Appendix 1: ROW/3360619 Wimbish FP70 s118 HA 1980

Statements of Case

[redacted]

From: Ted Browne [redacted]
Sent: 01 February 2026 22:26
To: Rightsofway <Rightsofway2@planninginspectorate.gov.uk>
Subject: Fwd: subject: ROW/3360619 - Footpath 70, Wimbish

[redacted]

From: Ted Browne [redacted]
Date: Sun, 1 Feb 2026 at 00:15
Subject: subject: ROW/3360619 - Footpath 70, **Wimbish**

Dear Sir, I am writing to refute the allegations made by ECC in the "Statement of Grounds" in Footpath 70 Wimbish (PUBLIC PATH EXTINGUISHMENT ORDER 2024)
I was born and have lived and worked in **Wimbish** most of my **life**. My Grandmother took me on the first walk I can remember from Upper Green (**where** we lived) to Lower House Farm, Lower Green (where she was born and lived as a young girl). We turned off Lower Green Lane onto FP70 **until** we came to a large pond. This **was** the destination of our **walk**.
My Grandmother explained that in dry **summers, this** pond was the last in the village with Good drinking **water**, and everyone from around Wimbish Green would come to get drinking **water**. (no mains water in wimbish until 1930).
Living in Wimbish Green, dog walking on the footpaths of Wimbish and beyond was a regular activity.
More than 25 years ago, I joined the Parish Council. My first priority was to investigate how we could improve our Recreation Ground, Common Land, and Footpaths.
To be granted permission for the PC to **work** on our footpaths, ECC requested that the Parish Council nominate a responsible officer to go on ECC Public Rights of way team courses for, Map reading, the law relating to Public Rights of Way, Health and Safety and Working on Public Rights of way,
Since then the Parish Council has taken on responsibility for field edge path cutting and reporting any issues to ECC public rights of way team.
(It was made very clear at the PRoW course **lectures,** that we should not get involved in any confrontational situations with any land owners, but to withdraw and **immediately** report the problem to ECC. PRoW team, for them to deal with).
I have been responsible for overseeing most of the work and reporting issues to ECC for the majority of that time, to date. We have reported all issues concerning public rights of way brought to the Parish Council's attention, either by phone or the **Highways website,** (if the problem has not already been reported by a member of the public). Issues with FP70 have been raised on a number of occasions over the years. Mostly the missing bridge.
I also disagree **with** ECC statement that FP70 goes through "Gardens". I cannot find where any of the field aquired by residents of Lower Green has had a change of use granted.
The Paddock at Midfield was not included in the site curtilage when **planning** permission **was** granted for the extension. So I would surgest that it to is still paddock.
I also disagree that Byeway 98 is a suitable alternative. Since a part of it was "made up", **numerous** delivery vans, lorries and other **vehicles** use it.
It now has a large number of deep potholes and is rutted either side in the verge, making it unsafe to walk down and equally risky stepping into the verge to allow vehicles to pass.

Yours sincerely,
Edward Browne

[redacted]

DPC:76616c646f72

From: Rightsofway
To: Jo Reid
Subject: FW: ROW/3360619 - Footpath 70, Wimbish
Date: 23 January 2026 08:35:17
Attachments: 2. statement of grounds.pdf

From: [redacted]
Sent: 22 January 2026 23:46
To: Rightsofway <Rightsofway2@planninginspectorate.gov.uk>
Subject: ROW/3360619 - Footpath 70, Wimbish

[redacted]

Good evening,

I've reviewed the response from ECC to the closure of Footpath 70, Wimbish, and am concerned by the claims made in their submission.

The attached "Statement of Grounds" has it's main reason for closure (in the closing summary) *"The historic unavailability of this footpath (believed by the applicant to have been unused for at least 50 years)"*, and make several references to this statement in other documents. I have walked the path on numerous occasions since moving to the village twenty years ago. I'm very concerned Essex County Council have presented a false claim (with no supporting evidence) submitted to them by the party set to benefit from the closure. Can I request both the applicate and ECC are made aware of the consequences of providing misleading evidence to a Planning Inspector, so they are able to decide if they chose to present this as evidence at the Inquiry.

I'm disappointed ECC are willing to spend so much money closing public access for the benefit of private home owners, rather than working in the public interest. I'd prefer the thousands of pounds this unnecessary closure order will cost was invested in improving access to public rights of way, and open access land in Wimbish.

For full disclose I am a member of the Wimbish Parish Council, but this submission is made in a personal capacity.

Regards and thanks,

Gareth Jones

[redacted]

responsibility of the recipient to perform all necessary checks.

The statements expressed in this e-mail are personal and do not necessarily reflect the opinions or policies of the Inspectorate.

DPC:76616c646f72

[redacted]

From: Paul Dockley [redacted]
Sent: 31 January 2026 15:35
To: Rightsofway <Rightsofway2@planninginspectorate.gov.uk>
Subject: Footpath 70 Wimbish ROW/ 3360619

[redacted]

Objection to Footpath 70 Wimbish Public Path Extinguishment Order 2024

Dear Sir

I write as a resident [redacted]
I hereby object to the confirmation of the **Footpath 70 Wimbish** Public Path Extinguishment Order 2024.
The statutory test under Section 118 of the Highways Act 1980 is whether the footpath is needed for public use, not whether alternative routes exist. The presence of Byways 98 and 100 does not make **Footpath 70** unnecessary. Byways are legally open to vehicular traffic and are not equivalent in character, safety, or amenity to a dedicated pedestrian footpath.
Low levels of recorded use or historic unavailability do not justify extinguishment. Public rights of way cannot be removed simply because they have fallen into disuse, particularly where lack of use may be due to obstruction, discouragement, or lack of maintenance. Rural footpaths are often lightly used but remain historic and important for public access, recreation, along with possible future need.
Footpath 70 contributes to route choice and connectivity within the wider public rights of way network. Extinguishing it would result in a permanent loss of a legally protected pedestrian route, including across common land, which is contrary to the public interest.
Landowner consent and private inconvenience are not sufficient grounds to extinguish a public highway. Public rights frequently cross private land, and this alone does not outweigh the benefit of retaining the path for public use.
For these reasons, the Order does not meet the requirements of Section 118 of the Highways Act 1980 and should not be confirmed.

Yours faithfully,

Paul Dockley

From: Rightsofway
To: Jo Reid
Subject: FW: Rights of Way 3360619 Wimbish footpath 70
Date: 30 January 2026 08:25:35

From: pete maisey [redacted]
Sent: 29 January 2026 16:54
To: Rightsofway <Rightsofway2@planninginspectorate.gov.uk>
Subject: Rights of Way 3360619 Wimbish footpath 70

[redacted]

I have been asked to confirm that footpath 70 has been in use within recent times. I used to live at Melbourne Cottage, Lower Green, not far from footpath 70.
I was footpath warden for the parish around early 2000's. From memory a Mr Baron was my contact at Highways for footpaths.
I can confirm that in my role as Warden I walked every footpath within the Wimbish parish more than once.
I hope this information is helpful.

Peter Maisey.

From: Rightsofway
To: Jo Reid
Subject: FW: ROW/3360619 - Footpath 70, Wimbish
Date: 29 January 2026 08:30:47

From: T Bale [redacted]
Sent: 28 January 2026 20:48
To: Rightsofway <Rightsofway2@planninginspectorate.gov.uk>
Subject: ROW/3360619 - Footpath 70, Wimbish

[redacted]

Dear Sirs,

I write with regard to the above proposed footpath closure and wish to state that my wife and I have lived in Wimbish for ten years and frequently use all the footpaths including this one. As such, We strongly advise that public footpath 70 remains open for all walkers.

Yours faithfully

Trevor Bale

DPC:76616c646f72

Planning Inspectorate reference: ROW/ 3360619
HIGHWAYS ACT 1980 SECTION 118
ESSEX COUNTY COUNCIL PUBLIC PATH EXTINGUISHMENT ORDER 2024
FOOTPATH 70 WIMBISH IN THE DISTRICT OF UTTLESFORD

STATEMENT OF CASE BY THE OPEN SPACES SOCIETY, OBJECTING

(i) The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and the public's right to enjoy them. We have over 2000 members, consisting of individuals, organisations and local authorities. We have 48 local correspondents acting for the society in their localities.

(ii) This Statement of Case is by Katherine Evans, who is the duly appointed volunteer Open Spaces Society Local Correspondent for Essex. The appointment was made in November 2024. Prior to this the OSS had no Essex correspondent, so there would have been nobody in-post to respond to the Made Order consultation in June/July 2024.

(iii) The only reason for **making** an extinguishment Order is that it appears expedient on the ground that the footpath is not needed for public use. However, a slightly different test has to be applied when considering the **confirmation** of an extinguishment order, namely that it is expedient to do so having regard to the extent to which it appears that the path or way would, apart from the order:

- be likely to be used by the public
- and having regard to the effect which the extinguishment would have on the land crossed by the path.

Regard must also be given to any material provision of a rights-of-way improvement plan.

(iv) The Open Spaces Society object to the confirmation of the extinguishment of (a part of) Wimbish public footpath 70 on the grounds that the path IS used by the public and is therefore likely to continue to be used in future.

A. Wimbish footpath 70 – need and usage

Whilst the test for the **making** on an extinguishment order is "need" the test for the **confirmation** of an extinguishment order is expediency having regard to "likely usage by the public". This was held in the case of *R v Secretary of State for the Environment ex parte Cheshire CC* [1991] JPL 537 (appendix 1).

Ramblers Essex Area have developed a PPA app which takes information from the Essex Highways fault reporting /defect on-line IT system and displays all the issues associated with a specific footpath – see the screenshot Table below. This shows reported issues on footpath 70 going back to 2018. There may be earlier / more reports available on the non-publicly available internal interface.

Whilst ECC / Essex Highways strongly encourage the use of their online fault reporting system, it requires some mapping and IT skills & equipment. In addition, faults have often remained on the system for a considerable time without being rectified, which does not encourage usage of the system.

The fact that some faults have been reported shows that people have used / attempted to use Wimbish footpath 70. As such the path has been used and will likely be used in future – especially if the faults (e.g. missing ditch crossing) are rectified.

FP 70 (7 issues)

DEF PRoW: vegetation

Multiple obstructions. Mostly overgrown vegetation and trees but fence also. One bidge is present but not obvious and needs replacement. No fingerposts or waymarkers. Route not clear. Issue being addressed jointly by AROS and ST.

Ref: 3317080 created date: 12/12/2018

DEF PRoW: vegetation

Significant dense upgrowth over c.50m including mature trees and blackthorn.

Ref: 3485374 created date: 04/06/2020

DEF PRoW: vegetation

Upgrowth going from site for new bridge around the corner of garden.

Ref: 3485375 created date: 04/06/2020

DEF PRoW: Bridge defect

Missing 4m decked bridge with one handrail.

Ref: 3485377 created date: 04/06/2020

DEF PRoW: vegetation

Brash woven into already dense hedgeline

Ref: 3485388 created date: 04/06/2020

DEF PRoW: Fingerpost defect

Missing fingerpost

Ref: 3593945 created date: 29/07/2021

ENQ obstruction of PRoW

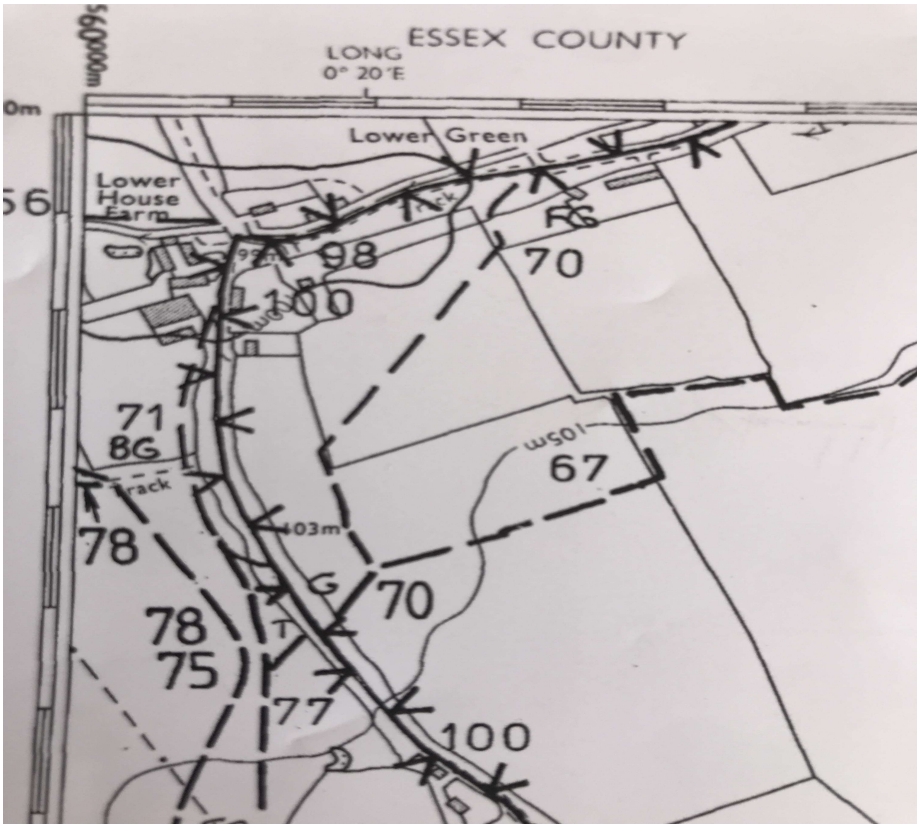
PROW

Ref: 4008820 created date: 13/12/2025

B. Wimbish public footpath 70 – Definitive Map & statement gardens and DEFRA guidance

The current (2002) Definitive Map Statement for Wimbish public footpath 70, unchanged from the previous Definitive Map statement, is… *From Lower Green in a southerly direction to its junction with FP77.*

A snip of the north-west corner of the hard copy 2002 Legal Definitive Map sheet TL63 SW shows footpath 70:



Comparing the current legal hard-copy Definitive Map with the Order Map and the current Essex Highways Interactive Map, the field / curtilage boundaries appear to have changed somewhat and there is some housing infill.

It is noted that the northern termination of Wimbish footpath 70 is stated to be Lower Green. Lower Green is registered common land (CL235) and is designated as access land under the CROW Act 2000. As such the public's right to access to this Common Land land remains.

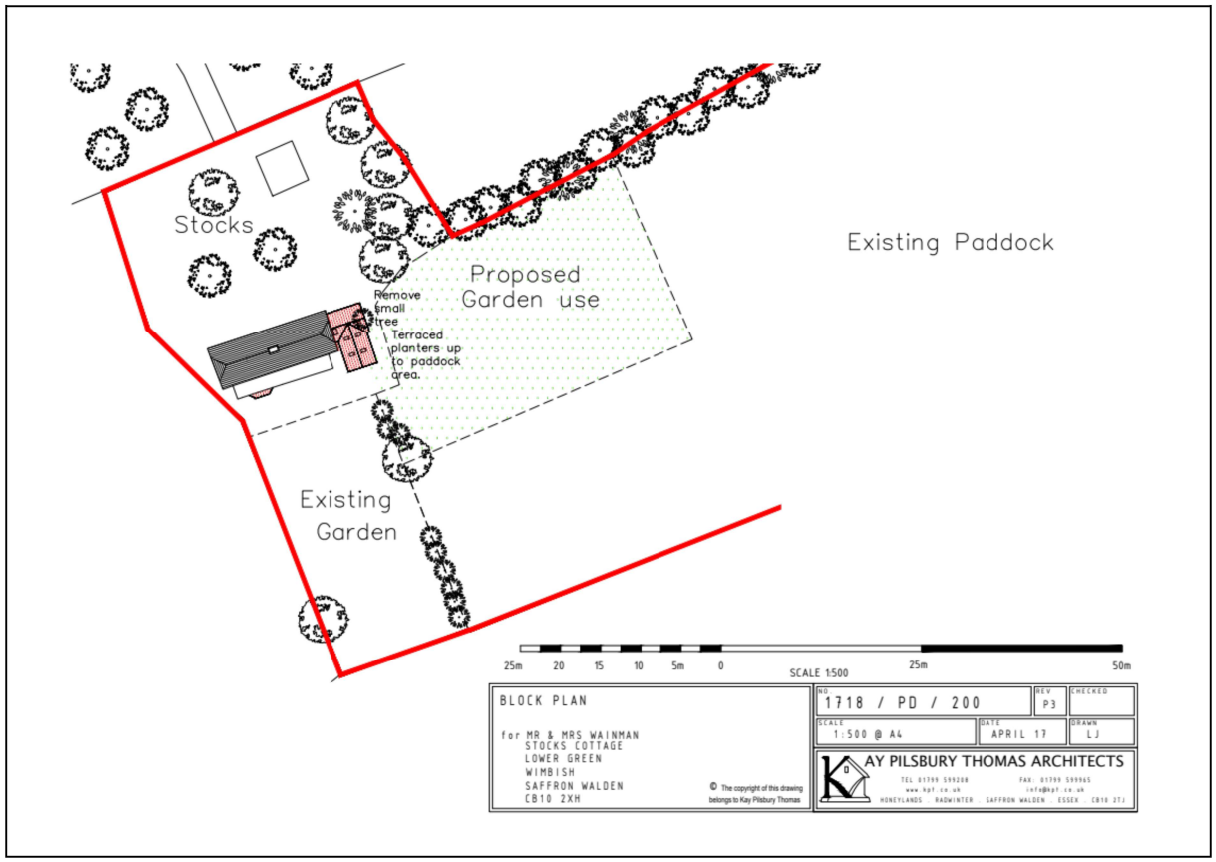
C. Wimbish public footpath 70 – gardens and DEFRA guidance

The OMA's statement 2(a) notes that Footpath 70:
- passes across common land… Common land rights are unaffected by this order
- the gardens of 3 properties
- a field used for animal grazing.

The OMA's statement 5.5 on the Parish Council's maintained objections, identifies the three "gardens" as belonging to the properties Midfield, Stocks Cottage and Flora Cottage.

(i) From the Lower Green Common Land (CL235) Footpath 70 passes along the western boundary of the western parcel of land belonging to Midfield – the dwelling is in the eastern parcel.

(ii) Footpath 70 continues across the south-east corner of a parcel of land that now belongs to Stocks Cottage – the land registry description is *"land adjoining Lower Green* (Inspire ID 58617899)". In the 2017 Stocks Cottage planning applications this land was described as a "*paddock / agricultural land"*. The 2017 granted planning applications (UTT/17/3591/HHF & UTT/17/3592/LB) included permission for a change of use to garden for the part of this paddock nearest the dwelling – the granted change of use to garden did **not** include the eastern part of the paddock which is crossed by footpath 70. Wimbish footpath 70 was not shown on the Planning Application Location or Block Plans and was not referenced in the planning application documents. The application form question.. "*Do the proposals require any diversions, extinguishments or creation of public rights of way*" was answered "*no*".



(iii) Footpath 70 continues south-west across agricultural land owned by Lower House Farm. This land is also crossed by Wimbish public footpath 67.

(iv) Footpath 70 continues in a generally southerly direction just inside the eastern boundary of land south of the stables built on land belonging to Flora Cottage (Inspire ID 29953739) - the cottage is at the northern end of the parcel. Footpath 70 is not shown on the 2008 or the 2015 planning application plans (UTT/1285/08/FUL & UTT/15/3261/CLE).

Flora Cottage - photo included with application UTT/15/3261/CLE for stables permitted development

(v) Footpath 70 continues southerly just inside the eastern boundary of an adjacent parcel of land - the land registry description is "*land on the south side of Flora Cottage* (Inspire ID 59400230). There is no dwelling on this land parcel and no planning applications.

(vi) The final southern section of Wimbish footpath 70, including the junction with Footpath 67, is again on agricultural land owned by Lower House Farm.

It is considered that the DEFRA guidance has only marginal applicability in this case as the land over which the legal line of Wimbish Footpath 70 passes is generally NOT any of … *"gardens of family homes, working farmyards or commercial premises where privacy, safety or security are a problem".* In any case, the DEFRA guidance does not replace or dilute the tests in section 118 which reference usage.

D. CONCLUSION

For the reasons given above, on behalf of the Open Spaces Society this Extinguishment Order for part of Wimbish public footpath 70 is objected to. It is requested that the extinguishment order is not confirmed as the path IS being used by the public and is likely to be used in the future.

Katherine Evans
OSS Local Correspondent – Essex
19 February 2026

Appendix 1: R v Secretary of State for the Environment ex parte Cheshire CC [1990] JPL 537

IN THE HIGH COURT OF JUSTICE CO/1012/89

QUEEN'S BENCH DIVISION

Royal Courts of Justice,

Thursday, 17th May 1990.

Before:

MR. JUSTICE AULD

- - - - - -

Crown Office List

THE QUEEN

-v-

SECRETARY OF STATE FOR THE ENVIRONMENT

Ex parte CHESHIRE COUNTY COUNCIL

- - - - - -

(Computer-aided Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd., Pemberton House, East Harding Street, London, EC4A 3AS. Telephone No: 071-583 7635. Shorthand Writers to the Court.)

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MR. C. CROSS (instructed by Messrs. Sharpe Pritchard, WC1, Agents for The County Secretary and Solicitor, Cheshire County Council) appeared on behalf of the Applicant.

MR. M. KENT (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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J U D G M E N T
(As approved by Judge)

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MR. JUSTICE AULD: This is an application by the Cheshire County Council for judicial review of a decision made by Mr. J. D. Lofts, an inspector appointed by the Secretary of State for the Environment, not to confirm an order by the council extinguishing rights of way over parts of two footpaths. The inspector was appointed to determine the matter in accordance with the provisions of paragraph 2A of Schedule 6 to the Highways Act 1980. The two footpaths in question are footpaths numbers 12 and 13 in the parish of Little Budworth in the district of Vale Royal in Cheshire.

On 10th February 1988 the Council, supported by two local parish councils, made an order under section 118 of the 1980 Act extinguishing the public rights of way over a part of each of these footpaths. The machinery, once such an order was made, is that the Council was required to publish it in order to enable objections to be made to it and to consider such objections if and when received. If they could not be resolved the Council was then required to submit the order to the Secretary of State for the Environment for confirmation. If there were no objections, so that the order made by the Council was unopposed, the Council could, subject to a provision to which I shall refer in a moment, confirm its own order.

In this case objections were received by the Council to the order made. There were objections from three walkers' societies; the Peak and Northern Footpath Society, the

Ramblers' Association, and the Mid-Cheshire Footpath Society. Those objections were not capable of resolution by the Council and therefore, in accordance with the statutory procedure, it submitted the order to the Secretary of State for confirmation. That required a public inquiry. That inquiry was held on 8th February 1989 before an inspector appointed as I have indicated. Before I continue with the history of the matter giving rise to this application I should now refer to the statutory provisions governing the making by the Council of the order and the confirmation of it in the event of opposition by the Secretary of State.

The power given to a local authority by section 118(1) of the 1980 Act to make such an order is, so far as material, in the following terms:

> "(1) Where it appears to a Council as respects a footpath or bridleway in their area ... that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the Council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way."

The criterion for the local authority when first making an order under this provision is clearly whether or not the footpath is needed for public use. However, section 118(2), which deals with the confirmatory part of the procedure involved in making such an order, imposes a different criterion on the Secretary of State when deciding whether to confirm an opposed order and on the Council when deciding to confirm an unopposed order. It provides, so far as material,

as follows:

> "(2) The Secretary of State shall not confirm a public path extinguishment order, and a Council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation continued in Section 28 above ..."

I said that the provision in section 118(2) imposed a different criterion from that in section 118(1). That is clear from the words of the two subsections that I have read. In particular, it is clear that the confirming role in the second subsection is not one by way of appeal from the decision of the local authority under the first subsection to make an extinguishment order on the ground of lack of need for it. Lack of need is not a consideration for decision by way of confirmation or otherwise under section 118(2).

The second subsection plainly gives the Secretary of State, in the case of an opposed order, and council, in the case of an unopposed one, a much broader and discretionary basis upon which to make the decision whether an order should or should not be confirmed, assuming that there is a lack of need for the footpath implicit in the making of the order in the first place.

In saying that, I respectfully adopt the approach of Phillips J in the case of R v. Secretary of State for the Environment, ex parte Stewart, (1980) JPL 175, a judgment

given on 18th October 1979. In that case there was an order made extinguishing a footpath under section 110 of the Highways Act 1959, the statutory predecessor of section 118 in the 1980 Act. The 1980 Act was a consolidating measure and thus reproduced the earlier statutory provision. The matter was referred to the minister who, by decision letter, refused to confirm the order on the stated ground that he was not satisfied that the path was not needed for public use.

It was argued before Phillips J that this was a misdirection on the ground that that was not a test for the minister; it was a test for the local authority. The minister was concerned only with the criterion in the statutory predecessor of section 118(2) which I have read, namely, whether extinguishment was expedient having regard to the extent, if any, to which it appeared to the minister that the path would, apart from the order, be likely to be used by the public. Phillips J accepted that the test for the authority in making the order and the test for the minister in deciding whether or not to confirm it were indeed different. He said:

> "So a different test applied to the Minister and it was to be noted that that choice of language must be presumed to be deliberate because there was a distinction between that language and that used in the following section 111, dealing with the diversion of footpaths and bridleways."

He went on to say that the only criterion which the second subsection laid down was whether it was expedient, having regard to the extent which it appeared to him that the path would be likely to be used. He pointed to the fact that

the provision concentrated on likely use as the prime consideration but added that he agreed with the submission that the word "expedient" used in that context must mean that, to some extent, other considerations could be brought into play because, if that were not so, there would be no room for a judgment which, in his view, was bound to be of a broad character.

The only other provision inthe 1980 Act to which I need refer before returning to the facts is section 118(6), which reads:

> "For the purposes of subsections (1) and (2) above any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded."

I read that provision not because it plays an important part in the decision that the inspector had to make or that I have to make in this matter, but the facts relating to the footpaths do at least prompt its mention.

Before I deal, quite briefly, with the nature of the evidence put before the inspector I should say something about the history of the footpaths as revealed by the narrative in his report. The two footpaths in the late 60's passed across open ground in what I am told is an attractive village, Little Budworth. Together they formed a "Y" shaped stretch of footpath which terminated in the two tops of the "Y" -- one to the north at the Red Lion public house alongside one of the village roads and the other just around the corner also terminating at the roadside. The bottom of the "Y" similarly

met a road and continued over it into further open ground. It appears that in the late 60's there was development of the area through which these parts of the footpaths passed, the effect of which was to leave the paths running behind or between the gardens of a number of newly constructed houses.

The road network of the village provided a ready means of connecting up with each of the three ends of the footpaths in the "Y" shaped section to which I have referred. So, if those sections extinguished or blocked, those in the know would be able to resume their walk on the condition of the footpaths after passing over a short section of roadway.

In 1971 the then Northwich Rural District Council -- as a result of an application by the builders responsible for the building development to which I have referred, under the Town and Country Planning Act 1968 for the diversion of part of one of the footpaths, made and confirmed such an order under section 94 of that Act. The other footpath part of the "Y" should also have been subject to similar treatment but no such application was made.

In January 1975 steps were taken with a view to the diversion of that other footpath to a new line, but they were not proceeded with because of objection by the Peak and Northern Footpaths Society and because the proposals were technically incorrect -- being a purported extinguishment and not a diversion. There the matter remained. The first order under the 1968 Act made in 1971 was, it appears, not

perfected as it was not properly certified. The other footpath was never the subject of any completed order.

However, despite the lack of any statutory change in the status of those footpaths, it appears that it has been assumed since 1971 or thereabouts that both lengths of footpath had been extinguished. The owners of the gardens whose houses were built alongside -- and which were the cause of the applications to extinguish or to divert -- in some cases have allowed their gardens to intrude upon the footpath, and there are obstructions along their length. In published maps of footpaths in the area both lengths of footpath are not shown. For many years, some 17 or 18 years, neither length of footpath has been used.

At the public inquiry held on 8th February 1989 the appellant Council called seven witnesses from the locality to give evidence in support of the extinguishment. Six of these were residents who had lived in Little Budworth for a period between two and 40 years. As the inspector's report at paragraph 11 records, they confirmed that, since the construction and development to which I have referred, they could not recall anyone wishing to seek to use those paths. Several of the witnesses stated that they considered that the footpaths had been extinguished, and all expressed the view that if the footpaths were opened up it would adversely affect the security of houses along the line of the paths. A county Council witness also gave evidence in support of the

application, which as I have already indicated, was supported by two local parish councils.

The inspector also heard evidence from three objectors, each of them representing one of the footpath societies, whose names I have mentioned. It appears that much of their evidence was devoted to the failure of the Northwich Rural District Council and its successors to protect the footpaths by permitting development of the land in a way in which it allowed illegal obstruction to the paths.

It was clearly shown in evidence that, whatever may have been the belief up to then, neither length of path had been validly extinguished by the orders or action taken by the local authority in 1971 and 1975. It was pointed out by the objectors that the paths had not been used because, on that mistaken basis, they were not shown as rights of way in the Pathfinder series of ordnance survey maps and that they had been allowed to become obstructed in various ways. Their arguments was that, but for that treatment of the paths they would be used by rambling associations and their members even if they were not in demand by those who lived in the village.

The case of the appellant Council to the inspector proceeded on the basis of the test of lack of need which it was said he should apply in his determination of the matter. According to paragraph 10 of the affidavit of Graham David Gordon, sworn on behalf of the appellant Council, it urged upon the inspector that the primary criterion was whether the

A footpaths were needed for public use and that, even if an inspector thought that a public path was likely to be used to some extent, he should confirm extinguishment if it was not needed, for example in a case where there was an equally convenient path nearby. The Council relied for that purpose on the ready availability of the stretch of road which was available to join the severed ends of the path.

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It is evident from the way in which the inspector framed his report and decision, that he acceded to the Council's submission that at least one of the considerations for decision by him was whether there was or was not a need for these parts of the footpaths.

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It is said by way of complaint that the inspector erred in a number of respects in the way in which he approached that issue. It is also said by way of complaint that he erred in the way in which he approached the other issue which was properly before him under section 118(2): whether it was expedient to confirm the order having regard to the extent, if any, to which it appeared that the footpaths would, apart from the order, be likely to be used by the public.

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In his report and decision letter, the decision having been delegated to him, the inspector rehearsed the history of the matter in more detail than I have set out in my judgment. He summarized the case for the appellant Council, the evidence called in support and the case for the objectors with its emphasis on the unfortunate history of the matter resulting in

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the footpaths having been extinguished, in fact if not in law, for a period of some 17 or 18 years.

In particular, when dealing with the objectors' case, he rehearsed their argument that, because of the failings by the Northwich Rural District Council and its successors, the question as to whether the footpaths were necessary or not could not be tested, and their contention that if the paths were reinstated and correctly signposted they would be used.

In the section of his decision letter under the heading "Conclusions" the inspector devoted four paragraphs to the unfortunate treatment of the footpaths by the local authority. He roundly criticized it for its ineptitude, as he put it, in not correctly carrying out its responsibilities in either diverting or extinguishing the relevant sections of footpath or in ensuring their continued existence. He also said that that ineptitude had been compounded by the continued inaction of the successors to that authority.

As to the obstructions that had emerged over the years, he took the view, and there is no real quarrel with this, that they were all to be treated as temporary within the meaning of that word in section 118(6) of the Act.

It is at this point, paragraph 23 in his decision letter, still under the heading of "Conclusions", that the inspector begins to outline the reasoning for his decision not to confirm the extinguishment order. This is what he says:

> "I accept the view submitted by the Objectors that if the paths were open, properly waymarked and suitably

fenced where necessary, and shown on the appropriate maps as the starting point of Footpath Nos. 12 and 13 leading to the southern network of footpaths that they would be used."

Then, in paragraph 24:

"There is no doubt in my mind that the case presented by Cheshire County Council does not satisfy me that the parts of Footpath Nos. 12 and 13 are not needed by the public as a whole. This is and must be a subjective judgment due to the factors already outlined but I incline to the view that these footpaths would be preferred by the general public and probably the other residents of Little Budworth than using the estate road. The footpaths route is certainly shorter and visually more attractive."

In paragraph 25 he returns to the criticism of the way in which the footpaths had been treated when the development began -- criticism both of developers of the site and of the local authority at the time.

In paragraph 26 he returns to the consideration which was properly his under section 118(2), the question of likely user, with these words:

"I have considerable sympathy with the views expressed by the residents of Little Budworth and especially those directly affected by the line of the footpaths following their boundaries. However, their remedy lies elsewhere than in an extinguishment order to resolve their problems and possibly with the solicitors who conducted the conveyance of their properties without identifying the line of any relevant footpaths. I am furthermore not convinced that the proper reinstatement of Footpaths Nos. 12 and 13 would cause any increased security problems for householders or danger for users of the footpaths if they are fenced where necessary."

Then his conclusion is set out in paragraph 27 in these words:

"The evidence submitted does not show that footpath Nos. 12 and 13 (Part) are not needed for Public use and if properly maintained and marked are likely to add to the

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> enjoyment of the footpath network as a whole and the evidence does not satisfy the requirements of the Highways Act 1980 section 118."

In paragraph 28 he says that for those reasons he had decided not to confirm the order.

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The Council's first ground of the application is that the inspector reached his conclusion as to the need for the path against the evidence. By way of alternative put before me by Mr. Cross on behalf of the Council in his reply to Mr. Kent's submissions on behalf of the Secretary of State, the Council argues that, if the inspector's finding is not against the weight of the evidence, he asked himself the wrong question. He therefore used a wrong decision-making process which flawed his whole decision.

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In my view, the inspector was wrong to embark upon a consideration of the issue of need in this confirmatory procedure. For the reasons that I have mentioned when referring to the statutory provisions, that was not his function. The matter only came to him because of a decision by the Council that there was no need, and it was not open to him to deal with that decision as if by way of appeal. His task was to consider the broader and discretionary question under section 118(2) as to the expediency of making such an order having regard to the extent, if any, to which it appeared to him that the paths would, apart from the order, be likely to be used by the public.

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Mr. Kent submits that, even if the inspector did ask

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himself the wrong question, it can be ignored because he did go on to ask himself the correct question under section 118(2). He argues that his treatment of the second question cannot be impugned. In my view, the inspector muddled two questions which the draftsman of the statute intended to be kept quite separate. It may be that that is not an easy task where need under subsection (1) has been considered and likely user under subsection (2) then falls to be considered in the confirmatory process. Nevertheless, they are and, as I have said, are intended to be, quite separate questions.

The inspector in paragraph 23 of his decision letter, which I have read, started off with a consideration of the second question and then, in paragraph 24, returned to the first, declaring himself not satisfied that there was no need. By way of justification of that conclusion he referred to it as being a subjective judgment due to factors already outlined but which inclined him to the view that the footpaths would be preferred by the general public. He thus merged and muddled the two tests, and he did so again in his conclusion paragraph, paragraph 27, where he began his conclusion by the reference to lack of need and concluded it by a clear reference to what would be likely user if the order was not confirmed.

Given the inspector's undoubted muddling of the two issues -- one of which had nothing to do with him -- it would be quite wrong for me to take the course suggested by Mr. Kent

of ignoring the inspector's treatment of the question of need and of relying only on his treatment of the issue of likely user. It is not as if I could take the view that no harm is done because, on the material before the inspector, there was strong evidence on which he could find no need for these lengths of footpath. Those who might be expected to be vociferous in maintaining public footpaths -- local parish councils, local residents and other supporters, one of whom was the village vicar -- all favoured the extinguishment of these footpaths.

Given the history of the matter, whatever its causes, and the fact of long disuse of these footpaths, any question of need by walking societies and the like to use the footpaths was, as Mr. Cross submitted, highly speculative. Indeed, the case of the walking societies, which is summarized in paragraph 16 of the inspector's decision letter, at its highest refers to likely use, not need. Nor was there any evidence of any pressure in the recent or distant past on the part of parish councils or walking societies that the encroachments on the paths as they became established should be removed. I do not think it is an over-statement to say that, as to need, all the evidence before the local authority and before the inspector was that there was no need.

However, that is a side issue in the light of my view that the inspector did indeed ask himself -- in an important and confusing way -- a wrong question when addressing the

question of need at all.

The second and third grounds of the application I think can be dealt with together. It is argued that to the extent that the inspector did ask himself a correct question, that is to say the question as to likely user in section 118(2), he reached a conclusion as to likely user which was against the evidence. Mr. Cross's submissions to me under this head were, in part, a repetition of those that he has advanced, with some success, on the first ground as to lack of evidence of need. He said that there was no evidence before the inspector as to likely user which was more than (a) speculative and (b) minimal, and that for that reason the inspector's decision was against the evidence to such an extent that I ought to quash it.

There is no doubt, as Mr. Kent emphasized, that even if the inspector had been of the view that there was no need for these footpaths he was still obliged to have regard -- and I emphasize those words "have regard" -- to the question of likely user. Mr. Kent submitted that there was ample evidence upon which the inspector could properly take the view that he did. He referred me to paragraph 16 of the decision letter, which refers to a contention by the three objectors that, if the paths were reinstated and correctly signposted, bearing in mind their location, they would be used. He referred me to the artificial difficulties which had been created for the objectors by the way in which the paths had been apparently

extinguished over the years so as to discourage any attempt at use; see paragraph 17 of the decision letter.

Mr. Kent also referred me to paragraph 18 of the decision letter in which the inspector recited the effect of the Department of the Environment Circular 1, paragraph 83, namely that alternative routes along nearby roads were not satisfactory, given the circular's recommendation that footpaths should be kept clear of roads whenever possible and the lack of attraction in such a diversion.

Also, Mr. Kent referred to paragraph 23 of the decision letter referring to the evidence of the objectors that, if the paths were opened, properly marked, suitably fenced where necessary and shown on the maps with their starting points leading to the whole network of footpaths, they would be used.

Mr. Kent submitted that the inspector, looking at the question under this head, was entitled to and did exercise a broad discretion in the way described by Phillips J in the Stewart case starting with the test of expediency, and that his decision on that cannot be criticized in this form of proceeding.

Looked at on its own, I agree with Mr. Kent that it would be difficult for a court to grant judicial review because the inspector took one view rather than another on the evidence and the material put before him. However, and I say this only for emphasis as I pass on, the difficulty lies in the earlier ground of appeal in that the inspector did not

confine himself to the right question. And, having adopted an additional basis for decision on which he was not entitled to rely, he did not keep the two bases sufficiently separate.

The third ground of the application is that the inspector failed to have proper regard to the evidence as to the effect which extinguishment would have with respect to land served by the path. The only evidence on this issue, as Mr. Cross submitted, went to the question of security. It was dealt with in paragraphs 11 and 26 of the inspector's decision letter. The local residents who gave evidence in support of the extinguishment order gave evidence of their anxiety about the lack of security that would result for their properties if the footpaths were opened and in use.

In paragraph 26 of his decision letter the inspector, whilst expressing considerable sympathy, as he put it, with the views expressed by the residents of Little Budworth on this issue, said that they had an alternative remedy possibly against the solicitors who dealt with the conveyance of their properties without identifying the line of the footpaths. He also said that he was not convinced that the proper reinstatement of the footpaths would cause any increased security problems for householders or danger for users of the footpath.

Looking at section 118(2), Mr. Cross relies on the words in this part of his case which follow the general test set out there, "having regard to the effect which the extinguishment

of the right of way would have as respects land served by the path or way". I agree with Mr. Kent that this provision is clearly directed to the consideration of adverse effects from extinguishment on nearby landowners who derive a benefit of one sort or another from the use of the footpath. It is clearly directed to a case where extinguishment is on the cards, and where the Secretary of State is asked to consider whether that would in some way harm nearby landowners. That view is supported by the concluding words of section 118(2) "... account being taken of the provisions as to compensation contained in section 28 above ....".

Although the inspector took a view adverse to the Council by purporting to apply that part of the test in the second subsection it was, in my view, a provision which had no application and could not have worked in its favour if the inspector had taken a different view on the evidence. It would have been an irrelevant matter in any event and not one, in this instance, which would flaw the decision that he made.

The fourth ground of the application is that the inspector took into account an irrelevant consideration in his repeated references to, and in his emphasis upon, the earlier failure by the local authorities concerned properly to deal with the extinguishment or diversion of the footpaths in question or properly to preserve them for the use of the public. It is notable that he starts his conclusions with four paragraphs devoted to this issue. It is clearly a

matter which concerned him. It is clearly a matter which was irrelevant to his decision under section 118(2) as to likely user. That is conceded by Mr. Kent on behalf of the Secretary of State. It is also conceded that if that irrelevant consideration could have influenced his decision-making then his decision is flawed on that ground alone.

Mr. Kent submits that, although the lengthy references by the inspector to the serious failures of the local authorities and their treatment of the footpaths over the years appear in the conclusion section of his report, the report should be read as a whole. He says that these paragraphs, paragraphs 19 to 22, are purely narrative and do not lead, on the face of them, to any decision by the inspector. He says that I should not treat the decision letter as a judgment on a pleaded case. An inspector has to receive and deal courteously with arguments and representations made on many points -- some of which are relevant to his decision and others not -- and it is a common feature of decision letters that irrelevant matter is rehearsed as a result.

In my view, the emphasis which the inspector gave to this matter, both in those passages at the forefront of his conclusions and elsewhere in his decision letter, at the very least suggest that they played or may have played a significant part in the decision that he reached. In saying

that, I am affected in particular by his attempt to treat both the question of need and likely user as part of one reasoning for reaching the decision that he did. He was clearly affected by the fact that need was a slippery concept where the facts imposed upon him were that the paths had not been used or sought to be used for many years.

In my view, the decision by the inspector under this ground as well as under the first ground of the application cannot be justified on the material before him. There was a risk in the way in which he couched his decision letter that he allowed an irrelevant consideration to affect his decision-making process. For those two reasons, under grounds 1 and 4 of the application, the decision of the inspector will be quashed and the matter will be remitted to the Secretary of State for a further inquiry under section 118(2) of the Highways Act 1980 to confirm or not the extinguishment order made by the Council.

MR. CROSS: My Lord, I ask for costs.

MR. JUSTICE AULD: Yes. Mr. Kent?

MR. KENT: My Lord, I cannot resist the application for costs. May I address your Lordship briefly on the nature of your Lordship's order?

MR. JUSTICE AULD: Yes.

MR. KENT: The relief sought is simply an order of certiorari to quash the decision. In my submission your Lordship's judgment should be limited to such an order. What will then happen will depend on a variety of factors. Your Lordship will be aware that decisions of this sort are quashed frequently by this court, particularly in planning matters. Sometimes it is possible that a fresh decision can be issued without the need for a further inquiry. Very much depends on circumstances.

My Lord, I have no instructions as to what will happen if this decision is quashed but I would invite your Lordship to limit the order simply to what is sought.

MR. JUSTICE AULD: If there was to be a fresh decision without an inquiry that would mean that the Secretary of State would take the matter back.

MR. KENT: This is not a case, for example, where it is suggested that there was an issue that still needs to be canvassed. It was not sugested that the decision letter wrongly records the evidence, for example, where it would be necessary to go back and ask the witnesses what exactly it was they meant. The evidence is there and properly recorded by the inspector. It is only a matter for decision.

MR. JUSTICE AULD: What are the possibilities, Mr. Kent? If the Secretary of State deals with the matter himself, what are the possibilities then?

MR. KENT: He may decide that he can ask the inspector to report, the same inspector, or treat his decision letter as a report and ignore the conclusion and decision but not the material which the inspector has gathered and then come to a decision on that basis. I am not saying that will happen because maybe it will be impossible to do that, but that can be done. I am seeking to avoid a situation in which the effect of your Lordship's order is to force an inquiry in circumstances where it may not be necessary.

MR. JUSTICE AULD: Yes. Mr. Cross, I should have asked you to address me on that matter before as Mr. Kent did. What do you say, Mr. Cross?

MR. CROSS: I would prefer the order which your Lordship proposes for this reason. As I understand the judgment of your Lordship there is a criticism of the decision-making process that is in issue here -- a decision-making process of the inspector concerned. It would seem to be fair to the public that a fresh mind ought to be brought to these issues. I would find it difficult for the inspector who had heard the evidence and had read your Lordship's judgment -- with all respect to him -- to do justice to the issue and more particularly to see that justice is done by the public.

My Lord, may I make a parallel, if your Lordship will have patience with me on this, because it is a public relations exercise now as to how those who are concerned would react. Quite often where the Secretary of State's decision has been impugned, the Secretary of State has merely come to the same decision but has rectified his reasons. There is nothing wrong in that and that is not uncommon, indeed, we

would quite often say, "If you win, you will only get the same decision but with lawful reasons". I do not think, if I can put it this way, that that fits a situation where there has been a public inquiry with local concern. I would think that the public would feel that, if that happened, then justice has not been seen to be done. My Lord, I am hesitant because I am thinking as I speak. I would have thought that -- in relation to the public in respect of which there has been so much feeling on both sides -- there would be a sense of injustice by one side if the same man noted your Lordship's comments and rewrote his report. If -- he having made a mistake -- a new inspector coming freshly to the matter comes to the same decision, at least the public would see that justice had been done. I would urge upon your Lordship to give such direction as you think fit. I would urge upon your Lordship that, in the interest of the appearance of justice and the substance, of course, as well as the appearance which is so important in public relations, your Lordship's original course should be adhered to.

MR. JUSTICE AULD: There is something in the point about the public element of this, Mr. Kent. I know there is the contrary point of expense and no doubt delay too, but the local public have a real interest in seeing the matter determined in the way in which, if I am right, it should be determined.

MR. KENT: My Lord, certainly. It cuts both ways because if there is a new inquiry then we may find that our evidence is better evidence against them on user.

MR. JUSTICE AULD: Mr. Cross appears to be prepared to take that risk.

MR. KENT: My Lord, he does not represent the public; he represents the Council. This is a public inquiry and it may be that some of the local residents are happier, as it were, taking a risk with the evidence that is presented, in getting a fresh decision. It may be in their favour. I submit it is a fairly fundamental matter in judicial review. First of all, where the only relief sought is to quash the decision where mandamus is sought that is the relief only that should be granted.

MR. JUSTICE AULD: You say that that on its own is so fundamental that I should not listen to Mr. Cross. If that is right I would like to see the authority.

MR. KENT: No, my Lord. If your Lordship would allow him to amend to claim other relief -----

MR. JUSTICE AULD: Does he need to amend? Do I have to make him

amend?

MR. KENT: In my submission, yes. It would be a mandamus. Your Lordship is doing more than quashing a decision. Your Lordship is directing an inquiry.

MR. JUSTICE AULD: It is not implicit in the general application for judicial review.

MR. KENT: My Lord, in my submission, no. Secondly, there is this point. I should say I am instructed that there is no question of this inspector issuing a fresh decision. What always happens in cases of this sort is that, where it has been a delegated decision, the Secretary of State will call it in. It will be a departmental decision this time. The only relevance is whether the inspector's unchallenged narrative of the issues and the argument at the inquiry should be the material upon which the departmental decision is made. In my submission, it is quite normal for it to be done on that basis. If error of law is found in the conclusions only then that part is, as it were, struck out and the decision is struck out but everything else at the public inquiry still exists. The evidence heard at the public inquiry is still there and is recorded by the inspector, all that happens is that the decision is made. In my submission, to direct a fresh inquiry where it is not suggested that the procedure at the inquiry went wrong, where evidence that should have been admitted was kept out or that there is uncertainty as to what someone was saying, or what they meant, or there was fresh evidence showing it was all based on a misunderstanding -- to order a fresh inquiry where those materials do not exist -- would be a departure and I invite your Lordship to say that the relief granted should be only as asked. That would be without prejudice to the possibility that the Secretary of State may take the view that a further inquiry is needed. I am saying nothing about what he will in fact do, only that the option should be open to the Secretary of State to make a fresh decision on the material which is available and which is not subject to challenge.

MR. JUSTICE AULD: The problem here -- for this the applicant Council is no doubt largely responsible -- is that there was a concentration from the beginning, both in the evidence and on the arguments, on the question of need before the inspector. If I am right about that neither of the parties was concentrating on the proper issue -- the question of likely user. If they had been it may be that more or differently emphasized evidence would have been put before the inspector and his report and decision letter would have had a wholly different make-up to it. The make-up of it, of course, is going to influence whoever in the office of the Secretary of State now has to look at the matter.

MR. KENT: It is not as if user was wrongly excluded from consideration, because then clearly one would need to hear evidence that had not been heard. All one does in my submission is take a pair of scissors to the decision and cut off from paragraph 19 to the end. One has then an unchallenged record of the evidence just as a Court of Appeal hearing has a transcript of evidence. It is all there. It is summarized. I am not suggesting that it is wrongly summarized. The departmental decision-maker is then able, or possibly able, to decide the matter. I merely ask your Lordship not to go so far as to direct an inquiry in circumstances where it may not be necessary. I should say also that if a fresh decision is made, let us say again refusing to confirm, that is without prejudice to any subsequent challenge my learned friend may have in judicial review proceedings to that decision. If he suggested for example that no decision could properly be made without a fresh inquiry, then that is an option that is open. I am merely seeking to keep matters open.

MR. JUSTICE AULD: I am against you, Mr. Kent. I think the muddling of the issues and the primacy given to the question of the issue of need by the inspector in his report does mean that the way in which he has expressed himself, upon which others might have to rely in part now, may be distorted so as to make difficult the giving of a proper decision by somebody now applying the proper test and relying only on the relevant facts which are to be elicited from his report and decision letter. In my view the matter should go back for a rehearing. Mr. Cross, Mr. Kent says that you have to put your house in order to apply to amend.

MR. CROSS: I do so apply, my Lord.

MR. JUSTICE AULD: What do you apply for?

MR. CROSS: For an order of certiorari to quash the decision and an order of mandamus to require the Secretary of State to cause a rehearing.

MR. JUSTICE AULD: Yes, under section 118(2). That is the order that I propose to make and do make. Mr. Cross, you will want costs.

MR. CROSS: Yes, my Lord.

MR. JUSTICE AULD: You have no observation to make about that, Mr. Kent?

MR. KENT: No, my Lord.

A MR. JUSTICE AULD: I am grateful to both counsel for their assistance.

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REF: ROW/3360619

Highways Act 1980 – Section 118

Order Making Authority: Essex County Council

Title of Order: PUBLIC PATH EXTINGUISHMENT ORDER 2024

FOOTPATH 70 WIMBISH

STATEMENT OF CASE MR PETER PUNKETT

I am Peter Punkett and I confirm that I am the owner of [redacted]

We purchased the property in 2010

The route of footpath 70 crosses over from Midfield, through the garden of Stocks Cottage and alongside the paddock of Flora Cottage and finally through one of the fields forming a part of Stocks Farm before joining onto path 67.

We can confirm that during the period from 2010 to 2026 we have not been aware of any people using Footpath 70.

In or around June 2024 we were approached by Mr. Patrick Diggines who explained that he had become concerned by the stated intention of the local council to clear the path of Footpath 70 after such a long period of non-use.

Mr Diggines stated that it was his view that as Footpath 70 had been unused for over 40 years he believed that clearing the path now would be a complete waste of public money that could be better spent on Footpaths actually used by the public. Further he stated that as he regularly had children of friends and family visiting his property, he believed that the clearing of Footpath 70 presented a real risk to the safe environment currently enjoyed.

Mr. Diggines confirmed that he had made an application to the Council to obtain an Order of Extinguishment of Footpath 70.

We wholeheartedly agree with Mr Diggines' application and in particular the waste of money on a footpath that is rarely used and the impact it will have on the longstanding quiet environment and security of the local properties.

In making the above request we would bring to the attention of the Panel that to our knowledge most people have been happy to use the alternative road/byeway route without serious accident or incident. This route has little or no traffic and presents no real risk to the public. To this end we cannot see that there is any real public need or benefit in Footpath 70 being cleared and reinstated.

In taking account of the above facts we request that the panel grant the Order Extinguishing Footpath 70.

We thank the panel for considering our statement.

Peter Plunkett