Introduction

1. The High Court decisions in Nettlecombe(1), Masters(2), and Buckland & Capel(3) resulted in confusion over the meaning of the phrase “but which is used by the public mainly for the purpose for which footpaths and bridleways are so used” found in the definition of byway open to all traffic (BOAT) in section 66(1) of the Wildlife and Countryside Act 1981. The Masters case in the Court of Appeal (4) has clarified this..

2. This Advice Note sets out the Planning Inspectorate’s view of the judgment. This Advice Note is publicly available, but has no legal force.

Background

3. Section 66(1) of the Wildlife and Countryside Act 1981 defines a byway open to all traffic (“BOAT”) as:

   “a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”.

4. The difficulties over the meaning of the second part of this definition have revolved around whether use, of any sort, is required for a carriageway to constitute a BOAT, and if so what form that use must take. For example, whether use must be by both pedestrians and equestrians and whether such combined use, if required, is sufficient if there is no vehicular use.

The High Court Judgments

5. In Nettlecombe Dyson J stated that “...the language of the definition is clear and unambiguous. It is expressed in the present tense, and refers to current use, not past or potential use”. However, the judgment was not specific on whether the present use was required to include an element of vehicular use, or whether the use needed to be both by pedestrians and equestrians in order for a prospective BOAT to meet the definition.
6. Hooper J stated in the Masters case that:

“In conclusion the intention behind defining the word ‘byway’ in section 66(1) of the 1981 Act in the way it is defined was to distinguish byways from ordinary roads. Having regard to the duty in section 54 to reclassify a road used as a public path (“RUPP”) as a byway if ‘a public right of way for vehicular traffic has been shown to exist’, to the maxim ‘once a highway, always a highway’, .... The definition should be construed in a purposive manner. The definition is referring to a type of highway and not seeking to limit byways to those that are currently and actually used by the public for the purpose for which footpaths and bridleways are so used”.

7. In Buckland and Capel Kay J, referring to the commentary on Nettlecombe in the Journal of Planning Law stated:

“I do not, however, begin to accept the interpretation of Dyson J’s judgment contained in the commentary. Nowhere, so far as I can see, did the judge decide that there needs to be evidence of current vehicular use. He held that there must be current pedestrian and/or equestrian use since without it the definition cannot be satisfied but no more than that”.

8. He went on to say:

“All that needs to be demonstrated is that the pedestrian and equestrian use outweighs the vehicular use and it matters not whether the latter is limited or non-existent. I equally reject the argument that there needs to be demonstrated both pedestrian and equestrian use...Under the definition of a RUPP [in the National Parks and Access to the Countryside Act 1949] it was arguable that one could not aggregate pedestrian use with equestrian use when making the comparison with vehicular use. As I read the definition of a BOAT, that matter is put beyond question. The only exercise required is to see whether the combined pedestrian and equestrian use, if any, is greater than any vehicular use”.

**The Court of Appeal Judgment in the Masters Case**

9. In his judgment in the Masters case Roch LJ stated that:

“ If it had been Parliament’s intention, when enacting the 1981 Act, that roads used as public paths should be deleted from the definitive map if they failed to satisfy some user test derived from the definition in section 66, Parliament would have expressly so provided in section 54, or if not in section 54, in section 53. Parliament’s intention was to preserve rights of way giving access to the countryside for walkers and horse riders. Parliament intended to include ways over which the public had vehicular
The last thing that Parliament intended was that once a way was shown on the definitive map as a byway open to all traffic, it could be the subject of applications to remove it from the definitive map and statement altogether because the use made of the way by the public had ceased or the balance between the various uses made by the public of the way had changed. The reading of the definition given by Hooper J did not involve “the wholesale rewriting” of the definition or indeed any rewriting. The purpose of the definition was to identify the way Parliament intended should be shown on the definitive map and statement by its type or character”.

10. Roch LJ went on to find:

“The intention of Parliament in passing the Acts of 1949, 1968 and 1981 is in my judgment clear. That purpose is that county councils should record in definitive maps and statements ways, including what Lord Diplock called “full ways 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...

I consider that in defining a byway open to all traffic in the terms set out 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 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 horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28 February 1983”.

Summary

11. To summarise, the effect of the judgment is that it is not a necessary precondition for a carriageway to be a BOAT for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test for a carriageway to be recorded on the Definitive Map and Statement as a BOAT relates to its character or type.
Application of the Judgment

12. The Masters case related to an order under section 53(2)(b) of the 1981 Act modifying the status of a road used as a public path (RUPP) to that of a BOAT. The Inspectorate’s opinion is that the interpretation which the Court of Appeal gave to the definition of BOAT applies in the case of all modification orders made on the grounds given in sections 53(3)(c)(i) & (ii). The Court of Appeal was not providing an interpretation of section 66(1) which is only to be applied in the case of a modification order which has the effect of showing a way shown as a RUPP, instead as a BOAT.

13. In the course of his judgment, Roch LJ pointed out that the issue in the appeal was “the meaning of the statutory definition of byway open to all traffic...found in section 66(1) Wildlife and Countryside Act 1981”. Section 66(1) provides definitions for the whole of Part III of the 1981 Act. Moreover, the court in deciding on the meaning of section 66(1) looked into what Parliament’s intention was, which was to record “full ways or cartways” for the benefit of ramblers and horseriders. That intention would not be served if, for example, a completely new BOAT could not be put on the map without current pedestrian or vehicular use or, a similarly unused footpath could not be upgraded to a BOAT.

14. Finally the effect of the judgment is not to exclude consideration of pedestrian or equestrian use. These may be relevant to the question of what the character or type is of a particular way.

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(1) R-v-Wiltshire County Council ex parte Nettlecombe Ltd [1998] JPL 707
(2) Masters-v-the Secretary of State for the Environment, Transport and the Regions [2000] 2 All ER 788
(3) Buckland & Capel-v- the Secretary of State for the Environment, Transport and the Regions [2000] 3 All ER 205
(4) Masters-v-the Secretary of State for the Environment, Transport and the Regions [Application of the Court of Appeal judgment] [2000] 4 All ER 458