

Guidance on Appeals under Section 6 of the Countryside and Rights of Way Act 2000:

**Appeals against the showing of land as Open
Country or Registered Common Land on a
Provisional Map**

**Appeals against decisions of Relevant
Authorities in respect of Exclusions and
Restrictions of Access**

Appeals against Notices

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Department for Environment, Food and Rural Affairs

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CHAPTER 1: An Introduction to Part I of the Countryside and Rights of Way Act 2000 and an overview of the appeals Provisions

Introduction

1.1 When fully in force, the Countryside and Rights of Way Act 2000 (the Act) will provide a public right of access to between 1 and 1½ million hectares of some of the finest landscape in England and Wales. The Government believes the right of access will bring significant public benefits, including not only more opportunities for recreation, but better public understanding of the countryside, and increased income for rural areas. Some people continue to object to the new right of access provided by the Act. It is important to note that the Act reflects Parliament's agreement with the Government's policy to introduce the new right but to do so in a balanced way which takes account of the needs of land managers.

1.2 Access land falls mainly into two broad categories: common land registered under the Commons Registration Act 1965 (RCL) and open country. Open country is defined as comprising land (other than registered common land) which appears to the relevant countryside body - the Countryside Agency (the Agency) in England or the Countryside Council for Wales in Wales (CCW) to consist wholly or predominantly of mountain, moor, heath or down (MMHD).

1.3 The Act does not provide a comprehensive definition of MMHD (although "mountain" is defined in section 1(2) as including land more than 600 metres above sea level), and MMHD excludes land which appears to the Agency to consist of improved or semi-improved grassland. The terms "improved or semi-improved grassland" are not defined by the Act.

1.4 Before the right of access can come into force the countryside bodies must map all RCL and open country. The countryside bodies are given discretion not to map areas of open country if they are so small that they consider their inclusion would serve no useful purpose [section 4(5)(a)]. To make it easier for walkers to identify mapped land on the ground, they may also map open country to a particular physical feature, even if that has the effect of including other land as open country or excluding land which would otherwise be mapped as open country [section 4(5)(b)].

1.5 Land of certain types or uses is classified as "excepted land". Excepted land will be mapped if it is open country or registered common land, but no right of access will exist whilst the land can be described as being of the use or type which makes it excepted. Excepted land includes that covered by buildings or their curtilage; land within 20 metres of a dwelling; golf courses, racecourses or aerodromes and land subject to military byelaws [section 1(1) and Schedule 1].

1.6 There is no provision in the Act for owners and occupiers to be compensated for the creation of a new public right over their land. Instead, the Act balances the new freedom for people to enjoy the countryside with the needs of farmers, landowners and other land managers. The Act contains a number of safeguards to minimise interference with private property rights without undermining the recreational, economic, and health benefits which the new right of access will bring.

1.7 Part I of the Act sets the framework for access, but the detailed implementation of its provisions will be done through regulations which the Department for Environment, Food and Rural Affairs (Defra) and the Welsh Assembly Government are now preparing.

Rights of the public

1.8 The Act provides a right of access: -

- on foot (but not on horseback or bicycle, or any vehicle)
- accompanied by dogs (with certain restrictions)
- to access land (open country, common land registered under Commons Registration Act 1965 and land dedicated for access under section 16).

1.9 Section 2 of the Act sets out the public's rights. In summary, any person may enter and remain on access land for the purposes of open air recreation provided they do not damage any wall, fence, hedge, stile or gate and they observe the general restrictions set out in Schedule 2 to the Act. These general restrictions include: being accompanied by any animal other than a dog (which precludes horse riding); lighting fires; committing a criminal offence; disturbing animals, birds or fish; swimming in non-tidal waters; using a metal detector; failing to shut gates; camping, engaging in organised games or hang-gliding.

1.10 These are limitations on the new rights only. People are not necessarily forbidden to do these things on access land - for example they may be able to do some of them along a right of way over the land, or with the owner's permission. But if a person exercising the right of access becomes a trespasser by failing to observe the limitations set out in Schedule 2 that person loses his entitlement to exercise the rights given by the Act, both on that land and on other land in the same ownership, for 72 hours after leaving the land.

Implementation

1.11 The Government plans to introduce the right of access across England and Wales by the end of 2005. Defra and the Welsh Assembly Government have made a Public Service Agreement with the Treasury to achieve this timetable. The Government has also announced that in England it wants to implement access through a rolling regional programme.

1.12 The right of access cannot be exercised until a number of things have happened:

- open country and RCL is mapped by the Agency and CCW

- enabling Regulations have been made by Defra and the Welsh Assembly Government.
- the majority of appeals against land being shown on the maps have been determined.
- landowners and managers have had an opportunity to seek necessary restrictions
- the maps have been issued in their conclusive form, and
- a commencement order has been made permitting public access to be exercised.

1.13 Access will not be implemented in any region until the majority of mapping appeals have been determined in that area, and landowners and land managers have had an opportunity to seek any necessary exclusions or restrictions.

The mapping process

1.14 First the countryside bodies issue a draft map and consult widely on it. This process should resolve many of the objections that might have otherwise resulted in appeals. They then issue a provisional map on which appeals can be made. Finally, a conclusive map is issued. The countryside bodies must review the conclusive maps at least every 10 years.

1.15 The Agency has divided England into 8 regions for mapping purposes. The first maps in England are for the South East and lower North West. In Wales, mapping is being done in five tranches each consisting of a number of smaller areas.

Appeals

1.16 There are three types of appeal provided for in the Act.

Mapping appeals

1.17 Landowners and others with a legal interest in land may appeal within three months of the issue of the provisional map against inclusion of land, on the grounds that: -

(i) where it is shown as RCL, it is not registered common land [section 6(2)]

(Appeals cannot be made against what is shown on the register – appeals will relate to whether the provisional map is an accurate representation of what is included on that register); or

(ii) where it is shown as open country, it is not wholly or predominantly MMHD [section 6(3)(a)], and, to the extent that the countryside bodies have exercised their discretion under section 4(5)(b) to treat land which is not open country as forming part of an area of open country, they ought not to have done so [section 6(3)(b)]

(Section 4(5)(b) allows the countryside bodies to determine that a boundary of an area of open country is to be treated as coinciding with a particular physical feature (even though the effect may be to include other land as open country)).

1.18 Although walkers and other users may make representations at draft map stage for inclusion of land on access maps, there is no right of appeal to add land to a provisional map.

1.19 The two other types of appeal are: -

Restriction appeals – Where a person with an interest in land has applied for a direction restricting or excluding access, or the original applicant for a direction (or his successor in title) has made representations on being consulted on a proposal to revoke or vary that direction and the relevant authority (In England, the Countryside Agency, National Park Authority or Forestry Commission as the case may be) has decided not to act in accordance with the application or the representations [section 30].

Notice appeals – The owner or occupier of land may appeal against a notice requiring that something be done to facilitate access to open country or common land [section 38].

Chapter 2: The Inspector's role in relation to the Secretary of State

2.1 The implementation and administration of Part I of the Act, and hence the determination of section 6 appeals, is the responsibility (in England) of the Secretary of State for Environment, Food and Rural Affairs (the Secretary of State). The Act entitles her to appoint any person to carry out the function of determining such appeals on her behalf.

2.2 All section 6 appeals are initially “transferred” to the Planning Inspectorate for determination and each Inspector is appointed by the Secretary of State for that purpose. The vast majority of cases will be dealt with in this way. Occasionally, however, (for example, in cases with novel features, or which are particularly high profile or controversial) the Secretary of State may “recover” jurisdiction; that is to say, she will take back a case initially transferred to an Inspector in order to make the final determination herself. The Secretary of State will make her decision after receiving a report from an Inspector setting out his or her conclusions and recommendations on the appeal.

2.3 Inspectors “stand in the shoes” of the Secretary of State, and must in consequence deal with the appeals before them by reference to the same criteria as she herself would. This will in the first instance mean making determinations in accordance with the provisions in the Act, any relevant regulations made under the Act, as well as any other publicly available Inspectorate or Defra publications or guidance. As and when a body of other guidance builds up (for example, from decisions made by the Courts), this will also need to be taken into account.

Chapter 3: An overview of mapping appeals

3.1 The expression “Mapping Appeals” is used in this guidance to mean appeals against the showing of land on a provisional map as RCL or open country. Appeals are made under s.6 (1) of the Act, which provides that:

Any person having an interest in any land may appeal –

- (a) in the case of land in England, to the Secretary of State, or
 - (b) in the case of land in Wales, to the National Assembly for Wales,
- against the showing of that land on a map in provisional form as registered common land or as open country.

3.2 Section 45(1) defines what is meant by an “interest” in land. Interpreting the definition accurately requires specialist understanding of the terms used; this should not cause difficulties for Inspectors because they should not be called upon to determine the right, or otherwise, of an appellant to bring an appeal. In most cases, a person will have a sufficient “interest” in the appeal site if he or she is:

- the owner in the sense that that word is commonly used and understood - i.e. the freeholder;
- a tenant of the freeholder, including, in particular, an agricultural tenant;
- the holder of any right of common (see Chapter 4); or
- the holder of an agreement or licence entitling them to any sporting rights over the land concerned.

3.3 It follows that, however strongly they may feel about a mapping issue, anyone without a legal interest in the land (for example, a user group or organisation representing land owners or managers, whether acting as a body or through one or more of its individual members) does not have the right to bring an appeal.

3.4 Mapping appeals must be made on one of the grounds set out in section 6. Sub-sections (2) and (3) are mutually exclusive. Although section 6(3) has two limbs, they form only one ground. Appellants must indicate on the appeal form whether they are appealing either under subsection (2) or subsection (3) and expand on their grounds of appeal to allow the Inspectorate to ensure that the grounds they intend to rely upon are valid, that is, within the scope of the grounds set out in the Act. The Inspectorate should reject any appeals which are not made on valid grounds.

3.5 Appeals may be dealt with in one of three ways:

(1) written representations - where evidence is exchanged between, and commented on by, the parties before being seen by an Inspector;

(2) hearings - a relatively informal discussion with the parties guided by the Inspector; and,

(3) inquiries - a formal procedure involving questioning of witnesses.

3.6 A site visit will be conducted in most open country cases. Appeals must be dealt with at hearing or inquiry if either party (the Agency or appellant) expresses a wish to be heard. It is for the Inspectorate to decide whether to hold a hearing or inquiry.

Standing of the Appellant

3.7 If another party to the appeal (whether the Agency or a third party) submits in correspondence that the appellant does not have a legal interest in the land concerned, the Inspectorate will make every effort to resolve such a dispute before the case reaches the Inspector. However, if the determination of appeals were to be delayed until all such disputes were resolved, the process could be held up considerably. Unless it is clear that someone has no legal standing to lodge an appeal, if they have submitted an appeal form the Inspectorate should assume that they have done so in good faith. Ultimately it is for the civil courts not the Inspectorate to resolve complex legal disputes over ownership or other land rights.

Change of Appellant

3.8 Although only persons with a legal interest in the land can make an appeal, they can instruct a solicitor or other person to act as their agent. If the appellant dies between the lodging of the appeal and its determination, his executors or administrators are allowed to proceed with it.

3.9 The appellant can also authorise another qualifying person (e.g. a purchaser of the appeal site) to carry on the conduct of any appeal they have previously lodged. If someone who is not the original appellant purports to pursue an appeal, the Inspectorate should attempt to resolve the matter before the case reaches the Inspector. This will be by simply obtaining a statement from either the original appellant that he has relinquished his interest in the land to another, who will continue the appeal, or from the new appellant that he/she has an interest in the land and wishes to continue with the appeal.

Mapping Methodology

3.10 The Agency is under a duty (under sections 4 and 5 of the Act) to produce draft and provisional maps of registered common land and open country. It has chosen to discharge that duty by applying a methodology which it devised specifically for the purpose - the Mapping Methodology for England (MME). The methodology has been made publicly available on the Agency's website –

<http://www.countryside.gov.uk/access/mapping/MapMeth/Default.htm>

3.11 Detailed advice on the MME in relation to RCL and open country appeals is given in Chapters 4 and 5. That advice should however be read and implemented in the context of the following, more general guidance.

Weight to be given to the Methodology

3.12 The Agency has gone to considerable efforts to discharge its duty to map open country in the manner laid down in the Act, and - in accordance with an undertaking given in Parliament - will have “exercised their discretion impartially, favouring neither landowners nor walkers.” The Agency also consulted widely on the methodology it proposed to adopt in discharging this duty.

3.13 Against this background, and in the interests of gaining consistency in appeal decisions, it is appropriate for the MME to be used as the starting point in all mapping appeals. It must be emphasised, however, that the MME has no statutory force and is not binding. It is open to appellants to challenge the MME and if their evidence is convincing, an appeal can succeed for that reason.

Challenges to the Methodology

3.14 Appellants are entitled to assert and submit evidence either that the MME is wrong in principle, or that it was wrongly applied to the case in question. Inspectors are not expected to be mapping experts (although they should be fully familiar with the MME) and should only need to take a view on the relative merits of the cases put forward by the appellant and the Agency. **However, in cases where an appellant argues that the MME itself is wrong the Inspectorate should consider, with Defra, whether it should be recovered for determination by the Secretary of State.**

Excepted land

3.15 Parts I and II of Schedule 1 to the Act define certain categories of land (“excepted land”) which section 1(1) excludes from the definition of “access land”. However, appeals under section 6 are not concerned with whether land is or is not access land. As there is nothing in the definition of either registered common land or open country (in section 1(2) to (4)) which excludes excepted land, such land must therefore still be shown on provisional maps. From this it follows that whether the whole or part of an appeal site is or is not excepted land will not be a matter for a section 6(1) appeal.

Section 15 land

3.16 The right of access will not apply to land if it is accessible to the public under any of the legislation listed in section 15(1) of the Act, even though the land may also be open country or RCL. However, the Agency is under a statutory duty to map all open country and RCL. All such land should be shown on provisional (and in due course also on conclusive) maps. Whether or not land also carries with it a right of access under legislation described in section 15 of the Act is not relevant to an appeal against the showing of that land on a provisional map.

Extent and use of an Inspector's powers under section 6(4)

3.17 Section 6(4)(a) empowers Inspectors to approve with modifications (when an appeal is allowed) or without modifications (when it is dismissed) "the whole or part of the map which is the subject of the appeal". Section 6(4)(b) entitles them to require the Agency to prepare a new draft map relating to all or part of the area covered by the provisional map on which the appeal site is shown.

Section 6(4)(a)

3.18 Section 6(4)(a) does not allow Inspectors either to add any land to the map, or to remove any land which does not form part of the appeal site. The grounds of appeal in the Act are solely concerned with whether the land which is the subject of an appeal should be removed from the map.

Section 6(4)(b)

3.19 The power in section 6(4)(b) would only be likely to be exercised following a series of cases where it had become apparent that the mapping process in a significant part of the mapping region was fatally flawed, and should hence be undertaken afresh. **In such cases the Inspectorate should consider, with Defra, whether the Secretary of State should recover it for determination.**

Chapter 4: Appeals Against the showing of land as Registered Common Land

Preliminary

4.1 Section 1(3) of the Act defines RCL as land which is registered as common land under the Commons Registration Act 1965 (the 1965 Act), and whose registration has become final under that Act. In addition, subsections (3)(b) and (4) of that section provide that, where on or after 30 November 2000 (the date on which the Act was passed) land is registered as common land under the 1965 Act and that registration has become final but that land has subsequently ceased to be registered as common land under the 1965 Act, it will continue to be treated as RCL for the purposes of Part I of the Act.

4.2 However, - by virtue of section 1(4) of the Act - this special provision does not apply in 2 separate cases: first, where the application to amend the register (so that the land ceases to be registered) was made before 30 November 2000 (see section 1(4)(a)), and second, where land has ceased to be common land because of the exercise of any statutory powers of compulsory purchase, appropriation or sale, or because of the exercise of any statutory powers under which land may be made common land in substitution for other land (see section 1(4)(b)(i) and (ii)). So, where either of the exceptions in section 1(4) apply, the land is not RCL for the purposes of Part I of the Act.

4.3 Only land which falls within this definition of RCL should be shown on provisional maps.

Discrepancies between Register and Land-Line¹ maps

4.4 Where the boundaries of the RCL are coincident with or closely follow physical features shown on a Land-Line map, and it is clear that the two are in practice one and the same thing, the Agency will normally have mapped RCL to the latter. This is because the Land-Line boundary depicts the boundary the register map would itself have depicted if at the time it was drawn it had been capable of production at today's degree of accuracy.

4.5 Where however an RCL boundary neither represents nor closely follows a Land-Line map feature, the Agency has attempted to reproduce the former, even if this has led to that boundary appearing in a place where in practice it could not be. This is because the Agency has no authority to correct any such anomalies, or to second-guess where the RCL boundary should now be. Resolving questions of this

¹Land-Line is an Ordnance Survey product. It depicts man-made and natural features ranging from houses, factories, roads and rivers to marshland and administrative boundaries. There are three different scales according to location:

- 1:1250 scale in urban areas;
- 1:2500 scale in rural areas; and
- 1:10,000 scale for remote areas such as mountains and moorland.

sort is a matter for the Commons Registration Authority (CRA) concerned, and currently CRAs have limited powers to correct anomalies or errors on the register. It could be that the RCL boundary follows a feature, for example a fence, that is no longer there. In this case the Agency's map would follow this original fence line, even though this feature does not exist anymore, as this is still the statutory boundary.

4.6 Examples of instances where discrepancies between register maps and Land-Line map boundaries could occur include:

- RCL bounded by a road which existed at the date of registration;
- existing roads within commons;
- new roads across commons not recorded on the register map;
- new roads across commons incorrectly recorded on the register map;
- building footprints not or incorrectly recorded on the register map;
- commons boundaries affected by river or coastal erosion or re-alignment;
- verges within commons.

4.7 In such cases the Inspector will need to determine the appeal on the best evidence available. The Inspector has no powers to correct anomalies or errors on the register.

Missing Register Maps

4.8 Not all CRAs have a full set of register maps; indeed, a few no longer have any at all. Where they do not, some other form of map has been substituted for those that are missing. The Agency has in these cases used the most reliable map the CRA could provide. The information provided by the CRA about the provenance of such maps has been recorded in notes (referred to as "issues") in the attributes section of the data the Agency keep for each parcel of RCL. This information should be supplied to Inspectors as part of the Agency's case in any section 6(2) appeal to which it is relevant.

4.9 In such cases the Inspector must determine the appeal on the best evidence available.

Other Potential Sources of Anomaly

4.10 Other variations in the nature and quality of the registers up and down the country include:

- commons or parts of commons deleted from the map but not from the textual register, and vice versa;
- land recorded by means of colours or symbols which do not accord with those prescribed by regulations made under the 1965 Act; and
- uncertainty of jurisdiction (and hence errors or omissions in record keeping) because of local government reorganisation.

In these and similar cases, the Agency should have obtained an explanation of the anomaly from the relevant CRA(s)

Evidence relating to the registration process.

4.11 Any evidence submitted which refers to the registration process itself, for example that:

- registration should or should not have taken place;
- the registration serves no useful purpose; or
- there are grounds for de-registration;

is not relevant to an appeal against the showing of land as RCL.

Cases where land may not be RCL for the purposes of Part I of the Act

4.12 Under section 1(4) of the Act if :

- the application for land to be de-registered had been made before 30 November 2000; or
- it was purchased or appropriated or sold under statutory powers; or
- other RCL was substituted for it in accordance with the provisions of the 1965 Act;

the land is not RCL for the purposes of Part I of the Act and should not therefore be shown as such on the Agency's maps of open country and RCL.

Cases where land is removed from a register as result of a statutory power of compulsory purchase, appropriation, sale or exchange before the appeal is heard

4.13 An appeal decision must be made on the basis of the status of the land at the time of that decision (or at least as close to the date of that decision as is reasonably practicable).

4.14 If land ceases to be common land as a result of any of the circumstances described in section 1(4) before an appeal has been determined that fact will be a relevant consideration in the decision. However, the land must have ceased to be common land as a result of the provisions of section 1(4) before the appeal is determined, and evidence that the land may fall within that description at some point in the future would not be a relevant consideration. In practice, it is unlikely that this situation will arise very often. If and when it does, the Inspectorate should, if they consider it necessary, refer it to Defra for advice.

The East Sussex Situation

4.15 The common land registers for East Sussex were destroyed by fire some years ago. East Sussex County Council, the CRA for the area, has a statutory duty to reconstitute them. The Agency has decided to show on the provisional map for the South East Region all land in East Sussex which it considers consists of "open country", even though some of this may also be RCL. This does not however alter the legal status of the County's commons: RCL remains, in law, RCL. The implications of the Agency's decision are as follows.

4.16 Section 6 of the Act does not allow an appeal to be made on the ground that land should have been shown not as open country, but as registered common land. The appellant might produce evidence to show that the land in question is registered as common land, and therefore cannot be open country, on the grounds that the definition of open country in section 1(2) excludes RCL. But section 6(3) does not permit an appeal against the showing of land as open country to be brought on the ground that it is RCL. Any appeal made solely on this ground would not therefore be valid. If, however, the appellant claims that the land does not consist wholly or predominantly of MMHD, the appeal would be valid and should be determined under section 6(3).

Alternative Status

4.17 In some section 6(2) appeals the Agency may argue that even if the Inspector were to find that the land in question is not RCL, it should not be removed from the provisional map because it also consists wholly or predominantly of MMHD and therefore constitutes open country.

4.18 Where the Agency intend to do so, they will inform the Inspectorate and the appellant at an early stage, in order to put the appellant on notice that he may in due course have to meet the argument.

4.19 If the Agency succeeds in showing that the land is open country (and that it should therefore remain mapped), the appeal should be allowed under section 6(2), but the power under section 6(4)(a) should be used to modify the part of the map concerned by altering the status of the appeal site from RCL to open country.

Chapter 5: Appeals against the showing of land as Open Country

Ground of Appeal

5.1 The sole ground of appeal is set out in section 6(3): -

“An appeal relating to the showing of any land as open country may be brought only on the ground that -

- (a) the land does not consist wholly or predominantly of MMHD, and
- (b) to the extent that the appropriate countryside body have exercised their discretion under section 4(5)(b) to treat land which is not open country as forming part of an area of open country, the body ought not to have done so.”

5.2 The use in section 6(3) of the word “ground” in the singular means that, notwithstanding the itemisation of (a) and (b) which follows, there is only one ground of appeal, embracing both aspects. There will be many cases in which only one of the two aspects will need to be actively considered, but this does not breach the principle that there is only one ground of appeal.

Identifying MMHD (also improved and semi-improved grassland)

Provisions of the Act

5.3 The starting point for considering an appeal under section 6(3) is the definition of “open country”. This is defined in section 1(2) as –

“land which-

- (a) appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and
- (b) is not registered common land.”

5.4 There is no comprehensive definition of MMHD in the Act, although section 1(2) includes the following definitions: -

““mountain” includes, subject to the following definition, any land situated more than 600 metres above sea level”;

““mountain, moor, heath or down” does not include land which appears to the appropriate countryside body to consist of improved or semi-improved grassland”.

5.5 The Act does not define improved or semi-improved grassland.

The Countryside Agency's criteria for identifying MMHD

5.6 The Agency has formulated its own criteria to assist it in identifying MMHD. The MME sets out criteria for identifying MMHD at paragraphs 68-69, and for improved and semi-improved grassland (ISIG) at paragraphs 70-73. The passages in the MME refer to criteria of general character and vegetation types.

5.7 General character includes openness. Although it is not referred to in the Act, the Agency considers that openness of character is inherent in the concept of open country. The footnotes to MME paragraph 68 explain how the Agency has approached this issue.

5.8 Vegetation types include primary vegetation types and those which may typically be associated with the habitat. Provided that the primary vegetation types are present, both primary and associated types are taken into account when determining whether land is wholly or predominantly MMHD. Also listed are certain physical characteristics which may be included (such as open water, rivers, streams and various forms of bare ground).

5.9 The methodology makes it clear that when determining whether grassland is improved or semi-improved, the key consideration is the current composition of the grassland rather than the extent of improvement in the past. The Agency classifies as semi-improved any grassland which appears to have a species composition or structure which is more akin to improved grassland than unimproved (paragraph 73).

Evidence likely to be produced by the Countryside Agency

5.10 The evidence produced by the Agency in defending an appeal is likely to reflect its methodology, but will typically give priority to the most recent evidence that the Agency has available.

5.11 In preparing a provisional map the Agency will have taken into account any new information obtained since the issue of the draft map. This may include IACS returns¹ produced by landowners (the Agency do not have access to these returns as of right but they may be supplied to them by landowners). If there is no additional data or the data is inconclusive, the Agency may have undertaken a site visit or commissioned further aerial photography. If not undertaken in connection with the preparation of the provisional map, the site will normally be visited by the Agency if an appeal is made.

5.12 It is open to appellants to bring forward evidence either that the MME itself is flawed or that it has been wrongly applied to the appeal site. Inspectors should be prepared to form a view on the evidence offered by the parties when deciding the

¹ IACS, or Integrated Administration Control System, is an annual declaration of all land farmed for that year for which claims are made for grants and subsidies under the Common Agricultural Policy. Supporting information includes the size of each field (which is located by reference to a centre point on an OS map) and the crop grown. The Agency has no access to this information when it prepares the draft map, and only sees it at provisional map stage if it is supplied with the information by an appellant.

appeal. Chapter 3 provides further guidance on challenges to the Agency's methodology.

“which appears to the appropriate countryside body”

5.13 The phrase “which appears to the appropriate countryside body” occurs in the definition of “open country” and in the reference to the exclusion of ISIG from MMHD, in section 1(2) of the Act. The Act therefore requires the Agency to exercise judgement, but this does not render the opinion of the Agency unchallengeable. Rather, it is intended to reflect the fact that judgement is required when assessing whether land is MMHD or ISIG.

5.14 It is important to note that although the definition of “open country” in section 1(2) includes the words “appears to the appropriate countryside body” (in the context of whether land consists wholly or predominantly of MMHD), the appeal provision in section 6(3)(a) does not do so. This means that under section 6(3)(a) the test to be applied on appeal is whether the land consists wholly or predominantly of MMHD, not whether it appears to the Agency that the land has those characteristics.

“wholly or predominantly”

5.15 In Part I of the Act, “open country” is defined, in part, as “...land which...appears to the appropriate countryside body to consist wholly or predominantly of MMHD..”. (section 1(2)). The word “predominantly” is not defined in the Act, so the word bears its natural and ordinary meaning

5.16 Ultimately, only the Courts can give an authoritative interpretation of the word “predominantly”. However, it is Defra's view that if, after a visual inspection of the land in question (on an appeal under section 6) and in the light of the evidence produced by the parties, an Inspector considers that in his or her judgment it is obvious that more of the land consists of the relevant qualifying habitat than does not, then the conclusion is likely to be that the land consists predominantly of MMHD. Conversely, if an Inspector is doubtful that this is the case, the likely conclusion will be that the land does not consist predominantly of MMHD.

Consideration of “context” when assessing whether the land consists “predominantly” of MMHD

5.17 Although an appeal may be brought only on the ground that the land which is the subject of the appeal does not consist wholly or predominantly of MMHD, it is open to an Inspector to decide that although the appeal site itself does not consist wholly or predominantly of MMHD, the appeal may nevertheless be dismissed on the ground that the appeal site forms part of a larger area of land which does consist wholly or predominantly of MMHD.

5.18 The reason for this approach is that although an appeal under section 6(3) relates to the showing of land as open country, the definition of open country in section 1(2) of the Act - in particular, the fact that open country may comprise land

which consists only predominantly of MMHD - clearly envisages that some open country comprises land which is not mountain, moor, heath or down.

5.19 The appropriate context may be the Agency's mapping parcel of which the appeal site forms part, or a wider area, or an area which is smaller than the mapping parcel but goes beyond the appeal site. In each case, the Inspector will have to decide whether land beyond the appeal site should be taken into consideration and, if so, what area. This will depend on the facts of the individual case and the evidence put forward by the parties to the appeal.

Other Matters Which May Arise

Decisions affecting nearby land

5.20 Although it might appear that the exclusion of an appeal site from an area of open country could create an anomaly if adjoining land with essentially the same characteristics remains on the map, there is no power for an Inspector to exclude land which is not the subject of the appeal.

Changes in the character of the appeal land

5.21 In most cases, the crucial information about the character of an appeal site is evidence gathered recently and in particular what can be seen on the ground at the time of the site inspection. Historical evidence about the state of the land or things done to it, including management measures to improve grassland, is likely to be of less significance.

5.22 However, even recent evidence may be outdated; and in certain circumstances, the date of the site inspection may be overtaken by events. The following are examples where changes may have occurred.

Changes after the date of the survey upon which the provisional map is based. Any such changes will usually have been mentioned by the appellant, but may only come to light at the site inspection. They should be taken into account, together with all other relevant considerations.

Changes during the interval between 2 site inspections. The need for a second site inspection is likely to arise only if the first is incomplete in some way. In such circumstances, the relevant date for considering the character of the land would pass to the date of the second inspection.

Changes between the site inspection and the issue of the decision. The interval between the site inspection and the issue of the decision will usually be so short that there will be little opportunity for a change to take place. But if this were to happen, and if the decision had not been issued, any request to take it into account would have to be considered. The Inspectorate would need to go back to the parties and reconsider the appeal.

Changes after the decision. If the appeal decision were the subject of a successful challenge in the High Court, consideration of the appeal would start afresh.

Chapter 6: Appeals against decisions of Relevant Authorities in respect of Exclusions and Restrictions of Access

Introduction

6.1 This chapter provides guidance on the second of the three types of appeal provided for in Part I of the Act. As in the case of mapping appeals, all restrictions appeals will initially be transferred to the Planning Inspectorate for determination; Inspectors are appointed by the Secretary of State for that purpose. The provisions of Chapter 2 of this guidance (The Inspector's role in relation to the Secretary of State) apply to restrictions appeals as they apply to mapping appeals. In addition, Chapter 1 (An Introduction to Part I of the Countryside and Rights of Way Act 2000 and an Overview of the Appeals Provisions), Chapter 8 (Costs), and paragraphs 3.8 and 3.9 (Change of Appellant) of Chapter 3 (An overview of mapping appeals) also apply to restrictions appeals as they apply to mapping appeals.

Background

6.2 Not all the land on the Agency's maps of open country and registered common land will be subject to the new right of access. People will not be able to walk on some land such as gardens or golf courses which are excepted from the right of access (13 categories of excepted land are set out in Schedule 1 to the Act). Damaging activities such as lighting fires or destroying plants will not be allowed. The right of access is limited to open air recreation on foot, and other recreational activities (e.g. cycling, horse riding, camping) are excluded from the new right¹. There are also special provisions requiring users of the right of access to keep any dog on a short fixed lead in vicinity of livestock and between 1 March and 31 July. These general restrictions are set out in Schedule 2.

6.3 Where despite these general restrictions (described as 'national restrictions' in guidance issued by the Agency) land managers feel that local intervention is necessary to prevent unacceptable impacts from the new access rights, they can use informal management techniques such as encouraging use of particular paths, areas or access points, to influence how people visit the land.

6.4 While informal management techniques are usually simpler and more convenient to implement than restrictions and exclusions of access, land managers are not obliged to try such techniques before using discretionary restrictions or applying for directions as described below.

Discretionary restrictions

6.5 The Act enables landowners (or where the land is subject to an agricultural tenancy, the tenant) to exclude or restrict access for any purpose for up to 28 days each calendar year. No more than four of the 28 days may be a Saturday or Sunday,

¹ These recreational activities may continue under other rights, or where the landowner continues to tolerate them. But, because the right of access does not apply to them they cannot be restricted or excluded under the powers in Chapter II of Part I of the Act and cannot therefore be the subject of an appeal.

and the discretion may not be exercised at all on Saturdays between 1 June and 11 August, on Sundays between 1 June and 30 September, or on any bank holiday.

6.6 The Act also gives owners the discretion to ban the taking of dogs onto land in certain circumstances. This discretion is available to owners of grouse moors and to owners or farm tenants of small enclosures used for lambing.

6.7 These discretionary restrictions and exclusions must be notified to the relevant authority (the Countryside Agency, or for land in a National Park, the National Park Authority, or in the case of dedicated woodland the Forestry Commissioners). Because a landowner does not require permission to impose discretionary restrictions and exclusions there is no provision for a right of appeal in respect of these powers.

Directions to restrict or exclude access

6.8 If a landowner (or, where relevant, a farm tenant) considers that discretionary restrictions and exclusions are not sufficient (or they are not available), he or she can apply to the relevant authority for a direction to exclude or restrict access for the purposes of land management (section 24), public safety or fire prevention (section 25). Other people with an interest in the land, who are not entitled to use discretionary restrictions, may also apply for directions. A relevant authority may also give a direction excluding or restricting access for the purposes of public safety and fire prevention of its own volition, without the need for an application.

6.9 Directions may also be given by a relevant authority to exclude or restrict access for the purposes of nature conservation or heritage preservation. When considering whether to give such directions the relevant authority must have regard to any advice given to it by the relevant advisory body (English Nature in respect of nature conservation or English Heritage in respect of heritage preservation). It is not open to landowners and others with an interest in land to apply for directions excluding or restricting access for these purposes. If they believe that public access to their land may have adverse effects on nature conservation or heritage preservation, they can contact the relevant advisory body to discuss their concerns.

6.10 The Act also allows the Secretary of State to give directions excluding or restricting access for the purposes of defence or national security. The power will be exercised by the Secretary of State for Defence or the Home Secretary.

Regulations

6.11 The Access to the Countryside (Exclusions and Restrictions) (England) Regulations 2003 (the Regulations) sets out the procedures which owners, land managers and relevant authorities must follow in relation to restrictions and exclusions. The Regulations also make provisions for appeals. They are available via the HMSO website at the following address:

<http://www.hmso.gov.uk/si/si2003/20032713.htm>

Land Manager Guidance

6.12 The Countryside Agency has published Land Manager Guidance for people who own or manage access land. It includes guidance on informal management techniques, public liability and restrictions and exclusions of access. The guidance is available via the Agency's open access website at the following address:

<http://www.openaccess.gov.uk/wps/portal/lm/welcome>.

Copies can also be obtained from the Agency's Open Access Contact Centre on 0845 100 3298.

Statutory guidance under section 33 to certain relevant authorities on their functions in relation to local access restrictions

6.13 Section 33 gives the Countryside Agency the power to issue guidance to the other relevant authorities in England (the National Park authorities and the Forestry Commissioners) on the discharge of their functions with respect to exclusions and restrictions of access. The Secretary of State must approve the guidance before it can be issued. Supplementary or updated guidance may be issued from time to time with the Secretary of State's approval.

6.14 The Countryside Agency issued guidance under section 33 on 3 March 2004 with the approval of the Secretary of State. The guidance is available via the open access website at the following address:

<http://www.openaccess.gov.uk/wps/portal/ra/guidance>

6.15 The scope of the statutory guidance and its status in relation to restrictions appeals are discussed further below.

Restrictions Appeals

6.16 Section 30 of the Act provides a right of appeal against two sorts of decision made by a relevant authority:

- in respect of applications for directions under section 24 and 25: and,
- on representations following consultation under section 27(5).

6.17 Section 30(2) requires relevant authorities to inform the applicant of their reasons for not acting in accordance with the application or representations. This information should assist applicants in deciding whether they should exercise their right of appeal. It will also be a material consideration if an appeal is made. In some cases, relevant authorities may find that they can rely entirely on the information they provided under section 30(2) when contesting an appeal.

Appeal against the decision of a relevant authority not to act in accordance with an application under section 24 or 25 (for a direction excluding or restricting access for the purposes of land management, fire prevention or to avoid the risk of danger to the public)

6.18 A right of appeal is available where a person interested in any land has applied for a direction under section 24 or 25 and the relevant authority has, in any respect, decided not to act in accordance with that application. An appellant may bring an appeal if the relevant authority has refused his or her application either outright or in part. If a relevant authority gives a direction in response to an application but that direction differs in any way from the one being applied for, the applicant may exercise his or her right of appeal.

6.19 In order to give a direction excluding or restricting access under section 24 or 25 during a specified period, a relevant authority must be satisfied that the exclusion or restriction is necessary, to the extent provided by the direction, for the purposes of land management (section 24), fire prevention or public safety (section 25).

6.20 A relevant authority may only give a direction if it is satisfied that it is necessary for one of the purposes set out in the legislation. The wording “to the extent provided by the direction” in sections 24(1) and 25(1) (a) and (b) implies that a relevant authority may only impose the minimum restriction or exclusion which is necessary for the purpose for which it is sought.

6.21 The reference to a specified period includes a specified period in every calendar year, or a period which is determined by the applicant (or a specified person) in accordance with the direction and notified to the relevant authority. However, other periods can be specified, for example, a period of 2 months in one year.

6.22 In deciding whether to give a direction under section 24 or 25, the relevant authority should take into consideration the use made or intended to be made by the applicant of the discretionary power (if it is available to him or her) to exclude or restrict access for up to 28 days each year. A relevant authority may encourage applicants to use the 28 days, if available, in preference to applying for a direction. But if the applicant decides to proceed with his or her application, the relevant authority must consider it on its merits and decide whether the restriction or exclusion is necessary in all the circumstances.

6.23 On an appeal against the relevant authority’s decision not to act in accordance with an application under section 24 or 25, consideration will need to be given to the evidence submitted by the parties, the provisions of section 24 or 25 and any other relevant factors, including the guidance issued under section 33. The decision on appeal will turn on the question of whether the relevant authority was correct in deciding not to give a direction in accordance with the application. To make this decision it will be necessary to come to a view, on the basis of the evidence, whether the exclusion or restriction applied for was necessary (to the extent applied for) for the purpose for which it was sought, in accordance with the provisions of section 24 or 25.

6.24 In this context, it should be noted that section 30(4)(b) (which is discussed further below), provides that on appeal the Secretary of State has the power to require the relevant authority to give such direction under section 24 or 25 as she thinks fit. In Defra’s view, this means that the power of the Secretary of State is not

limited to either deciding an appeal in favour of the appellant (and thus requiring the relevant authority to give a direction in accordance with the application) or the relevant authority (and thus confirming the relevant authority's decision). Section 30(4)(b) allows for a judgment to be made with the Secretary of State's powers on what, if any, direction should be given in response to the application.

Appeal against the decisions by a relevant authority not to act in accordance with an application under section 24 or 25 where the relevant authority considers the exclusion or restriction applied for is for the purposes of nature conservation or heritage preservation.

6.25 It is not open to landowners and others with an interest in land to apply for directions excluding or restricting access for the purposes of nature conservation or heritage preservation. If a relevant authority believes that all or part of an application it receives is an application for one or both of these purposes, it must refuse the application or that part of the application. If, however, the application is to exclude or restrict access for land management or to avoid danger to the public, where these purposes may be connected with nature conservation or heritage preservation objectives, a relevant authority must consider the application on its merits and decide whether the restriction or exclusion is necessary in all the circumstances.

6.26 On appeal the same considerations should apply. If the exclusion or restriction applied for is for the purposes of nature conservation or heritage preservation the appeal should be dismissed. If however, the application is to exclude or restrict access for land management or to avoid to danger to the public, even where those purposes may be connected with nature conservation or heritage preservation objectives, the appeal should be determined in the same way as any other appeal against the decision of a relevant authority not to act in accordance with an application under section 24 or 25.

Appeal against the decision of a relevant authority not to act in accordance with an application under section 24 or 25 where the relevant authority considers an existing direction already excludes or restricts access to the land

6.27 If it is decided, on the basis of the evidence, that a direction has already been given under Chapter II of Part I of the Act and that direction covers the whole of the land to which the application relates, it is for the same (or longer) duration and it excludes or restricts access to the land to the same (or greater) extent, this would indicate that the direction applied for under section 24 or 25 is not necessary. The appeal should therefore be dismissed.

Appeal against the decision of a relevant authority not to act in accordance with representations on being consulted on the revocation or variation of a direction under section 27(5)

6.28 Under section 27(2) a relevant authority can revoke or vary any direction it has given by giving a subsequent direction under the same section.

6.29 If a relevant authority is minded to revoke or vary a direction given on application under section 24 or 25, section 27(5) requires it to consult the original

applicant or their successor in title. Section 30 provides a right of appeal where a person has made representations on being consulted under section 27(5), but, in any respect, the relevant authority has decided not to act in accordance with those representations.

6.30 When consulting the original applicant or their successor in title under section 27(5), regulation 13 of the Regulations requires the relevant authority to provide a statement of its reasons for the proposed revocation or variation, and in the case of a variation, a description of the variation.

6.31 It is likely that a relevant authority's reasons for proposing to revoke or vary a direction will usually fall into one or more of the following three broad categories:

- i) the exclusion or restriction is no longer necessary for the purpose for which it was given;
- ii) the extent of the exclusion, or the nature of the restriction is no longer appropriate for the purpose for which it was given; or,
- iii) access has been excluded or restricted for a purpose other than that provided for by the direction;

6.32 The following paragraphs set out the factors that need to be taken into account in an appeal against a relevant authority's decision not to act in accordance with representations made on consultation under section 27(5). They are discussed with reference to the categories of decision set out above, For convenience categories i) and ii) are grouped together.

Appeals relating to a relevant authority's decision - categories i) or ii)

6.33 In some cases a relevant authority may have proposed the revocation or variation of a direction following a review of that direction under section 27(3). Section 27(3) requires relevant authorities to review those directions which exclude or restrict access: indefinitely; on an annual basis; or, for more than five years. A relevant authority is required to review all directions of the types described in section 27(3) at least every five years.

6.34 When undertaking a review under section 27(3), regulation 14 of the Regulations requires relevant authorities to consider:

- whether the exclusion or restriction is still necessary for the purpose for which the direction was given; and if so,
- whether the extent of the exclusion or the nature of the restriction remains appropriate for the purpose for which the direction was given.

6.35 If a proposal to revoke or vary a direction follows a review of that direction, the considerations set out in regulation 14 are likely to inform the relevant authority's statement of reasons provided under regulation 13(3). Those considerations are also likely to be referred to as part of its reasons for not acting in accordance with

representations made under section 27(5) which the relevant authority is required to provide to the applicant under section 30(2).

6.36 A relevant authority is only required to review directions of the type described in section 27(3), and it may revoke or vary a direction under section 27(2) without having first formally reviewed it (although it should nevertheless have clear reasons for doing so). However, relevant authorities may also find it helpful to take account of the considerations set out in regulation 14 before revoking or varying a direction in cases where they are not required by section 27(3) to review it.

6.37 The considerations set out in regulation 14 also provide a useful framework for the determination of an appeal against the decision of a relevant authority not to act on representations made following consultation under section 27(5).

Appeals relating to a relevant authority's decision - category iii)

6.38 There may be cases where a relevant authority proposes to revoke or vary a direction because it has reason to believe that access has been excluded or restricted for a purpose other than that provided for by the direction. In many cases the period of the exclusion or restriction will have expired before the relevant authority becomes aware that the direction is not being used for the specified purpose or period. In such cases there would be no point in the relevant authority deciding to revoke or vary the direction because it would already have ceased to have effect.

6.39 However, for long term directions or directions which allow the applicant to notify the period(s) of the restriction or exclusion at a later date (described as "outline directions" in guidance issued by the Agency), a relevant authority could revoke or vary the direction before the period expires.

6.40 If it can be established, on the basis of the evidence, that access has been excluded or restricted for a purpose other than that provided for by the direction, the appeal should be dismissed. But, if that cannot be established on the evidence, the appeal should be upheld, provided the restriction or exclusion remains necessary for the purpose for which it was given.

Statutory guidance to certain relevant authorities on their functions in relation to local access restrictions under section 33

Scope of the guidance

6.41 Under section 33, National Park authorities and the Forestry Commissioners must have regard to the Agency's guidance. The Agency has decided that it will also have regard to that guidance in determining applications for directions which it receives in its role as relevant authority. In the interests of consistency and fairness for all appellants, the guidance, for the purposes of restrictions appeals, should be regarded as applying to the Agency as it applies to the other relevant authorities.

Status of the guidance

6.42 The Agency's guidance contains the following sections:

- The Overview summarises the land affected by the right of access, the nature of those rights and how they can be managed;
- Part 1 summarises the approaches – both informal management techniques and restrictions and exclusions – that can be used to manage the right of access;
- Part 2 gives relevant authorities detailed advice on assessing the need for directions on the various grounds provided for by the Act;
- Annexes provide further detailed information on access rights, key functions, discretionary restrictions, directions, appeals and related legislation.

6.43 Chapter 2.5 of Part 2 of the guidance “Considering the case for a land management or public safety direction” includes a determination chart setting out 8 steps that a relevant authority is recommended to follow when deciding whether or not to give a direction in respect of an application under section 24 or 25. The Agency has devised specific sets of criteria to give relevant authorities supplementary guidance on the circumstances most commonly encountered in relation to land management or public safety issues on access land. The guidance advises relevant authorities to choose the criteria set that best fits the circumstances of the case, or to use the general criteria set for circumstances not covered by the specific criteria sets. The guidance explains that the specific criteria sets cannot cover all of the situations that will arise locally, so the relevant authority's decisions must take full account of the circumstances in each particular case.

6.44 Relevant authorities may therefore, in their reasons for not acting in accordance with an application for a direction under section 24 or 25, and in evidence submitted as part of an appeal, refer to the Agency's guidance in support of their decision where the guidance has been applied or is otherwise relevant.

6.45 A relevant authority could also submit evidence relating to the guidance in support of a decision not to act in accordance with representations made by the appellant on being consulted under section 27(5).

6.46 In considering such evidence, it is important to remember that the guidance has been issued under a statutory power, and National Park authorities and the Forestry Commissioners are required by the Act to have regard to it (and the Agency has decided to have regard to it). The guidance is therefore likely to contain information which is material to the decision which is the subject of an appeal. If the evidence shows that a relevant authority has acted in accordance with the guidance in coming to the decision that is the subject of the appeal, appropriate weight must be given to that in determining the appeal.

6.47 Appellants are entitled to assert and submit evidence that the guidance was wrongly applied to the case in question. If their evidence is convincing, this may result in a successful appeal. An appellant may also assert that the guidance is wrong in principle on a particular issue, and submit evidence to support this assertion. If a relevant authority has acted in accordance with the guidance, an appeal against its decision is unlikely to succeed unless the Inspectorate consider that the particular circumstances of the case require a different approach from that suggested in the guidance. In such cases the Inspectorate may wish to consider whether the powers of the Secretary of State should be used to recover the appeal for determination and advise accordingly.

If an appeal is dismissed

6.48 If an appeal is dismissed the relevant authority's decision in respect of the application or representations stands.

If an appeal is upheld in whole or in part

6.49 Section 30(4) gives the Secretary of State the power to (a) cancel any direction given by the relevant authority, or (b) require the relevant authority to give such direction under section 24 or 25 as she thinks fit.

6.50 Section 30(4)(a) may be used to require the relevant authority to cancel a direction revoking or varying the original direction. It may also be used to cancel a direction given by a relevant authority in response to the appellant's application.

6.51 Section 30(4)(b) may be used to require the relevant authority to give a direction in accordance with the original application. It may also be used to require the relevant authority to replace a direction it has given with another direction. The powers of the Secretary of State are not limited to requiring a relevant authority to give a direction in accordance with the application. If it is considered that a different direction is more appropriate, there is the power under section 30(4)(b) to require the relevant authority to give that direction instead.

6.52 If the section 30(4)(b) power is used to require a relevant authority to give a long term direction - that is, a direction which excludes or restricts access indefinitely or for a period which exceeds or may exceed six months – the requirement in the Act and the Regulations for the relevant authority to consult the local access forum and the public on long term directions would not apply.

6.53 It is important when exercising the powers in section 30(4) that clear instructions are given to the relevant authority on the direction they are being required to give.

If an appeal is conceded

6.54 There is no provision for a restrictions appeal to be cut short if the relevant authority accepts that the appeal should succeed. But, there would be nothing to stop an appellant in such circumstances from withdrawing their appeal and resubmitting their application to the relevant authority, which could then give a direction in

accordance with the application. However, where the original application was for a direction lasting six months or more, in accordance with section 27(1) and regulation 9 of the Regulations, the relevant authority would be obliged to consult the local access forum and the public before it could give the direction.

Other factors

Excepted land

6.55 Parts I and II of Schedule 1 to the Act define certain categories of land (excepted land) which section 1(1) excludes from the definition of “access land”, even though the land is required to be shown on the Countryside Agency’s maps as open country or registered common land. As the right of access does not apply to such land it follows that directions may not exclude or restrict the right of access to it and, even if they purported to do so, they can have no effect. If the evidence shows that the land which is the subject of an appeal is excepted from the right of access, the appeal should be dismissed.

Section 15 land

6.56 The right of access will not apply to land if it is accessible to the public under any of the legislation listed in section 15(1) of the Act, even though the land is required to be shown on the Countryside Agency’s maps as open country or registered common land. As the right of access does not apply to such land it follows that directions may not exclude or restrict the right of access to it and, even if they purported to do so, they can have no effect. If the evidence shows that the land which is the subject of an appeal is subject to any of the legislation listed in section 15, the appeal should be dismissed.

Standing of the appellant

6.57 A relevant authority may only give a direction on an application under section 24 or 25 if the applicant has the requisite interest in the land. It therefore follows that if a relevant authority believes that an applicant for a direction under section 24 or 25 does not have an interest in the land it should not give a direction. As the right of appeal is only available to people with an interest in the land, it also follows that if a person does not have an interest in the land they cannot make a valid appeal.

6.58 Section 45(1) defines what is meant by an “interest” in land for the purposes of Part I of the Act. In most cases, a person will have a sufficient “interest” in the land if he or she is:

- the owner in the sense that that word is commonly used and understood - i.e. the freeholder;
- a tenant of the freeholder, including, in particular, an agricultural tenant;
- the holder of any right of common; or

- the holder of an agreement or licence entitling them to any sporting rights over the land concerned.

6.59 If it is clear from the notice of appeal and any supporting documents that the appellant does not have the requisite interest in the land, the appeal should be turned away as invalid. The power to require further information in respect of statements of case which is available under regulation 28 of the Regulations may be used to seek further evidence on the appellant's interest in the land. If, once all the evidence has been gathered it shows that the appellant does not have the requisite interest in land, the appeal should be dismissed. If, the evidence suggests that the appellant does have the requisite interest in the land (or the evidence is inconclusive) the appeal should be determined in the same way as other restrictions appeals.

Chapter 7: Appeals relating to notices given by access authorities under section 36(3) or 37(1) of the Countryside and Rights of Way Act 2000

Introduction

7.1 This chapter provides guidance on the third of the three types of appeal provided for in Part I of the Act. As is the case for the other appeals under Part I, all notice appeals will initially be transferred to the Planning Inspectorate for determination; Inspectors are appointed by the Secretary of State for that purpose. The provisions of Chapter 2 of this guidance (The Inspector's role in relation to the Secretary of State) apply to notice appeals as they apply to the other appeals. In addition, Chapter 1 (An Introduction to Part I of the Countryside and Rights of Way Act 2000 and an Overview of the Appeals Provisions), Chapter 8 (Costs), and paragraphs 3.8 and 3.9 (Change of Appellant) of Chapter 3 (An overview of mapping appeals) also apply to notice appeals as they apply to the other appeals.

Background

7.2 Chapter III of Part I of the Act provides a range of powers for access authorities relating to means of access. The access authority is the local highway authority unless the land is in a National Park in which case it is the National Park authority. The Act defines "means of access", in relation to land, as meaning: any opening in a wall, fence, or hedge bounding the land (or bounding part of the land) (with or without a gate, stile or other works); any stairs or steps to enable people to enter on the land (or any part of the land); and, any bridge, stepping stone or other works for crossing a watercourse, ditch or bog on or adjoining the boundary of land.

7.3 Under section 35, the access authority may make an agreement with an owner or occupier where it considers that an existing means of access needs to be opened up, improved, repaired or maintained, or a new means of access needs to be constructed. The authority may agree to carry out the works itself, or pay the whole or part of the cost to the owner or occupier to do so.

7.4 The access authority may also make an agreement under which the owner or occupier agrees to a restriction not to destroy, stop-up or alter existing means of access, or to a restriction on doing anything which would impede public access.

7.5 These powers may be used on access land or land on the boundary of or adjoining access land. This does not include any access land from which the public has been excluded under Chapter II of Part I of the Act either indefinitely or for a specified period of which at least six months remain unexpired.

Notices under section 36(3)

7.6 Section 36 provides powers for the access authority to undertake the work where an owner or occupier fails to abide by an agreement to do the work. The

authority may recover the amount of any expenses reasonably incurred by it from the owner or occupier reduced by their contribution under the agreement. Where the owner or occupier has failed to observe a restriction, section 36(3) enables the authority to serve a notice requiring him to undertake any remedial work and, if this is not complied with, the authority may undertake the work itself and recover the amount of any expenses reasonably incurred by them from the owner or occupier.

Notices under section 37(1)

7.7 Where no agreement can reasonably be reached, section 37(1) allows the access authority to serve a notice on the owner or occupier stating its intention to carry out the necessary work.

Notice Appeals

7.8 Section 38 allows an owner or occupier to appeal to the Secretary of State (in respect of land in England) against a notice requiring the carrying out of works to remedy the failure to observe a restriction (under section 36(3)) or a notice of intention to create or safeguard a means of access (under section 37(1)).

7.9 Where an appeal has been brought under section 38, the access authority may not exercise its powers (section 36(5) or 37(5)) to carry out the works specified in the notice until the appeal has been determined or withdrawn.

Regulations

7.10 The Access to the Countryside (Means of Access, Appeals) (England) Regulations 2004 (the Regulations) provide for the period within which appeals are to be brought and for the necessary procedures for making and considering appeals.

They regulations are available via the HMSO website at the following address:

<http://www.opsi.gov.uk/si/si2004/20043305.htm>

Grounds of appeal

7. 11 An appeal against a notice under section 36(3) may be brought on the grounds that:

- the notice requires the carrying out of works that are not necessary for remedying the breach of the agreement;
- any of the works have already been carried out, and;
- the period specified in the notice for carrying out the works is too short.

7. 12 An appeal against a notice under section 37(1) may be brought on the grounds that:

- the notice requires the carrying out of any works which are not necessary for giving the public reasonable access to the land;
- the means of access should be provided elsewhere or a different means of access should be provided, and;
- any of the works have already been carried out.

7.13 Unlike the other types of appeal under Part I of the Act, there is no equivalent to the mapping methodology or the relevant authority guidance which needs to be taken into account in appeals. Consideration will therefore need to be given to the evidence submitted by the parties, the grounds of appeal and any other relevant factors. In Defra's view, the decision on appeal will ultimately turn on whether, on the basis of all the evidence, the appellant is able to show valid grounds for his or her appeal.

7.14 On an appeal under section 38 the Secretary of State may confirm the notice with or without modifications or cancel the notice.

Standing of the Appellant

7.15 The right of appeal under section 38(1) is available to anyone who has been given notice under section 36(3) or 37(1) and any other owner or occupier of the land. By virtue of section 37(3) and regulation 4(3) the access authority is required to give copies of any notice given under section 36(3) or 37(1) to every other owner or occupier of the land.

7.16 If another party to the appeal (whether the access authority or a third party) submits in correspondence that the appellant is not an owner or occupier of the land concerned, the Inspectorate will attempt to resolve such a dispute before the case reaches the Inspector. However, if the determination of appeals were to be delayed until all such disputes were resolved, the process could be held up considerably. Unless it is clear that someone has no legal standing to lodge an appeal, if they have submitted an appeal form the Inspectorate should assume that they have done so in good faith. Ultimately it is for the civil courts not the Inspectorate to resolve complex legal disputes over ownership or other land rights.

Chapter 8: Costs

Basic principles

8.1 The object of the costs regime is, in conjunction with the mapping appeal regulations, to instil in the parties a sense of discipline in the conduct of appeals. It is not to deter parties from appealing or from defending appeals, nor is it in any sense a punishment for having done so.

8.2 Determining the appeal and awarding (or refusing to award) costs are separate jurisdictions. Unlike most court proceedings, appeal costs do not "follow the event", (which means an award of costs does not follow directly from the result of the appeal itself). Conversely, the outcome of a costs application should not influence the outcome of the appeal.

8.3 An award of costs is an order, enforceable in the courts, that one party to an appeal refund to another whatever professional fees and / or other expenses the former has necessarily and reasonably incurred in bringing or defending that appeal. Such expenses do not include payments in respect of matters such as compensation for lost profits, other perceived loss or damage, or for hurt feelings. Events which justify an award may arise from how matters prior to the appeal were handled. But the award itself relates only to the costs of the proceedings.

8.4 The Secretary of State is concerned only with the principle of whether or not an award of costs should be made, and if so, whether - in accordance with the preceding paragraph - it should be a full or partial award. The amount of money actually payable under the award is a matter for the parties to settle by negotiation or, failing that, by one of them applying to the High Court for a detailed assessment. This is a separate, judicial, process in which neither the Inspectorate nor the Secretary of State have any involvement or responsibility.

Legislation relating to costs orders

8.5 The primary legislation underpinning the appeal costs regime is contained in section 250(5) of the Local Government Act 1972, which states:

"The Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by whom such costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order."

8.6 The first part of section 250(5) gives the "Minister" (the Secretary of State in appeals under section 6) a discretionary power to make a costs order. The second part refers to a separate process by which a party affected by an order as to costs can have it made a civil debt, and enforced through the courts if necessary.

8.7 Section 7(2) of the Countryside and Rights of Way Act 2000, however, extends the application of section 250(5) to both inquiries and hearings held under that Act, and section 7(3) to cases where such proceedings have been requested but no hearing or

inquiry has in fact been held. Paragraph 5 of Schedule 3 to the Act allows Inspectors to deal with costs applications (in the same way as the Secretary of State is allowed to deal with such applications by virtue of section 7(2)).

8.8 There is no provision for costs to be awarded in appeals where written representations has been the agreed method of proceeding throughout. Costs applications may be decided by way of written representations where a hearing or inquiry has been requested, or chosen by the Secretary of State, but it has subsequently been agreed to determine the appeal by way of written representations.

Policy relating to costs orders

Key Principles

8.9 The key principles underlying awards of costs are set out in DOE Circular 8/93 - "Awards of Costs Incurred in Planning and Other (including Compulsory Purchase Order) Proceedings". Paragraphs 8 and 9 of Annexe 1 to the Circular explain that its guidance applies by analogy to different categories of proceedings. Although mapping appeals are not mentioned because they post-date the guidance, the wording of paragraph 8 is wide enough to include them.

8.10 Costs can be awarded only where, on specific application, it is found that the party against whom the application was made (usually referred to as "the respondent") has behaved unreasonably, and has thereby caused the party seeking the award (usually referred to as "the applicant") to incur unnecessary or wasted expense (Circular 8/93, Annexe 1, paragraph 6).

Who may apply and when

8.11 In theory, any party has the right to apply against any other. Applications by or against third parties are, however, rare. Applications thus for the most part can be expected to be made by and against the appellant and the Agency as the principal parties.

8.12 Applications should normally be made to the Inspector at the hearing or inquiry. Late applications may sometimes be entertained, but only if the applicant can show good reason for not making the application at the proper time.

8.13 If one of the parties has asked to be heard and the hearing or inquiry does not take place, then - by virtue of section 7(3) of the Act - the Secretary of State may exercise the power to make an order in relation to costs incurred for the purposes of the hearing or inquiry, as if it had taken place.

The extent of an award

8.14 Costs may be both applied for, and awarded, either in full or in part. Any award, whether full or partial, can however be made only as reimbursement for expenses incurred in the course of the proceedings - that is to say, the costs of preparing to pursue or rebut an appeal, and attending or being represented at a hearing

or inquiry. Costs cannot be awarded for expenses which are not directly related to the appeal itself, such as those incurred in pursuing an objection to a draft map.

8.15 An application for an award of costs may (as well, of course, as being refused) be allowed in part. All partial applications and awards must clearly identify the part of the proceedings to which they relate. Such an application or award may, for example, relate only to one of several issues raised in the respondent's case, or may be time-related - that is, limited to part of the proceedings.

Justifying an award

8.16 For an award of costs to be justified there has to be:

- an application made at the hearing or inquiry, unless the hearing or inquiry does not take place;
- unreasonable behaviour; and
- unnecessary expense.

8.17 All of these conditions need to be met (Circular 8/93, Annexe 1, paragraph 6). Thus, if the respondent has behaved unreasonably but the applicant has not been put to unnecessary expense as a result of that behaviour, no award would be justified.

8.18 The word "unreasonable" is used in its normal, everyday sense. That said, the circumstances in which an award will be justified by behaviour which does not match any of the criteria set out in the Circular will be rare. Unreasonableness may arise from either a failure to comply with the procedures set out in the mapping regulations, or a failure to substantiate a case (or part of a case) to a degree which is unreasonable. A case which was so weak that it clearly had no likely prospect of success would be "unreasonable", whereas one which, though respectable, did not in the event win the day would not.

8.19 "Unnecessary expense" refers to the costs which the applicant has incurred in the appeal as a result of the respondent's unreasonable behaviour. They must be quantifiable in terms of the applicant's involvement in the proceedings, but do not have to be substantial. An award cannot be withheld simply because the amount of money involved would be small.

Chapter 9: Human Rights Act

Introduction

9.1 Schedule 1 to the Human Rights Act 1998 sets out the particular rights from the European Convention on Human Rights which have been incorporated into UK law.

9.2 This guidance sets out the types of challenge most likely to arise in respect of appeals brought under section 6 and section 30 of the Countryside and Rights of Way Act 2000 (the 2000 Act) (mapping appeals and restrictions appeals), and the Department's views on them.

9.3 This is public guidance, but it is not a definitive interpretation of the law. Appellants may need to take legal advice on the issues as necessary.

Key sections of the Human Rights Act 1998

9.4 The key sections of the Human Rights Act 1998 (the 1998 Act) most likely to affect mapping and restrictions appeals are as follows:

Section 3(1) - So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Section 6(1) - It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Section 6(2) - Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.

Section 7(1) - A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

(a) bring proceedings against the authority under this [*the 1998*] Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

9.5 The 1998 Act provides for two sorts of challenge to be made. The first is that a provision of primary legislation is not compatible with a Convention right. This is dealt with in section 4(1) and (2) of the 1998 Act. The court has power to make a declaration of incompatibility. Section 4(3) and (4) of the 1998 Act enables secondary legislation to be challenged in a similar way.

9.6 The Department's view is that such a challenge cannot be made at an appeal brought under section 6 or section 30 of the 2000 Act. It would have to be pursued through the higher courts.

9.7 The second sort of challenge is where a person claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the 1988 Act (*section 7(1)*). A public authority includes an Inspector, as well as the Secretary of State (*section 6(3)*). They are under a positive obligation not to act in a way which is incompatible with a Convention right (*section 6(1)*). This means being mindful of situations where there could be a potential violation of a person's Convention rights. However, if – because of a provision in primary legislation – they could not have acted any differently, then they will not have acted unlawfully (*section 6(2)(a)*). Similarly, if some primary or secondary legislation cannot be given effect in a way which is compatible with the Convention rights, and the Inspector was acting so as to give effect to those provisions, then they will also not have acted unlawfully (*section 6(2)(b)*).

9.8 A claim under section 7 can be pursued in one of two ways. The claim can be a freestanding one against the public authority under the 1998 Act (*section 7(1)(a)*). Alternatively, a person can rely on the Convention rights in any legal proceedings (*section 7(1)(b)*). In the latter case, this would enable a party to an appeal under section 6 or section 30 of the 2000 Act who considers that their Convention rights have been, or would be, violated, to rely on those rights at an inquiry, hearing or in the written representations procedure.

9.9 All courts and tribunals (including Access Inspectors) are required to take into account the case law of the European Court of Human Rights (*section 2(1)*).

Key Convention Rights likely to affect appeals

The Right to a Fair Trial – Article 6

9.10 Article 6 is concerned with the fairness of the procedure for access to, and handling of, inquiries and other procedures for considering mapping appeals. The relevant part of Article 6 is as follows:

ARTICLE 6: Right to a fair trial

1. "In the determination of his civil rights and obligations.....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....."

9.11 The procedural framework for planning appeals dealt with by the Planning Inspectorate and established by statute has been considered in *R v SSETR ex parte Alconbury Developments Ltd and others (2001)*. The House of Lords held that when taken as a whole, the appeal process, which includes the safeguard of being able to challenge the legality of an appeal decision in the High Court, is compatible with Article 6. As the principles employed by the Planning Inspectorate in determining planning appeals are also employed in mapping appeals there is no reason to think the *Alconbury* judgement does not equally apply to mapping appeals. Claims attacking the procedural framework cannot, therefore, be considered by the Inspector or Planning Inspectorate Staff. However, some claims will fall within their scope. These may include:

- i) the right of effective access to appeal proceedings (e.g. the venue must not be so distant from the parties' homes that they are unable to attend proceedings);
- ii) 'equality of arms' between the parties i.e. each party must have a reasonable chance to put their case and must not be put at a substantial disadvantage in relation to another party;
- iii) the right to a hearing within a reasonable time, including the right to a decision within a reasonable time;
- iv) the right to an independent and impartial tribunal.

9.12 On iv), an Inspector is independent and impartial for the purposes of Article 6(1). It was held in *Bryan v UK (1995)* that "...there is...nothing to suggest that, in finding the primary facts and drawing conclusions and inferences from those facts, an Inspector acts anything other than independently". The judgment by the European Court of Human Rights also pointed out that:

the Inspector is in no sense connected with the parties to the dispute or subject to their influence or control;

the Inspector's findings are based exclusively on the evidence and submissions before him;

the Inspector has a duty to exercise independent judgment;

the Inspector is required not to be subject to any improper influence; and

it is the stated mission of the Planning Inspectorate to uphold the principles of openness, fairness and impartiality.

9.13 The approach of the European Court was fully endorsed by the House of Lords in *Alconbury* (paragraph 24 of the judgment).

The right to respect for Private and Family Life and for the Home - Article 8

9.14 Rights under Article 8 are qualified, which means they may be interfered with in certain circumstances. Interference must, however, be proportionate and can only take place where it is necessary in the interests of the wider community. Of the four private interests mentioned in the Article, three (respect for private life, family life and the home) may be relevant to mapping appeals. They tend to inter-relate and are often grouped together.

ARTICLE 8: Right to respect for private and family life

1. "Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Section 6 Appeals

8.15 In a mapping appeal evidence of an alleged breach to Article 8 may relate to interference with the rights of anyone whose home, private life and/or family life is affected by the mapping of the land in question as open country or registered common land.

9.16 However, the Department takes the view that the only relevant considerations which should be taken into account in considering a mapping appeal are those set out in section 6 of the 2000 Act. It is clear that section 6 of the 2000 Act does not permit personal considerations to be taken into account.

9.17 This means that - in accordance with section 6(2)(a) of the 1998 Act - an Inspector may only consider the grounds of appeal provided for in the 2000 Act, even if the dismissal of an appeal were to result in an appellant's Convention rights being interfered with. Similarly - in accordance with section 6(2)(b) of the 1998 Act - even if it were the case that an appellant's Convention rights were interfered with, the appeal provisions in the 2000 Act cannot be given effect in a way which is compatible with those rights. The Inspector must give effect to the appeal provisions in the way provided for in the 2000 Act. As a result, in the Department's view, the dismissal of the appeal and confirmation of the provisional map by the Inspector (or the Secretary of State) would not be unlawful under section 6(1) of the 1998 Act.

Section 30 Appeals

9.18 In a restrictions appeal the only relevant considerations which should be taken into account are those set out in section 24 (excluding or restricting access for land management purposes) or section 25 of the 2000 Act (excluding or restricting access for fire prevention or to avoid the risk of danger to the public). So evidence of an alleged breach to Article 8 cannot be a relevant consideration.

9.19 The Department takes the view that section 6 of the 1998 Act applies to appeals made under section 30 of the 2000 Act. In accordance with section 6(2)(a) of the 1998 Act, an Inspector may only take into account the matters set out in section 24 or 25 of the 2000 Act, even if the dismissal of an appeal were to result in an appellant's Convention rights being interfered with. Similarly – in accordance with section 6(2)(b) of the 1998 Act – even if it were the case that an appellant's Convention rights were interfered with, the appeal provisions in the 2000 Act cannot be given effect in a way which is compatible with those rights because the Inspector must give effect to the appeal provisions taking into account only those considerations which are relevant to whether or not a direction should have been given (or revoked or varied) in the first place. As a result, the dismissal of the appeal by an Inspector (or the Secretary of State) would not be unlawful under section 6(1) of the 1998 Act.

9.20 In the Department's view, therefore, the same principles apply to challenges on appeals under section 30 of the 2000 Act as to challenges on appeals under section 6 of the 2000 Act.

Article 1 of the First Protocol: the Right to Property

9.21 The aspect of this Article which is most relevant to mapping appeals is interference with the peaceful enjoyment of property, rather than the deprivation of property. The aspect relating to control of the use of property may also be relevant. The term "possessions" is widely defined. It includes all property (not just dwellings as in Article 8) and other property rights, such as a restrictive covenant¹.

ARTICLE 1 OF THE FIRST PROTOCOL: Protection of property

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

9.22 In an appeal under section 6 or section 30 of the 2000 Act evidence alleging a breach of Article 1 of the First Protocol may be submitted relating to interference with the peaceful enjoyment of property or control of the use of property resulting from the mapping of the land in question as open country or registered common land or from the decision of a relevant authority not to act in accordance with an application for a direction under section 24 or 25 or in accordance with representations following consultation on the revocation or variation of a direction under section 27(5).

¹ A restrictive covenant is a clause in a contract that requires one party to do, or refrain from doing, certain things.

9.23 In the Department's view, the same principles apply to challenges relating to Article 1 of the First Protocol as to challenges relating to Article 8 (see *paragraphs 9.15 to 20 above*).