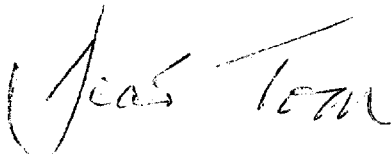


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Our Ref: 264567/MG

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20 September 2006

Tom Levitt MP



Thank you for your letter of 1 August enclosing a further one from your constituent Mr J G Riddall, Countryside Secretary of the Ramblers' Association, about section 68 of the Natural Environment and Rural Communities Act 2006.

Mr Riddall is concerned to find out the meaning behind the words 'in appropriate circumstances' in my previous letter to you on this subject, in the context of pedal cycle use possibly giving rise to a restricted byway. It is worth noting that it is Defra's view that, prior to the Natural Environment and Rural Communities Act, use of a way by pedal cycle could have given rise to a byway open to all traffic, which is a public right of way with rights for mechanically propelled vehicles. One of the aims behind section 66 of the Natural Environment and Rural Communities Act is to ensure that use of a way by non-mechanically propelled vehicles, in particular pedal cycles, cannot give rise to a byway open to all traffic, but could instead only give rise to a restricted byway, which has rights for non-mechanically propelled vehicles.

During the passage of the Natural Environment and Rural Communities Bill, there was considerable pressure from cycling interests to provide that a restricted byway arises automatically after a qualifying period of use by pedal cycle. This we resisted, for the kinds of reasons that Mr Riddall sets out in his letter, and we were careful to ensure that the Bill did not provide such an automatic link.

The main criteria for use giving rise to a right of way, as set in section 31 of the Highways Act 1980, are that the way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years (with common law applications, the period may in

certain circumstances be shorter). If these are satisfied, the way is to be deemed to have been dedicated as a right of way unless there is sufficient evidence that there was no intention during that period to dedicate it. There is one important proviso to this, and that is that where the way is of such a character that use of it by the public could not give rise at common law to any presumption of dedication.

From the case law it appears that there is good authority to show that a claim that a footpath has become a restricted byway on the basis of its use by bicycles may fail by virtue of the law of public nuisance. I am aware that Mr Riddall is a co-author of "Rights of Way, A guide to law and practice" and so will be interested in the relevant case law.

This issue was dealt with in the case of Hereford and Worcester CC v Pick (1996) 71 P & CR 231, page 239. The judge in that case said: "I am equally satisfied that riding a bicycle or motorcycle on the footpath at this particular place would be dangerous for pedestrians. That being so, it would constitute a nuisance and no rights could be acquired as a result of such conduct."

The court in the Pick case referred to the 1904 case of Sheringham UDC v Holsey as authority for that proposition. The case concerned a public footpath that had for many years been used by fishermen to drive their carts. Joyce J rejected the submission that such use had given rise to the presumed dedication of a carriageway at common law. "It is said that a right to use the lane for wheeled traffic has been acquired by a user. Upon the evidence I do not see any way to hold that there has been any such user as to convert the footway into a public highway for all purposes. The user for wheeled traffic was in its inception and has all along been a public nuisance, and no length of time can legalise it."

Lord Scott, in the judgement in the House of Lords in Bakewell Management Ltd. v Brandwood and others (2004) 2 All ER 305, referred to Pick's case and said: "I agree with Stuart-Smith LJ's remarks about nuisance. It would not, in my opinion, have been open to the land owner to have dedicated the footpath as a public vehicular highway if use by vehicles would have constituted a public nuisance to pedestrians using the footpath."

It is our belief that, whether or not, the use of a footpath by bicycles amounts to a public nuisance, is a question of fact to be resolved having regard to the circumstances of each case. However, such use by itself is unlikely to provide a proper basis for a finding that a public nuisance has arisen. There must be some particular fact, or circumstance, which provides the foundation for such a finding. In both Pick and Holsley's cases, referred to above, the Court was concerned by the physical limitations of the footpath in question, and the fact that danger to pedestrians would arise from vehicular use.

We can see no reason why an Inspector should not adopt a similar approach when determining a claim under the Wildlife and Countryside Act 1981, if he is satisfied on the evidence that pedestrians have or would be endangered, or obstructed, by bicycles or other vehicles, using the footpath in question, by virtue of the physical limitations of the footpath itself. The Inspector may also consider that even though the footpath may be

capable of accommodating pedal cycles as well as pedestrians without conflict, if there is evidence that pedestrians have already been obstructed or endangered by the presence of cyclists, we believe that the Inspector is entitled to reject the claim for a restricted byway on that basis.

In addition, the Inspector may find that even though use by bicycles has not given rise to public nuisance, use of it by other classes of vehicles may be likely to do so. In common law, the correct analysis would be that the character of the footpath was such as to negate the inference of dedication as a restricted byway, that being an improper inference in the circumstances notwithstanding the actual use of the footpath by cyclists. Under section 31 of the Highways Act 1980, the analysis would be that the footpath was 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 as a restricted byway because its use for passage by vehicles could give rise a public nuisance.

It seems to us that footpaths such as the one that Mr Riddall mentions in his letter, would be very unlikely to be upgraded to the status of restricted byway for the reasons set out above. It will, of course, depend upon the particular facts of any given case, but with an application in relation to such a path, we think it likely, that an Inspector would be given evidence of actual nuisance to pedestrians by pedal cycles and conclude that the way was of such a character that use of it by the public could not give rise to any presumption of dedication as a restricted byway. In our view, whether or not there were styles, or gates, along the route would also be material to any Inspector's consideration.

I trust this is helpful
Yours faithfully
Barry Gardiner

Barry Gardiner MP