be given as to whether vehicular use of the way has given rise to, or is likely to give rise to, a public nuisance.

5.44 Section 31, HA80, as amended by section 68 of NERC06, provides that use of a way by non-mechanically propelled vehicles (such as a pedal cycle) can give rise to a restricted byway. In *Whitworth* it was suggested that subsequent use by cyclists of an accepted, but unrecorded, bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the CA68, could not give rise to anything other than a bridleway. Whilst Carnwath LJ accepted that regular use by horse riders and cyclists might be consistent with dedication as a restricted byway, it was also consistent with dedication as a bridleway. In such an instance of statutory interference with private property rights, he determined, it was reasonable to infer the dedication least burdensome to the owner.

Dedication at Common Law

5.45 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938,* quoted with approval by Laws J in *Jaques v SSE 1994,* who described the former's summary as "*a full and convenient description of the common law*". Other leading cases regarding dedication at common law are *Fairey v Southampton CC 1956, Mann v Brodie 1885* and *Poole v Huskinson 1843. Jaques* is particularly helpful on the differences between dedication at common law and under statute. Dyson J's judgment in *Nicholson v Secretary of State for the Environment 1996* comments further on aspects of these differences.

5.46 Halsbury states – "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance...An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;...At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication*".

5.47 Regardless of whether or not dedication at common law is argued as an alternative, in case the s31 claim fails, there should be consideration of the matter at common law. Whilst the principles affecting dedication by landowners and acceptance by user will normally apply in both statute and common law (even though there is no defined minimum period of continuous user in common law), there is an important difference in the burden of proof. Denning LJ clarified in *Fairey v Southampton County Council 1956* that RWA32, which was the precursor to s31 of HA80:

"...reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right...now after 20 years user the legal burden is on the landowner to refute it."

5.48 From these comments it follows that, in a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant. For the reasons given by Scott LJ in *Jones v Bates 1938*, this is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. However, should it be asserted in rebuttal that there was no one who could have dedicated the way, the burden of proof on this issue would rest with the asserting party (Halsbury).

5.49 In *Nicholson* Dyson J commented on an assertion that *Jaques* was authority for the view that the quality of user required to found an inferred dedication was different from that required to found a statutory dedication. To bring the statutory presumption into play it was not necessary that the user should have been so notorious as to give rise to the presumption, necessary for common law purposes, that the owner must have been aware of it and acquiesced in it. Dyson J stated, "*The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will dedication be inferred if the other conditions are satisfied. But notoriety is also relevant for the purposes of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate.*"

Land Held in Trust or Mortgaged (common law only)

5.50 Halsbury gives useful guidance; Volume 21 para 73 states: "*Where a mortgagor (borrower) is still in possession of the mortgaged land it would seem that the mortgagee's (lender's) assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge of it.*"

5.51 Trustees of land held on trust for sale generally have power to dedicate on their own provided that no incompatibility is introduced (Halsbury Vol.21 para 74 refers). For leaseholds and copyholds the consent of both landlord and lessee, or copyholder, would usually be required for dedication. However, the detailed wording and provisions of the trust or mortgage document should always be checked, in case there are specific requirements for enabling powers. A public body can in general create a right of way, provided that the public use would not be incompatible with the purpose of the body. (See also relevant RWLR articles and note the provisions of HA80 s31(8)).

Crown Land

5.52 HA80 does not apply to land belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, the Duchy of Cornwall, a government department or held in trust for a government department. If

an agreement has been made between the appropriate authority charged with the administration of the land and a highway authority then the provisions of HA80 can apply; in the absence of any such agreement, there cannot be a presumption of dedication of a public right of way over Crown land under s31.

5.53 The Crown Estate manages property belonging to the monarch in right of the Crown. The Crown Estate does not include land belonging to a government department; such land is nonetheless Crown land and is exempt from the provisions of HA80. Forestry Commission land, Defence Estate land and National Health Service land is Crown land, as those lands are owned by the relevant Secretary of State.

5.54 With regard to the land assets of the remaining and former nationalised industries, whether the land at issue could be regarded as Crown land will depend upon the terms of that body's enabling legislation. The presumption is that a public corporation (such as a nationalised industry) is not a Crown body and therefore the land belonging to that body is not Crown land.

5.55 It seems likely that s31 would not apply to land leased to the Crown, as the land subject to the lease would belong to the Crown for the duration of the lease. However, whether it would be possible for the freeholder of the land to dedicate a public right of way during the operation of the lease would depend upon the terms upon which the lease was granted.

5.56 Although Crown land is exempt from the provisions of s31 of HA80, this would not prevent or preclude a presumption of dedication arising in a 20-year period prior to, or after, such ownership or leasehold of the land.

5.57 Under common law, there can be a presumption of dedication of a way over Crown Land. However, there cannot be such a presumption over land requisitioned by the Crown, as there would be no one with power to dedicate *(Jaques 1994)*.

Common Land

5.58 Public rights of way over defined routes can and do exist on common land and can be established by deemed dedication through use over a number of years. However, the effect of various statutes, including schemes of regulation and management under Part 1 of the Commons Act 1899, and s193 of the LPA25, which create (often restricted or conditional) public rights of recreational access, may have to be considered, since these apply to a substantial number of commons.

5.59 This issue is addressed in *R v SSE ex parte Billson 1998*[7], and background information can be found in the RWLR article 'Public Access to Common Land' 15.4. Public rights of access have been conferred on nearly all common land (where no previous statutory rights existed) by Part I of CROW00, and s.12(3) makes clear that: "*the use by the public or by any*

[7] This judgment was partially overruled in the *Godmanchester* judgment.

person of a way across land in the exercise of the right conferred [under Part I] is to be disregarded".

The National Trust

5.60 The Trust has power to dedicate highways by virtue of s12 of the National Trust Act 1939. However, Trust bylaws may be in place and operate as a conditional permission to use the land. Such bylaws may prevent a presumed dedication under s31, whether users were aware of them or not. Useful reference can be made to *National Trust v SSE* [1999] JPL 697, holding that the permissive nature of the use of NT land precluded user as of right.

Land in management agreement with Natural England

5.61 Where land is subject to a management agreement with Natural England under s7 of the NERC06 (e.g., Environmental Stewardship agreement), use of a way across the land is to be disregarded during the term of the agreement for the purposes of presumed dedication (see s7(5))

Charities

5.62 Section 36 of the Charities Act 1993 provides that no land held by or in trust for a charity shall be conveyed, transferred, leased or otherwise disposed of without an order of the Court of the Charity Commission. 'Land' includes any estate, interest, easement, servitude or right in or over land, and thus the dedication of a right of way over land would seem to qualify as a means of 'disposal'.

5.63 However, even in the absence of such an order, and/or where dedication is to be presumed by virtue of long use, it is considered there is nothing to prevent the statutory dedication of public rights of way over land held for charitable purposes, provided always that such a dedication would not be contrary to the stated purposes of the charity concerned, by reference to Section 31(8) of the Highways Act. This provides that the incapacity of a body or person in possession of land for public and statutory purposes to dedicate a way over land is not affected by Section 31 provisions as a whole, if the existence of a highway would be incompatible with those purposes.

5.64 At common law, the lack of any owner with the capacity to dedicate could be a bar to the necessary finding of an actual intention to dedicate.

Physical Characteristics of a Claimed Way

5.65 In some circumstances the physical characteristics of a way can prevent a highway coming into existence through deemed or inferred dedication. In *Sheringham UDC v Holsey 1904* it was held that use by wheeled traffic of a public footway appointed by an Inclosure Award at 6 feet wide had always been an illegal public nuisance in view of the obstruction and danger to pedestrians, and no length of time could legalise it.

Furthermore, there was no one with power to dedicate. Hence there could not have been any dedication of the way as a vehicular highway.

5.66 In *Thornhill v Weeks 1914,* Astbury J observed that:

> *"it seems impossible that a lady who resided there would at once start dedicating a way through her stable yard ... In trying to form an opinion whether an intention to dedicate has existed, one must have some regard to the locality through which the alleged path goes. The fact that it goes through the stable yard [close to the house] is strong enough to raise a presumption against an intention to dedicate."*

5.67 Where physical suitability of a route is argued, referring to gradient, width, surface, drainage, etc., there should be awareness that what may now be regarded as extremely difficult conditions may well have been relatively commonplace and frequently met by stagecoaches, hauliers and drovers in times past. Special arrangements were often in place to negotiate them.