

Case Name: *Slough Borough Council v Secretary of State for Environment Food And Rural Affairs* [2018] EWHC 1963 (Admin) (03 August 2018)

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Commentary: This is not a Planning Court case but is of interest as it relates to the dedication of rights of way.

The Council's statutory challenge to an Inspector's decision that a right of way should be shown as a Byway Open to All Traffic, BOAT, not as a bridleway on the Council's Definitive Map and Statement was allowed and the Inspector's decision was quashed. The first ground related to the evidence for common law dedication and the significance of cycle use and the second ground concerned the application of the exemption in section s67 of the Natural Environment and Rural Communities Act 2006.

The first ground of challenge was on the Inspector's findings on common law dedication and the significance of the evidence of cycle use, vehicular use before 1961 when its use by vehicles was blocked, and the way in which it was said that he had ignored the significance of that blocking for his assessment of whether there had been an earlier dedication for vehicular use at all. There is no requirement for long use in order to infer common law dedication. The question is whether dedication is the more probable explanation for the use, than trespass or toleration. The evidence was that there had been some vehicular use from 1956 but a blockage was then put in place in 1961 to prevent the use. The Court held that the Inspector had failed to consider the role of the blockage, and response to it, in drawing the inference of dedication.

The significance of the cycle use was that before the Countryside Act 1968, there was no right for cycles to use bridleways so the use by cycles prior to this would have been considered vehicular use so it was argued that dedication for vehicular use could be inferred from bicycle use. However, had the Inspector approached the matter in the way the Judge held was required, he might have accepted that the bicycle use prior to 1968 was tolerated over a footpath and bridleway, rather than being a dedication for vehicular use, including motor vehicles. The Court held that the principle in *Whitworth and ORS and Secretary of State for Environment, Food and Rural Affairs 2010 EWCA Civ 1468* that "since section 30 [of the Countryside Act 1968] involves a statutory interference with private property rights, it is appropriate to infer the form of dedication by the owner which is least burdensome to him" applied equally to common law dedication as to statutory dedication. There was no reason that dedication for some rights of way could not be accompanied by toleration of part of some wider class rather than dedication for the whole gamut of vehicles which might come within it.

The second ground of challenge was based on the effect of s67 of the Natural Environment and Rural Communities Act 2006 which, subject to a disputed exemption for highways maintainable at public expense shown in a list kept under s36 Highways Act 1980, extinguished the rights of users of bridleways by mechanically propelled vehicles. The right

of way in question was on the Council's list but marked as a private road. The Inspector held that its inclusion on the list meant that the exemption in section 67(2)(b) of the NERC 2006 did not apply. However, the Court held that there was no reason why the Council's list could not contain the section 36 list (highways maintainable at public expense) alongside other matters (a list of private roads). The Inspector was wrong to interpret the Council's list as showing that the right of way was a highway maintainable at public expense when the very entry said that it was not. If he had not made that error there was no other basis upon which he could have concluded that the exemption did not apply to what he found the position to be and he was therefore bound to conclude that the rights of way for mechanically propelled vehicles ended in 2006.

Case summary prepared by Town Legal LLP