

**MAYHEW v THE SECRETARY OF STATE FOR THE ENVIRONMENT
LASHAM PARISH MEETING v HAMPSHIRE COUNTY COUNCIL****Introduction**

1. This Advice Note sets out the Planning Inspectorate's interpretation of the *Mayhew*¹ and the *Lasham*² judgments.
2. This Advice Note is publicly available. It has no legal force and is not itself an authoritative interpretation of the law.

Background

3. The *Mayhew* and the *Lasham* judgments considered a number of issues relating to orders under sections 53 and 54 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). In *Mayhew*, the following was addressed:
 - (a) Whether the discovery of evidence under section 53(3)(c) of the 1981 Act could cover evidence which was not fresh evidence but which had been held unconsidered in a surveying authority's archives for some length of time; and
 - (b) Whether there is a discretion under section 53(2) of the 1981 Act not to make an order to show a way as a byway open to all traffic ("BOAT") on the basis that it is not suitable for vehicular traffic despite vehicular rights having been ascertained.
4. In the *Lasham* judgment, the court addressed the following points:
 - (a) Whether under section 54(1) of the 1981 Act, a surveying authority has a discretion not to make an order to show a road used as a public path ("RUPP") as a BOAT if a public right of way for vehicular traffic has been shown to exist, on the basis that the way is unsuitable for vehicular traffic; and
 - (b) Whether a surveying authority is entitled to treat an order made under section 54(1) of the 1981 Act as an unopposed order where the only objection to it is based on legally irrelevant considerations.

Mayhew

¹ *Mayhew v Secretary of State for the Environment* [1992] 65 P & CR 344; [1993] JPL 831; [1993] COD 45

² *Lasham Parish Meeting v Hampshire County Council* [1992] 65 P & CR 3; 91 LGR 209; [1993] JPL 841

5. In the *Mayhew* case, the challenge was to the confirmation by the Secretary of State of an order under section 53 to reclassify three ways shown in a definitive map as footpaths as BOATS. The documentary evidence that was relied upon for the order had been in the surveying authority's archives as far back as 1952 when the ways were originally classified as footpaths, but had not been previously considered by the authority.
6. The order was challenged, first, on the basis that the evidence relied upon did not come within section 53(3)(c) of the 1981 Act. It had to have been fresh evidence previously unavailable to the authority in order to be "discovered".
7. This argument was rejected. The judge, Potts J, adopted parts of the judgment in *R v Secretary of State for the Environment ex parte Simms and Burrows*³ where it was said that: "the word 'discovery' suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected". In addition, Potts J adopted the following passage from *Simms and Burrows*:

"In particular I am satisfied that section 53(3)(c), with its use of the word "discovery", embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time of the definitive map".
8. In the court's view in *Mayhew*, the meaning of "to discover" is to find out or become aware. The phrase implies a mental process of the discoverer applying their mind to something previously unknown to them.
9. The order was also challenged on the second ground that its practical effect had been ignored. The modification order would open up the ways to motor-cyclists and four-wheel drives which would cause damage to their surfaces and pose a danger to walkers and horse-riders.
10. On this, the court pointed out that the power under section 53(2) of the 1981 Act is not to make such modifications as appear desirable. The power is to make such modifications as appear to be requisite in consequence of the events in subsection (3). It was stated that section 53 limits:

"...the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give

³ *R v Secretary of State for the Environment ex parte Simms and Burrows* [1991] 2 QB 354; [1990] WLR 1070; 3 All ER 490; 60 P&CR 105; 89 LGR 398; [1990] JPL 746

effect to the rights of way which were found to exist rather than those which might be thought suitable or desirable....The surveying authority's duty under section 53 is to ascertain public rights of way and to modify the map so that it correctly defines those rights; no more and no less".

11. Where vehicular use of a BOAT is inappropriate then the use of traffic orders under the Road Traffic Regulation Act 1984 might be considered by the local authority.

Lasham

12. In the *Lasham* case, the surveying authority made an order under section 54(1) reclassifying a RUPP as a BOAT. An objection to the order was made by a parish council on the basis that the way was unsuitable for motor vehicles and that vehicular traffic would disturb local residents, walkers and cyclists. Despite this objection, the surveying authority treated the order as unopposed and went on to confirm it rather than referring it to the Secretary of State for confirmation. The surveying authority took the view that the objection was irrelevant as it related solely to amenity issues and it could, therefore, be disregarded. The order was challenged on the basis that the authority had no power to confirm it as it was opposed.

13. Potts J, who had given the judgment in the *Mayhew* case, took the view that just as amenity considerations are irrelevant to an order under section 53(2) of the 1981 Act, they are irrelevant to an order under section 54(1). The sole issue is what public rights of way exist. He stated:

"Section 54 must be given its natural meaning. It is concerned with status. It imposes on the surveying authority "a duty to reclassify roads used as public paths". The duty is mandatory...The section confers no discretion on the surveying authority to consider whether the way is suitable for vehicular traffic....Section 54 merely gives the surveying authority the power to decide which of the three descriptions specified in subsection (2) should apply to the way in question given the requirements of subsection (3). Accordingly, if a public right of way has been shown to exist, the way must be reclassified as a byway open to all traffic."

14. On the issue of whether the surveying authority had been correct to treat the order as unopposed, the court took the view that it had not. The order should have been referred to the Secretary of State for confirmation despite the fact that the objection was based on irrelevant considerations of amenity.

15. Paragraph 7(1) of Schedule 15 to the 1981 Act provides that if any

representation or objection is duly made and not withdrawn then a surveying authority shall submit the order to the Secretary of State/Welsh Assembly Government for confirmation. A duly made objection is one that is made within the time and in the manner specified in the Notice of the Order. Although the legislation requires objections to include particulars of the grounds relied upon⁴, it does not specify what those grounds must be to constitute a duly made objection. Therefore neither the Secretary of State/Welsh Assembly Government nor a surveying authority is entitled to disregard an objection that is made on legally irrelevant grounds (but see paragraph 16 below).

16. Once an objection is duly made, the surveying authority must submit the order for confirmation to the Secretary of State/Welsh Assembly Government. Where an order is so submitted, whether or not the objection is irrelevant, the Secretary of State/Welsh Assembly Government is obliged to cause a local inquiry to be held or afford any person who has made a duly made objection the opportunity of being heard by a person appointed by him (although by virtue of paragraph 7(2A) and 8(3) of Schedule 15 to the Wildlife and Countryside Act 1981⁵ the Secretary of State/Welsh Assembly Government is not so obliged if, in his opinion, none of the duly made objections relate to an issue which can be taken into account in determining whether or not to confirm an order, either with or without modifications).
17. Potts J, went onto to explain that the Secretary of State is entitled to consider the nature of the objection in deciding whether to hold a public inquiry or a hearing. The fact that an objection was irrelevant could inform his decision on what procedure to adopt. The Secretary of State would also be entitled to ask the person making the objection whether they wished to maintain it or withdraw it and give them the opportunity to modify the grounds. He would also be entitled to remind the objector of the power to award costs under paragraph 9 of Schedule 15 to the 1981 Act.
18. Paragraph 7(2) of Schedule 15 of the above Act provides any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose. Therefore, the Inspectorate considers that duly made letters of representations, which also include letters of support, should be treated in the same way as duly made letters of objection.

Conclusions

⁴ Paragraphs 3(1)(c) and 8(2)(a) of Schedule 15 to the Wildlife and Countryside Act 1981 (as inserted by paragraphs 11(2) and 11(7)(a) of Schedule 5 to the Countryside and Rights of Way Act 2000).

⁵ As inserted by Paragraph 11(5) and (7) of Schedule 5 to the Countryside and Rights of Way Act 2000.

19. Sections 53 and 54 of the 1981 Act are concerned with the status of rights of way. Arguments about which particular rights of way are desirable or suitable are irrelevant to orders under those sections. Inspectors should indicate this in their opening remarks at inquiries, and remind objectors that although they have a right to be heard, there may be cost implications of repeating such irrelevant arguments when giving evidence.
20. There is similarity between the statutory language used in Schedule 15 to the 1981 Act and that governing the procedures for the confirmation of public path orders (paragraphs 1 and 2 of Schedule 6 to the Highways Act 1980) and orders made under section 257 of the Town and Country Planning Act 1990 (Schedule 14 to that Act). Consequently, the *Lasham* judgment is to some extent applied in those cases by paragraphs 8 and 9 of Annex A to Welsh Office Circular 5/93, which states:
- If duly made objections are not withdrawn, the order must be referred to the [Welsh Ministers] (but see paragraph 3 of Annex C for further clarification, with regard to public path orders). The authority has no locus to determine whether or not the grounds of the objection or representation are relevant.....the [Welsh Ministers] will look carefully at the objections and may give an objector the opportunity to modify grounds of objections where he considers these are not legally relevant....However [they have] no power, if the objection is not modified or withdrawn, to determine the order without giving the objector an opportunity of being heard.
21. In relation to public path orders, paragraph 3 of Annex C to the Circular points out that authorities appear to have the discretion not to proceed with opposed orders and so may bring the procedure to an end instead of being required to refer the order to the Welsh Assembly Government for confirmation.
22. For England, these matters are covered in paragraph 5.30 of DEFRA Circular 1/09
23. Chapter 8 of the Planning Inspectorate's guide 'Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England' contains advice about the award of costs when irrelevant objections are pursued at inquiries.