Neutral Citation Number: [2022] EWHC 1804 (Admin)

Case No. CO/244/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Thursday, 16th June 2022

Before:
THE HONOURABLE MRS JUSTICE STEYN DBE

B E T W E E N:

(1) TRAIL RIDERS FELLOWSHIP & GREEN LANE ASSOCIATION LIMITED
(2) GREEN LANE ASSOCIATION LIMITED

Claimants

and

(1) THE SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS
(2) CORNWALL COUNCIL

Defendants

MR ADRIAN PAY (instructed by DMH Stallard LLP) appeared on behalf of the Claimants
MS VICTORIA HUTTON (appeared on behalf of the First Defendant
The Second Defendant did not appear and was not represented

JUDGMENT (Approved)

MRS JUSTICE STEYN:

Introduction

1. This is the judgment following a hearing of the claimants' application pursuant to paragraph 12 of schedule 15 to the Wildlife and Countryside Act 1981 ("the WCA 1981") challenging the decision of the Secretary of State on 2 December 2021, to confirm the Cornwall Council (Addition of Restricted Byway from Road U6177 at Mawgan-in-Pydar School to Road U6177 at Lanvean Parish of St Mawgan-in-Pydar) Modification Order 2017 ("the Order").

2. The Order made by Cornwall Council and confirmed, following a two-day public inquiry, by an Inspector appointed by the Secretary of State, added to the Definitive Map and Statement ("the DMS") a restricted byway running generally northeast from the road adjacent to Mawgan-in-Pydar School to the road at Lanvean. The route of the restricted byway ("the Order Route") is described more precisely in the Schedule to the Order.

3. In confirming the Order, the Inspector determined that the public right of way for mechanically propelled vehicles ("MPVs") was extinguished by section 67(1) of the Natural Environment and Rural Communities Act 2006 ("NERCA 2006"), and none of the exceptions in section 67 which save such a right from being extinguished applied.

4. The first ground of challenge is, in essence, that the Inspector erred in her approach to section 67 of NERCA 2006, in particular in determining that the exception in s.67(2)(a) was inapplicable. This is primarily, a point of statutory construction.

5. The second ground concerns the particulars of the width of the Order Route given in Part II of the Schedule to the Order. The claimants contend the Inspector erred in declining to modify the Order so as to incorporate in the definitive statement reference to the depiction of the way on map sheet Cornwall XXXII.6 (1908) from the Ordnance Survey County Series Second Edition ("the 1908 OS map"), as that provided the best evidence of the width of the route.

6. I am grateful to Counsel for the claimant, Mr Adrian Pay, and Counsel for the Secretary of State, Ms Victoria Hutton, for their excellent written and oral submissions, as well as for the additional research they conducted in response to matters I raised following the first day of the hearing.

The legal framework

7. Part IV of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act") first made provision for authorities to make, publish and maintain "a definitive map and statement" of the public rights of way in their area. The map was required to show "a footpath or bridleway as may appear to the council to be appropriate, wherever in their opinion such a right subsisted, or is reasonably alleged to have subsisted, at the relevant date": section 27(1) of the 1949 Act. The map should also show any way which, in the opinion of the surveying authority was, or was reasonably alleged to be, "a road used as a public path", ("RUPP"): section 27(2) of the 1949 Act.

8. The definitions in section 27(6) of the 1949 Act provide, so far as material:

> "In this part of this Act, the following expressions have the meanings hereby respectively assigned to them, that is to say-
>
> 'footpath' means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road;
>
> 'bridleway' means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway;
>
> …
>
> 'public path' means a highway being either a footpath or a bridleway;
>
> ...
>
> 'road used as a public path' means a highway, other than a public path, used by the public mainly for the purpose for which footpaths or bridleways are so used."

9. The aim was to record rights of way on foot, on horseback, or leading a horse, rather than rights of way for MPVs. However, the definition of RUPPs was such that a highway with public rights of way for MPVs fell to be recorded, so long as it was "used by the public mainly for the purposes for which footpaths or bridleways are so used". Where the map showed a RUPP, it was conclusive evidence that there was a right of way on foot, and on horseback, or leading a horse, but it was not conclusive evidence of the right of way for MPVs: section 32(4)(b) of the 1949 Act.

10. The Countryside Act 1968 ("the 1968 Act") simplified the surveying procedure, and paragraph 9 of Schedule 3 requires surveying authorities to reclassify each RUPP (whether or not shown on the DMS) as a footpath, bridleway or a byway open to all traffic ("BOAT"). By paragraph 9(2)(b) of Schedule 3, recording of a BOAT was conclusive evidence of the existence of a right of way for vehicular and all other kinds of traffic. Paragraph 10 provided a test for reclassification, as the 1968 Act did not include a definition of the term BOAT.

11. These provisions have been superseded and in substance replaced by part III of the WCA 1981 which makes similar provision for preparing, maintaining, reviewing and revising the DMS.

12. Section 53 of the WCA 1981 imposes a duty on a surveying authority (here, Cornwall Council) to keep the DMS under continuous review. Section 53(5) provides:

> "Any person may apply to the authority for an order under subsection (2) which makes such modification as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3)".

13. One of the "events" under subsection (3) is:

> "(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows -
>
> (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54(a), a byway open to all traffic".

14. Section 53(4) makes clear that modifications which may be made by an order under section 53(2) include the addition to the statement of particulars as to "*the position and the width of any public path, restricted byway, or byway open to all traffic which is, or is to be shown on the map…*".

15. Section 56 of the WCA 1981 makes provision for the DMS to have conclusive effect, as set out in that provision. Subsection (1) states, so far as material:

> "A definitive map and statement shall be conclusive evidence as to the particulars contained therein, as the following extent, namely-
> …
>
> (c) where the map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public have thereover at that date a right of way for vehicular and all other kinds of traffic;
>
> (d) where the map shows a restricted byway, the map shall, subject to subsection (2)(A), be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse together with a right of way for vehicles other than mechanically propelled vehicles, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than those rights; and
>
> (e) where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to the highway shown thereon, any particulars contained in the statement as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date".

16. Section 66(1) of the WCA 1981 gives the definition of a BOAT as follows:

> "'byway open to all traffic' means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which it is <u>used by the public mainly for the purpose for which</u> <u>footpaths and bridleways are so used</u>".

The underlined words are clearly drawn from the definition a RUPP.

17. A restricted byway is given the same meaning as in Part II of the Countryside and Rights of Way Act 2000. Section 48(4) of that Act provides:

> "In this part –
>
> 'restricted byway rights' means-
> (a) a right of way on foot,
> (b) a right of way on horseback or leading a horse, and
> (c) a right of way for vehicles other than mechanically propelled vehicles; and

> ‘restricted byway’ means a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way.”

18. Just as under the 1949 Act a right of way for MPVs did not fall to be recorded in the DMS unless it was a RUPP, so too under the WCA 1981, only rights of way for MPVs falling within the definition of a BOAT were to be recorded on the DMS. Other rights of way for MPVs, such as main roads, would not be recorded on the DMS.

19. The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12) (‘the 1993 Regulations’) provide, so far as material:

> “3. Rights of way for which Part III of the Act (public rights of way) applies shall be shown on a definitive map as indicated in Schedule 1 to these Regulations.
>
> 4. A modification order shall be in the form set out in Schedule 2 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.”

20. Schedule 1 shows the notation to be used on definitive maps. Schedule 2 sets out the form of modification order including a schedule to the modification order setting out (a) in Part I, the modification of the definitive map, including a description of the path or way to be added (“Describe position, length and width of path or way in sections, e.g. A-B, B-C, etc., as indicated on the map”); and (b) in Part II of the modification of the definitive statement (“Variation of particulars of path or way (Set out new description of path or way or additional particulars.)”).

21. The legislation which is at the heart of the first and main ground is NERCA 2006. Section 66 imposes a restriction on the creation of new public rights of way for MPVs. The key provision, section 67, provides for certain public rights of way for MPVs to be extinguished.

22. Section 67(1) of NERCA 2006 provides:

> “An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which immediately before commencement -
>
> a) was not shown in a definitive map and statement, or
>
> b) was shown in the definitive map and statement only as a footpath, bridleway or restricted byway.
>
> But this is subject to subsections (2) to (8)”.

23. As I have indicated, the DMS was not intended to record rights of way for MPVs other than in the case of BOATs. So the starting point - prior to consideration of the exceptions - appears to be a radical one, effectively extinguishing existing public rights of way for MPVs, save for recorded BOATs. However, section 67(1) is subject to exceptions. In particular, section 67(2) contains five exceptions:

> “Subsection (1) does not apply to an existing public right of way if:

a) it is over a way whose main lawful use by the public during the period of five years ending with commencement [2 May 2006] was used for mechanically propelled vehicles,

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

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

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

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

24. In addition, there are three further exceptions provided in section 67(3) concerning public rights of way in relation to which an application had been made prior to the commencement date to record it as a BOAT.

The facts

25. On 15 August 2011, St Mawgan-in-Pydar Parish Council, ("the Parish Council") made an application under section 53(5) of the WCA 1981 to Cornwall Council to have the order route added to the DMS as a BOAT.

26. Cornwall Council investigated the application and determined that the Order Route should be added to the DMS as a Restricted Byway. Cornwall Council did so on the basis that it considered that the evidence established that there was a public vehicular highway over the Order Route, but that rights for MPVs had been extinguished by section 67(1) NERCA 2006, as none of the exceptions thereto in section 67(2) NERCA 2006 applied.

27. On 21 November 2017, Cornwall Council accordingly made the order to modify the DMS to show a restricted byway along the Order Route (subject to confirmation by the Secretary of State). In Part I of the Schedule to the Order, the second paragraph, under the heading "Description of Path or Way to be Added" states:

"The total length of Restricted Byway to be added to the Definitive Map is 239 metres. The width of the Restricted Byway described varies between 5 … (five) metres and 9 (nine) metres based on the depiction of the way, as shown on map sheet Cornwall XXXII.6 (1908) from the Ordnance Survey County Series Second Edition map series published at 1:2500 scale."

28. Part II of the Schedule to the Order records:

In the Definitive Statement for the Parish of Mawgan-In-Pydar			
Location	Average width	Minimum width	Maximum width
RB from Road North of Mawgan-in-Pydar School to Road south of Lanvean	-	5 metres	9 metres

29. The Parish Council objected to the Order, maintaining that the Order Route carried rights for MPVs which were not extinguished by NERCA 2006 and, if the Order Route was to be recorded on the DMS, it should be recorded as a BOAT. The Parish Council initially relied on the exceptions in section 67(2)(a) and (e) of NERCA 2006, submitting in its statement of case:

> "It also appears to the PC that it cannot definitively be stated that the main use of the Lane in the five years before NERCA came into force was not by MPVs. It seems unlikely that there would have been more recreational, equestrian use of the Lane than MPV use during this period, and if the pedestrian use of the Lane by residents along the Lane has to be discounted, then it is likely that as many non-resident users of the Lane did so in cars as on foot in the relevant period, thus potentially engaging the exception under section 67(2)(a)."

30. In closing submissions at the public inquiry, the Parish Council relied on the exceptions in subsections (b) and (e). In relation to section 67(2)(a) the Parish Council submitted:

> "As to the exception under section 67(2)(a) the PC's submission is simply that, absent a proper contemporaneous survey, it is impossible to say what the main use of the lane was in the five year period before NERCA 'bit'. 101 user evidence forms may well be a significant amount as Mr Eastwood and Mr Brett maintain, but that number of forms on its own takes no account of idiosyncrasies that might arise from the questions in user evidence forms, and the manner in which they are framed. For example, if a couple with two children drove a car up the Lane, would that count as four MPV users or one MPV user?
>
> In short, the PC concurs with the caveats alluded to by the first instance judge and the Court of Appeal in [*Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334] that the exercise contemplated by section (2)(a) is always likely to be challenging."

31. By its Statement of Case dated 26 July 2021 (amended) fore the inquiry, the first claimant submitted, among other matters, that rights for MPVs had not been extinguished because the exception in section 67(2)(a) NERCA 2006 applied. The first claimant further submitted that any order should provide for the definitive statement to record the width of the route by reference to the 1908 Ordnance Survey map.

32. On 18 October 2021, the inspector conducted an unaccompanied site visit. On 19 and 20 October 2021, she conducted a public inquiry as to whether the Order should be confirmed.

33. On 2 December 2021, the inspector decided that the Order should be confirmed for the reasons set out in her decision of that date. In summary, the Inspector decided that the route was a longstanding vehicular public highway. However public rights of way for MPVs had been extinguished by section 67(1) NERCA 2006, as none of the exceptions contained in section

67(2) NERCA 2006 applied. She declined to modify the order such that the Definitive Statement would contain a description of the width of the route by reference to the 1908 OS map.

The inspector's decision

34. In her decision letter, the inspector described the route as follows:

> "10. The Order route runs from a cul-de-sac highway, the U6177, which ends to the north of Morgan-and-Pydar Community Primary School (the school) and northeast of the village shop and post office. Other facilities, such as the church and a public house are situated to the south-west of the Order route; a car park to the south; and a play area and recreation ground to the north of points A - B (points A - B- C are shown on the Order map), with access gained from the Order route. I consider that the southwestern end of the order route can be said to be situated within the village centre.
>
> 11. The Order route itself runs through a ford with a footbridge on one side, running generally north-east and then north-north-east, with several properties gaining access from it. The route is surfaced, patched with tarmac, concrete and stone in places, with boundary hedges and fences. There are a couple of street lights at the southern end. It joins the road, also the U6177, to the north-east, in an area referred to as 'Lanvean'."

35. The Inspector's determination that the route was a longstanding vehicular public highway is not in issue. Nor is her determination that the exceptions in section 67(2)(b) and (e) were inapplicable. It is, therefore, unnecessary to address her reasons for those decisions.

36. At paragraphs 54 to 55 the Inspector observed:

> "54. 101 UEFs were submitted in support of the application, whilst objectors provided additional information on use, or non-use, of the route. I note that there were some concerns as to the reliability of the user evidence, and the point of the Inquiry was to allow that to be tested. The OMA found that there were also 15 UEFs completed in 2003, 6 of whom also completed UEFs in support of the 2011 application. The 2003 UEFs appear to have been submitted due to verbal challenges to users and notices erected by local people who lived along the lane. No application was made to the OMA for an order at that time.
>
> 55. As noted by the OMA there was some discrepancy between the claimed use in the 2003 and 2011 evidence where users had provided information in both years. Whilst the evidence submitted in 2011 is more detailed, I disagree that this means it is more accurate, despite the more structured setup of the UEF. Without further information, through interview or cross-examination, I will only take the lowest reported level of use from these witnesses. However, even in doing so, the number of UEFs, and the agreement in the information provided is striking and provides a strong picture of consistent use of the route on foot, horse, bicycle and vehicle dating back to the 1940s."

37. The Inspector observed "the use had been part of everyday village life" and that "when there were roadworks in the village, this route was used as an alternative access".

38. The Inspector was satisfied that this was a "through-route" used by all classes of users that might be expected on a road. At paragraph 60, in the context of her conclusions at common law, the Inspector observed, "The location of the route in relation to village facilities, both recent and from years past, mean that it appears to be an integral part of the village network".

39. The inspector considered that NERCA 2006 provides appropriate mechanisms to avoid the extinguishment of rights over the ordinary road network. In relation to section 67(2)(a), she gave the following reasons:

> "68. This section of the 2006 Act would prevent the extinguishment of the MPV rights if the use is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for MPVs. The date of commencement was 2 May 2006 and so the relevant period, 2001 - 2006 falls within a period covered by the UEFs.
>
> 69. I consider that the UEFs demonstrate use on foot, horse, bicycle and vehicle throughout the relevant period, despite there being some evidence of notices to dissuade use during this time. The Parish Council argued that the use by vehicles was higher than use on foot or horse, with no specific comment on bicycle use. Although suggesting that the number of people in a car may lead to more 'users' of vehicles, the information was not available to me in this way.
>
> 70. The TRF also suggested that the use prior to commencement was sufficient to save the MPV rights. The more recent UEFs are structured to try to gain information on both the type and quantity of use by individuals completing them. Reliance on the bar chart of MPV use alone does not provide the full picture of use in the UEFs as a whole. I am satisfied that the OMA are correct in their view that the UEFs record less use overall with vehicles, than by any other means in the relevant five-year period to 2 May 2006. I also take note that there appears to have been action to prevent use within the five-year period to 2001. As a result, I am satisfied, on the balance of probabilities, that this exception to the extinguishment of MPV rights does not apply."

40. The Inspector concluded that the appropriate status for the order route is "restricted byway", observing this allows public use on foot, horse, bicycle, and with horse and cart, whilst retaining lawful private vehicular use for access to land and property.

41. Under the heading, "Width", the inspector stated at paragraph (77) to (78):

> "77. It was argued in objection that parts of the route were only 2.5 metres. I agree with the OMA that the lane is bounded and the width clear. I do not consider the order to be incorrect in setting out the minimum width of five metres and I do not propose to modify the order on this point.
>
> 78. The TRF raised concerns about the lack of reference in Part II of the Schedule to the Order to the mapping, as in Part I. The OMA explained that the reference to the width, based on the depiction of the way, as shown on map sheet Cornwall XXXII.6 (1908) from Ordnance Survey County Series Second Edition map series published at 1:2500 scale was not carried over to Part II of the Schedule due to the format of the existing statement. I am satisfied that the Order provides sufficient

> information for users and landowners - and most importantly the Highway Authority - to understand the width of the route at any given point and that amendment of the text of the order is required."

GROUND ONE

The claimants' submissions

42. The claimants' first and main submission is that by treating the question whether the exception in section 67(2)(a) applies as confined to an arithmetic assessment of the frequency of use, the Inspector erred in her construction of that provision. The claimants submit that while frequency of use may be an aspect of the assessment, the Inspector misapplied the section in failing to have regard to the character of the route in determining whether it had mainly been used by MPVs in the five-year period to 2 May 2006.

43. In support of this submission, the claimants rely, first, on the first instance decision in *Fortune v Wiltshire Council*, a judgment of HHJ McCahill QC, sitting as High Court judge, which was upheld on appeal in *Fortune v Wiltshire Council* [2013] 1 WLR 808. In *Fortune* HHJ McCahill QC addressed the question whether public vehicular rights had been extinguished by NERCA 2006 from paragraph 989 of his judgment. The council contended that the exceptions in section 67(2)(a) and (b) of NERCA 2006 applied. However, the judgment only directly addressed section 67(2)(b) as, due to a late amendment by the claimants, the council had not been in a position to deploy its evidence in respect of the section 67(2)(a) exception, and so the determination of that provision's applicability was left over to be determined later if it had proved necessary. Nevertheless, the judgment addresses the scheme of section 67 of NERCA 2006, and construes section 67(2)(b) in the context of the exception in (a).

44. In *Fortune*, the Court of Appeal observed:

> "130. Section 67 of NERCA was enacted as a result of public concern about inappropriate use of 'green lanes'. Green lanes are minor unmade rights of way, over which vehicular rights of way existed but which were generally enjoyed by walkers and horseback riders. Users of mechanically propelled vehicles ('MPVs'), such as motorcycles, were using some green lanes for recreational purposes and causing damage to them.
>
> 131. Parliament reacted to this concern by restricting the ways that could be used for this purpose. The legislative technique chosen for this purpose was to graft, onto then recent legislation for the official recording of rights of way, the sanction of extinguishment for public rights of way for MPVs in default of such recording by midnight on 1 May 2006. That is the time when section 67 of NERCA came into effect ('the NERCA commencement date')."

45. This reflects the point made by HHJ McCahill QC at [989], citing a judgment of Dyson LJ in *R (Warden and Fellows of Winchester College v Hampshire County Council* [2009] 1 WLR 138, in particular, paragraphs 10 to 12 of that judgment, in which the concerns expressed by the Rural Affairs Minister, in a consultation document published by DEFRA 2003, were expressed.

46. HHJ McCahill QC addressed the scheme of Part 6 of NERCA 2006, from paragraph 1053 of his judgment. He said:

> "1053. The use of mechanically propelled vehicles over public rights of way in the countryside was causing concern. Whilst nothing could be done to extinguish existing vehicular rights already recorded on a Definitive Map and Statement, NERC sought to address the issue by preventing any future vehicular rights being established by mere usage, and by eliminating any existing vehicular rights which had not been recorded on the Definitive Map and Statement.
> 1054. Therefore, one purpose of Part 6 NERC was to limit those vehicular rights which could be accorded on English and Welsh Local Authorities' Definitive Maps and Statements showing public rights of way. Section 66 halted the implied creation of rights (by user over 20 years) in the future for mechanically propelled vehicles.
> …
>
> 1055. Having limited the creation of any *new* implied rights of way for mechanically propelled vehicles, all existing public rights of way for mechanically propelled vehicles were extinguished on 2 May 2006 unless, immediately before that date, those particular rights were shown on a Definitive Map and Statement.
> 1056. This represented something of a legislative sledgehammer to crack a relatively small nut. Section 67 NERC extinguished all motor vehicular rights (as Mr Laurence said, even over the M4) unless those rights were recorded on a Definitive Map and Statement. However, the real aim of this section was to extinguish vehicular rights over unrecorded byways open to all traffic." (emphasis added)

47. HHJ McCahill QC's comment at [1056] finds reflection in Lewison LJ's observation at [137] that "Section 67 is both dramatic and draconian; it had a 'once and for all effect' at the NERCA commencement date".

48. As HHJ McCahill QC observed, section 67(1) of NERCA 2006 has the curious effect that the starting premise is all public rights of way for MPVs are extinguished, if they are not recorded on a DMS, even though the only public vehicular rights that could have been recorded were minor vehicular highways not mainly used for vehicular traffic (that is BOATs). The ordinary road network - that is roads mainly used for road traffic - was not eligible to be recorded on the DMS.

49. At [1060], Judge McCahill QC observed,

> "Having extinguished the vast majority of public vehicular rights on the national road network in section 67(1), section 67(2) sets out the exceptions to this extinguishment, and puts the burden of establishing one of those exceptions on the person asserting the existence of public vehicular rights."

I note that the burden of proof was not the subject of argument in *Fortune*. As the judge recorded at [996], it was common ground that the onus was on the person asserting the existence of a right of way for MPVs to show an exception applied.

50. The judge addressed the various exceptions at [1061] *et seq*. At [1067] to [1071] he observed:

> "1067. There is an obvious difference between Section 67(2)(a) and (b).
> 1068. Section 67(2)(a) saves from extinguishment a way mainly used lawfully by mechanically propelled vehicles. This will preserve the ordinary road network, which would not usually qualify for entry on a Definitive Map and Statement because it was *mainly* used by mechanically propelled vehicles. Although one

might expect many such ways to be created expressly by an enactment or instrument or constructed under statutory powers as a road. Section 67(2)(a) will also capture public vehicular highways created by implied dedication and acceptance still being used mainly and lawfully by vehicles in the 5 year period before 2 May 2006.

1069. Section 67(2)(b) does not contain any requirement as to how long a way had been used, or what its main use was. This subsection preserves from extinguishment unrecorded public rights of way for mechanically propelled vehicles *merely* by being present on a list required to be kept of highways maintainable at public expense.

1070. Whereas a way recorded on a Definitive Statement is a record of public rights (e.g., byway open to all traffic, bridleway, footpath etc), a s 36(6) list is concerned with highways (which need not be highways over which exist rights of way for mechanically propelled vehicles) which simply are maintainable at the public expense. Furthermore, the s36(6) list relates to *maintenance* of the highway (including footpaths), and not to a record of public rights of way for mechanically propelled vehicles.
1071. In my judgment, the exception in Section 67(2)(b) serves at least two very useful purposes. First, it avoids the question of whether the use of a highway was *mainly* vehicular, a difficult factual assessment, where the burden of proof lies on the person seeking to argue the unrecorded right has not been extinguished. S67(2)(b) would therefore be useful in a case where the evidence was equivocal as to the main lawful use in the 5 years preceding 2 May 2006."

51. At [1020] to [1021], he addressed a contention that there was a danger of public vehicular rights over the major road network of the county being extinguished. The judge rejected this as lacking substance, saying:

> "… The major road network would be preserved from extinguishment by its main and lawful use over the preceding five years by mechanically propelled vehicles. Alternatively, such roads would usually have been created under an express enactment. Therefore, Mr Laurence's interpretation of the section contained in section 67(2)(b) would not have had this this widespread effect.
>
> That is not to say that the exception in section of 67(2)(b) was unimportant. As I have already indicated, this exception obviated the need to argue about what the main and lawful use of a particular way was over the preceding five years. It encompassed the equivocal cases, as well as the little used minor and unclassified roads of antiquity which had not been created by any statute or had not been formally adopted".

52. At 1073, HHJ McCahill QC said:

> "This analysis of the role and purpose of ss66 and 67 NERC leads me to conclude that s67(2) NERC should not be given a restrictive interpretation. On the contrary, Parliament having extinguished certain public vehicular rights of way merely because they were not shown on a Definitive Map, on which many of them simply could not have been recorded, a purposive interpretation should be given to the exceptions, especially when the burden of proof is cast upon the person seeking to

> establish that a particular unrecorded vehicular right of way has not been extinguished. Moreover, it seems to me appropriate that, if NERC starts from the premise of abolishing such a wide category of vehicular highways (and beyond the mischief at which the Act was directed, namely unrecorded BOATs), the exceptions to this extinguishment should not, in the absence of clear and compelling language to the contrary, be construed narrowly." (emphasis added)

Although the claimants submit that one of the reasons given by HHJ McCahill QC, namely the burden of proof lying on the person seeking to show an exception applies, is wrong, the claimants rely on this passage in support of the submission not only that section 67(2) should not be given a restrictive interpretation but also that it should be interpreted generously, in favour of saving rights from extinguishment.

53. The other principal authority on which the claimants rely is *Masters v the Secretary of State for the Environment, Transport and Regions* [2001] QB 151. This case predates NERCA 2006. The issue before the Court of Appeal was the meaning of the statutory definition of a BOAT in section 66(1) of the WCA 1981. At paragraph 10, Roch LJ noted that the factual position was that:

> "the route has been recorded as a public road since 1929 or since the publication in 1972 of the definitive map as a road used as a public path. There is little evidence of use of the route by the public with vehicles in living memory. On the other hand the route is shown on maps which pre-dated 1929 in the way appropriate to public rights of way for vehicular traffic, for example, in the ordnance survey map of 1886. The only evidence of use by the public in living memory has been use on foot or on horseback, that is to say uses appropriate to the route being a footpath or a bridleway, which use was often challenged by the owners of the farms, and some attempts to ride the route by motorcyclists with varying degrees of success".

54. Roch LJ observed at paragraph 30:

> "The intention of Parliament in passing the 1949, 1968, and 1981 Acts is in my judgment clear. That purpose is that county councils should record, in definitive maps and statements ways, including what Lord Diplock (in *Suffolk County Council v Mason* [1979] AC 705, 710A) called 'full highways or cartways' for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that 'full highways or cartways' which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost. Parliament's purpose was to record such ways not to delete them."

55. The Court of Appeal agreed with Hooper J that the definition of a BOAT "should be read purposively so as to avoid rights of way by foot and horse being removed from the DMS just because there was not current evidence of vehicular use by the public". Roch LJ said:

> "31. …The definition in section 66(1) of byway open to all traffic requires the public to have a right of way for vehicular or other kinds of traffic over the highway in question but does not require the highway in question to be used by the public

with vehicles unless the word 'mainly' in the second part of the definition is read so as to exclude 'exclusively'. I would agree with Kay J on this point: 'exclusively' is simply the extreme form of 'mainly' in this context. Although it can be said that the words 'but which is used by the public mainly for the purpose for which footpaths and bridleways are so used' are unambiguous if read in isolation, to read those words in isolation is in my judgment to fall into error. The definition read in its entirety is ambiguous. In those circumstances, Hooper J was right to adopt a purposive approach to the construction of the definition.

32. The definition in sections 66(1) has to be read in its statutory context, and, in particular, the provisions of section 54 and section 56 of the Act in mind. The whole purpose of Part III of the Act is the ascertainment of public rights of way. … If a public right of way for vehicular traffic has been shown to exist over the road used as a public path then it is to be shown as a byway open to all traffic. Once that is done then under section 56(1)(c) the definitive map and statement, shall be conclusive evidence that there was at the relevant date a highway as shown on the map and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic. It is, in my judgment, clear from those provisions that Parliament did not contemplate that ways shown in definitive maps and statements as roads used as public paths should disappear altogether from the definitive maps and statements simply because no current use could be shown or that such current use of the way as could be established by evidence did not meet the literal meaning of the definition in section 66(1). In my opinion, it is much more likely that Parliament intended the way to be shown in the definitive map and statement so that thereafter, if no current use was being made of the way, ramblers and horse riders would come to know the existence of the way and start to use it. …"

56. Roch LJ continued at paragraphs 38 to 39:

"38. Consequently in my judgment, it cannot be shown that evidence that the use of the way by the public does not satisfy the so-called user test or has ceased to satisfy the so-called user test, is an event the occurrence of which Parliament intended should lead a county council to make an order modifying the map and statement. Again this reading of section 53 is consistent with Parliament's undoubted intention that rights of way over which persons may access the countryside on foot or on horseback should not be lost, but should be recorded.

39. This result also avoids the absurdity that the adoption of a literal interpretation of the statutory definition of byway open to all traffic would produce; that county councils might have to review their maps and statements every few years as evidence was submitted to them that the patterns of use of such ways had altered. That in turn could lead to a plethora of public inquiries to determine whether a way which appeared on the map should be deleted or a way which had been removed from the map should be restored. Mr Laurence invited us to view that prospect and the prospect of such ways following deletion from the map and statement being lost with equanimity because the public right of way would survive following the common law's principle of 'once a highway, always a highway'."

57. Roch LJ concluded in paragraph 41:

> "I consider that in defining a byway open to all traffic in the terms it has in section 66(1) of the Wildlife and Countryside Act 1981, Parliament was setting out a description of ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way. Parliament did not intend the 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 because they were more suitable for use by walkers and horse riders than by vehicles." (emphasis added)

58. The claimants submit that the real aim of section 67 was to extinguish unrecorded BOATs, as HHJ McCahill QC said, and section 67(2)(a) of NERCA 2006 is, broadly, the obverse of the definition of a BOAT given in section 66(1) of the WCA 1981. Parliament should be taken to appreciate that the Court of Appeal had held that the test for a BOAT defined the concept and character of such a way, rather than focusing on a factual assessment of the actual frequency of use. That being so, Parliament must be taken to have intended that section 67(2)(a) of NERCA 2006 also introduced a test that was primarily concerned with the character of a way, albeit frequency of use was a relevant consideration.

59. The claimants contend that although the Inspector considered the character of the way in the context of determining that the Order Route was historically a highway open to public use with all forms of transport, she did not take its character into account when determining whether the section 67(2)(a) exception applied, focusing instead solely on the figures for distinct types of use. That was an error of law in the form of misinterpretation of the statutory provision.

60. In particular, the Inspector failed to take into account:
    1) her own finding that the Order Route was historically open to public use with all forms of transport, and appears to have been "an integral part of the village network";
    2) that the Order Route was a through route comprising a public vehicular highway connecting two other public vehicular highways;
    3) that it was a continuation of a stub of a route recorded by Cornwall Council on its List of Streets (which stub was evidently a route for MPVs);
    4) that the way in which the route was surfaced, patched with tarmac, concrete and stone in places, with the provision of street lighting, was likely to have been for the main purpose of use by vehicles; and
    5) that the provision of a ford next to the footbridge must have been for the main purpose of use by vehicles.

61. The claimants' second submission in respect of ground one is that having chosen to undertake an arithmetic exercise, the Inspector based her determination on evidence which was necessarily flawed and, in doing so, she committed a *Tameside* error. This is because, as the Inspector recognised, the evidence available to her was not such as to show the number of occupants of vehicles. The Inspector was aware that, in this regard, the information she had

was inadequate. In proceeding on the basis of that evidence, without making further enquiries, the claimants contend that she took an irrational approach.

62. The claimants contend that the user evidence forms present only a fraction of the likely actual use because of the failure to adjust the evidence of MPV use to take into account multiple occupancy of cars. The claimants have submitted evidence, which was not before the inquiry, that the Department of Transport has statistics for average car occupancy, and the suggested average car occupancy for all purposes for the period 2002 to 2006 is 1.6. If the total average MPV frequency per annum shown by the user evidence forms (2,940) is multiplied by a factor of 1.6 the result (4,704) remains that total pedestrian frequency per annum of 5,541, is greater than MPV usage. But the claimants submit that interpreting section 67(2)(a) generously, in favour of avoiding the extinguishment of rights of way for MPVs, it ought only to be found that the exception does not apply if the preponderance of pedestrian and other MPV use is very large, not if it is marginally greater.

63. The claimants accept that this fresh evidence is admissible other than in the context of any argument as to remedy, to show that if I were to accept that there was a *Tameside* error, it made a difference.

64. The claimants' third submission under ground one is that the burden of proof was not on those contending an exception applied, but on those seeking to show that an established public right of way for MPVs had been extinguished. On this premise, the claimants contend that the Inspector erred in approaching the application of section 67(2)(a) as a binary issue, i.e., either the exception applied or it did not. She failed to address the third possibility that the evidence before her was insufficient to determine the question either way. She should have found that she had insufficient information to determine that 67(2)(a) did not apply, with the consequence the order should not have been confirmed.

65. The claimants' fourth and final submission under ground one is that the nature of the route is such that pedestrians will have used it in the expectation of the likelihood of encountering vehicles. This means they will have tended to use the verge and avoid the central part of the carriageway, or at least moved away from the central part of the carriageway on sight of a vehicle. It follows, the claimants contend, that part of the way - namely, the central part - would have been used mainly by vehicles.

66. As I agree with the Secretary of State's response on each of these issues, I have incorporated those submissions within my discussion and analysis, rather than set them out separately.

Discussion and analysis

67. The objective in interpreting an enactment is to determine the true meaning of the words used by the legislature. *Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition* 2020 ("Bennion"), comments at 11.1:

> "The text is the starting point, and centre of the interpreter's attention from then on. After all, it is the text that is being construed. So for example in *R v A No 2* [[2001] UKHL 25 at 44] Lord Steyn said:
>
> 'It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it …'

> In *R (On the Application of Jackson) v Attorney General* [[2005] UKHL 56 at 29], Lord Bingham said:
>
> '[the Attorney General] invites the House to focus on the language of the 1911 Act, and in this he is right, since a careful study of the statutory language, read in its statutory and historical context and with the benefit of permissible aids to interpretation, is the essential first step in any exercise of statutory interpretation.'"

68. The words of the statute must be construed in context, with common sense, having regard to the consequences of any proposed construction, and with the aim of giving effect to the legislative purpose of the enactment. I accept the claimants' submission that the exceptions in section 67(2) should not be construed restrictively, given that the effect of section 67(1) is to extinguish existing rights. Equally, however, given that Parliament made plain its intention to extinguish some existing rights of way for MPVs, in my judgment, the starting point is that the provision should be given its natural and ordinary meaning rather than a generous interpretation.

69. The words of section 67(2)(a) make clear that what is required is a factual assessment of whether the main lawful use by the public of the Order Route during the five-year period to 2 May 2006 was for MPVs or not. The word "main" is an ordinary English word. In context, it denotes the chief or predominant use. Parliament has expressly provided for the question whether the main use was for MPVs to be ascertained in respect of a specified five-year period.

70. This is consistent with the true purpose of section 67, being to extinguish only public rights of way for MPVs over unrecorded highways which were mainly used by the public for the purposes for which footpaths and bridleways are used, i.e., unrecorded BOATs. Both parties contended that was the purpose, consistently with the judgment of HHJ McCahill QC on *Fortune,* and I agree.

71. The statutory provision does not direct the decision maker as to the factors that should be taken into account when making the factual assessment as to the main use in the period. There is nothing on the face of the provision that would suggest that the character of a way is a statutory *mandatory* consideration in assessing the main use, still less, that it is the primary consideration.

72. I accept that the legislature is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions And so, in construing the words, "main lawful use" in section 67(2)(a) of NERCA 2006, the Court may place reliance on how the similar phrase, "which is used by the public mainly for the purpose" in section 66(1) of the WCA 1981 was interpreted in *Masters*. However, this is no more than an external aid to interpretation. The weight to be placed upon it depends on the context: see *Bennion* section 24.6.

73. In my judgment, although I accept that section 67(2)(a) NERCA 2006 can be characterised as seeking to ascertain, roughly, the obverse of section 66(1) of WCA 1981, there are important differences between the provisions and the context. On its face, section 66(1) focuses on current use (see the words "is used"), rather than a defined historic five-year period. The consequence is that the parameters for assessing actual use, in terms of frequency of use by different types of users, would be both unclear and constantly changing in section 66(1),

whereas the parameters are clear and unchanging in section 67(2)(a).A key reason why the Court of Appeal in *Masters* departed from the natural and ordinary meaning that the provision was concerned with frequency of use was that it would have resulted in public rights of way potentially dipping in and out of falling within the definition of BOAT over time. This would have been detrimental to the protection of the rights of way on foot or horse, contrary to the purpose of the statute, and would potentially have resulted in endless public inquiries as the answer would change over time. Those consequences are inapplicable here, because of the different wording of section 67(2)(a).

74. The purpose of the provisions is also different. In *Masters*, the Court of Appeal was interpreting section 66(1) in light of the statutory purpose that paragraph 9 of Schedule 3 of the Countryside Act 1968 required RUPPs to be reclassified as BOATs, bridleways or footpaths. The Court of Appeal was clearly concerned to interpret section 66(1) in a way that did not have the effect of public paths disappearing altogether from the DMS; an effect which would have been contrary to Parliament's intention to preserve rights of way for ramblers and horse riders: see *Masters*, [32]. In contrast, section 67 of NERCA 2006 was clearly and expressly intended to extinguish some rights of way for MPVs.

75. I agree with the Secretary of State that, in making assessment under section 67(2)(a), the character of a way is not a statutory mandatory relevant consideration. Nor of course, is it made by statute, a mandatory irrelevant consideration. It falls within the category of potentially relevant considerations which the decision maker may take into account but is not required to do so unless it is so obviously material on the facts that it would be an error of law to ignore it.

76. In this case, the Inspector was fully aware of the character of the Order Route. In my judgment, it was not so obviously material that she made any error in failing to take it into account in the context of her consideration of section 67(2)(a). The aspects of the character of the route on which the claimants rely are consistent with the fact that the Order Route is one over which there are historic rights of way for MPVs, and which has been used over a lengthy period by all types of users, as well as the fact that there are private properties along the Order Route which are accessed from it. These characteristics are in no way inconsistent with the *main use* being by other types of user than MPVs. The Inspector's judgment as to the matters that were material to her assessment under section 67(2)(a) does not, in my view, disclose any error of law.

77. I also reject the contention that the inspector made a *Tameside* error. This point links into the claimants' contention regarding the burden of proof, and the option that is said to have been open to the Inspector of not deciding whether the exception of section 67(2)(a) applied. I therefore take the second and third points under ground one together.

78. In my judgment, the burden was on the Parish Council, which objected to the route being recorded as a restricted byway, and others who asserted that there was a right of way for MPVs, to prove on the balance of probabilities that one of the exceptions to section 67(1) of NERCA 2006 applied. That accords with the scheme of the legislation which starts from the premise that such rights are extinguished, making that subject to exceptions, and it accords with the usual position that it is for the person who asserts a proposition to prove it. I also draw support for this view from the judgment of HHJ McCahill QC in *Fortune*. I recognise that the point was not argued but, first, that was because it was common ground between two

experienced counsel in the field, and second, it is plain that HHJ McCahill QC considered that this followed from the scheme of the provisions.

79. In my judgment, it would not have been open to the Inspector to have declined to determine whether or not the section 67(2)(a) exception applied. It was one of the issues in the public inquiry that she was appointed to determine. She cannot sensibly be criticised for taking the view that it was her job to make a determination even if - as is so often the case in courts, tribunals and inquiries - the evidence was imperfect or could have been fuller. Indeed, a failure to make a determination would have been properly subject to criticism: see *Re B* [2009] 1 AC 11, Baroness Hale at [30] to [32].

80. Both the Parish Council and the first claimant referred to the issue that the frequency of MPV use may be increased if the number of persons in each vehicle were to be factored in. Neither sought to put any evidence before the Inspector to assist her in determining how that could be factored in. Nor did any party seek an adjournment to enable them to submit such evidence. Nor did they suggest that the Inspector ought, herself, to seek such evidence. In these circumstances, the high threshold for showing a *Tameside* error has clearly not been met. The Inspector was reasonably entitled to make a determination on the basis of the evidence the parties before her had chosen to adduce.

81. Moreover, the evidence of Mr Boyle as to what the Inspector would have ascertained if she had made the enquiry that the claimants contend should have been made shows that factoring in for the average occupancy of vehicles would still have led to the conclusion that the main use during the five years was for pedestrians and other non-MPV uses. That evidence would only have assisted the claimants if they were right to contend that for the exception to be inapplicable that non-MPV use must be much greater than MPV use. That is not the natural and ordinary meaning of the provision. If Parliament had intended to say that it could, and would, in my judgment, have done so.

82. I can address the claimants' fourth and final submission under ground one briefly. The suggestion that there may have been a way within the way which was mainly used by MPVs by reason of pedestrians tending to walk on the verge is pure speculation. There is no evidence to support it. No evidence to that effect was adduced before the Inspector and no submissions were made to her that she should consider whether there was a way *within* the Order Route for which the main use was by MPVs. In the circumstances, it is clearly not a point that the Inspector made any error of law in not addressing.

GROUND TWO

83. The claimants' second ground raises a narrow point. In essence, the claimants contend that the Inspector found that the best evidence as to the width of the Order Route along its entire length is the 1908 OS map. They infer this from the fact that the maximum and minimum widths were drawn by Cornwall Council, and accepted by the Inspector, from the 1908 map; and Part I of the Schedule to the Order described the Order Route by reference to the 1908 OS map.

84. Having so found, they contend it was irrational for the Inspector to reject the first claimant's contention that the text in Part II of the Schedule to the Order should be modified to refer to the width by reference to the 1908 OS map. The Inspector found that the Order provides sufficient information for users and landowners, and, most importantly, the Highway

Authority, to understand the width of the route at any given point. But the claimants submit that that misses the point that by not including the best evidence as to the width on the definitive statement the Inspector missed the opportunity to determine the width *conclusively*.

85. The Secretary of State draws attention to *R (Norfolk County Council) v Secretary of State for Environment, Food and Rural Affairs* [2006] 1WLR 1103, at [37] to [38], for the proposition that while there is a statutory duty to prepare a definitive map there is a discretion as to the particulars to include in the statement. The map and statement should be examined together but, "If they are in conflict, then the map must take precedence since these discretionary particulars depend for their existence upon the conclusiveness of the obligatory map".

86. The Secretary of State also relies on *Perkins and Another v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin), in which Sir George Newman addressed the question as to what degree of detail is required by law. He referred to a statement of Purchas LJ in *R v Secretary of State for the Environment, Food and Rural Affairs, ex parte Burrows* [1991] QB 394 that the WCA 1991 recognises, "…the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy". Sir George Newman observed at paragraphs 13 to 14:

> "13. The *dictum* of Purchas LJ in *Burrows* is helpful, but is not to be taken in substitution for the standard set by the legislation. Purchas LJ can be taken as referring to the general intention of the legislation, namely that the map and statement should be kept under review and modified in the light of the most up-to-date evidence as to what rights of way are in existence so as to show, as accurately as possible, those rights of way. I do not take him to have been purporting to lay down a general requirement that the map and statement should attain some particularly high level of precision in the sense of showing the detail of the route in terms of its precise location on the ground to a manifestly high degree of particularity.
> 14. I accept that if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question. Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes, in my judgment, there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence."

87. The Secretary of State also draws attention to the "Rights of Way Advice Note Number 16: Widths on Orders", which provides:

> "3.2 The relevant regulations do not prescribe the manner in which the width of the way to be created is described. Apart from specific instances such as the reinstatement of a right of way after ploughing under Schedule 12A to the Highways Act 1980 (as inserted by the Rights of Way Act 1990), there are no statutory widths for rights of way. Inspectors may exercise their discretion in determining whether the description is reasonable in all the circumstances of the case. Nonetheless, a minimum or approximate width should not be used in an order. Including a minimum or approximate width in an order can led to uncertainty regarding the position, area, maintenance and obstruction of a right of way. If

inspectors come across orders where a minimum or approximate width is shown then the inspector should modify the order and put in an actual width.

3.3 In some cases, the width of the new way may vary frequently along its length making a simple written description difficult. In such cases a suitable form of wording might say 'varying between X metres and Y metres as shown on the order plan'. Whether this is feasible or not depends upon the scale, detail and quality of the order plan. Reference to fixed physical boundaries can sometimes be acceptable but walls, fences, hedges and buildings may be removed or repositioned in future and are therefore not always reliable as a permanent marker.

…

4.4 In some cases, the width of the way to be recorded may vary frequently along its length making a simple written description difficult. In such cases a suitable form of wording might say 'varying between X metres and Y metres as shown on the order plan'. Whether this is feasible or not depends upon the scale, detail and quality of the order plan. Reference to fixed physical boundaries can sometimes be acceptable but walls, fences, hedges and buildings may be removed or re-positioned in future and are therefore not always reliable as a permanent marker. Alternatively, reference may be made to other reliable sources of mapping that may be available, for instance the Ordnance Survey 25 County Series maps. Although it may not be possible to scale off precise measurements from such maps, they may indicate where significant variations of width occur between the minimum and maximum figures".

88. The claimants disavow any submission of the law requires any particular degree of specificity in the definitive statement. The 1993 Regulations clearly do not impose any such requirement. Indeed, I note that schedule 3 to the regulations, which sets out the form of order, expressly indicates that the description of the width should be given in Part I whereas no such indication is given in Part II. The Order drafted by the Council, and accepted by the Inspector, clearly follows the form prescribed in the 1993 Regulations.

89. The reasons for rejecting the first claimant's submission given by the Inspector were, first, the council had not carried over reference to the 1908 OS map to Part II "due to the format of the existing statement" and, secondly, she was satisfied that the Order provided sufficient information to enable users, land owners and the authority to understand the width at any given point. While I appreciate the importance of the conclusive impact of particulars specified in the statement, I accept the Secretary of State's submission that there was nothing irrational in the Inspector's acceptance of the form of Order proposed by the Council, in circumstances where the reason given was, in effect, to aid consistency in the form of statement, and where the Inspector assessed that the effect was to ensure that all involved had sufficient information as to the width of the route at any given point.

Conclusion

90. For the reasons I have given I dismiss both grounds of claim.

End of Judgment.

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