Appendix A
Overview plan

4 Coal Lane

5 Houselop Lane

3 Hartop Lane

1 Middleton Lane

2 Pikestone Lane

2 Stanhope Road (Lane)

6 Old Stanhope Road

Weardale and Teesdale byway applications

Appendix B

Durham County Council

Wildlife and Countryside Act 1981, Section 53

Definitive Map Modification Applications concerning Pikestone Fell, Stanhope Road, Middleton Lane, Hartop Lane, Old Stanhope Road, Coal Lane and Houselop Lane

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Further Advice in the light of the Joint Opinion of George Laurence QC and Ross Crail dated 31 March 2011

Background

1. I have previously advised Durham County Council ("the Council") in this matter, on 17 December 2010, concerning the so-called *Winchester* argument that the various applications made by Mr Snoddy between 1992 and 1995 may not have been properly "made" for the purposes of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act"), and accordingly did not attract the exemption from extinguishment of vehicular rights contained in section 67(3) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act").

2. I expressed the view that, notwithstanding the authority of both *R (Winchester College) v Hampshire County Council* [2008] EWCA Civ 431, [2009] 1 WLR 138 and *Maroudas v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA Civ 280, the five applications made by Mr Snoddy in this matter were all validly made.

3. Since receiving my advice the Council has resolved to make modification orders which, if confirmed, would have the effect of adding[1] six byways open to all traffic to its Definitive Map and Statement, but has undertaken not to act upon its resolution without giving at least seven days notice to certain of the affected landowners of its intention to do so, in order to give those landowners the opportunity, should they decide to do so, to apply to the High Court for an injunction to prevent the Council from acting on its resolution (in the manner of *R v Wiltshire County Council, ex p Nettlecombe Estates Ltd* [1998] JPL 707). The Council has also received a copy of a Joint Opinion from George Laurence QC and Ross Crail, dated 31 March 2011 and addressed to the landowners concerned, responding to my Advice of 17 December 2010 (which had been made available to the various landowners), and expressing their opinion that such an application to the High Court would be likely to be successful on the basis that the Council has clearly erred in law by resolving to make the modification orders.

4. The Joint Opinion addresses the six routes as follows, and I propose to do the same below: Middleton Lane (route 1); Pikestone Lane and Stanhope Road (Lane) (route 2); Hartop Lane (route 3); Coal Lane (route 4); Houselop Lane (route 5); and Old Stanhope Road (route 6). It does not directly address routes 4 and 5 (because they do not cross land in the ownership of those to whom the Joint Opinion is addressed), but the Joint Opinion suggests, not unreasonably, that similar points might be made in respect of them.

5. The Joint Opinion addresses not only the *Winchester* argument, but also two further arguments advanced by the relevant landowners: first, that the Council, having previously determined the relevant applications[2] and made modification orders, now has no power to determine them again and make further orders in respect of these routes because it is *functus officio*; and, secondly, that the exemption in section 67(3) of the 2006 act does not apply to an application "which had been finally disposed of adversely to the applicant before 2 May 2006 when section 67 came into force" (quoted from paragraph 3 of the Joint Opinion). I will call these the *functus officio* argument, and the section 67(3) argument, although, as the Joint Opinion accepts, they are closely related.

[1] In some instances by upgrading existing routes.

[2] It is accepted in the Joint Opinion that this argument does not extend to route 6, in connection with which no order has ever been made. I understand that the same is true of routes 4 and 5 (i.e. the High Court Order of 20 July 2000 extended only to routes 1 and 2).

The *functus officio* argument

Route 3

6. I agree with the view expressed at paragraph 6 of the Joint Opinion that the committee resolution of 3 March 2011 to make a modification order in respect of route 3 should not be acted on. Route 3 was not the subject of High Court proceedings (unlike routes 1 and 2), because the order in relation to route 3 was not confirmed by the Inspector. I agree with the Joint Opinion that, in the absence of any judicial review proceedings at the time,[3] that is the end of the matter as far as route 3 is concerned. There is no subsisting application left to be determined.

Routes 1 and 2 (the argument has no possible application to routes 4, 5 and 6, in respect of which no modification orders have ever been made or determined to be made)

7. The argument based on the Council being *functus officio* in respect of routes 1 and 2 is more complex. Halsbury's Laws at Volume 61 (Judicial Review, 5th ed, 2010), para 611, states the doctrine in this way:

> "*A body may by taking a valid decision exhaust its powers such that any further decision on the same matter will be made without jurisdiction or vires. Such a body may be described as* functus officio."

The Joint Opinion does not refer to any authority as to the operation or extent of the doctrine. It is clear that its operation depends very much upon the precise statutory powers under consideration: a great many of the decided cases, for example, being concerned with the powers of magistrates, coroners and the like to reopen apparently completed determinations of matters before them. I am not aware of any authority directly on the question of the application of the doctrine in the context of the Council's functions under the 1981 Act, but the following examples from other fields provide at least some guidance as to how a court would be likely to approach this particular statutory context.

8. In *Aparau v Iceland Frozen Foods plc* [2000] 1 All ER 228, [2000] ICR 341, the Court of Appeal considered the actions of an industrial tribunal which, on referral back to it of a specific issue by an Employment Appeal Tribunal, went beyond the

[3] And subject only to the possibility of a very strict view of the operation of the 2006 Act, considered briefly below at footnote 9, and which I do not advise the Council to seek to maintain.

matter specifically referred to it to consider wider questions. Moore-Bick J, with whom the rest of the court agreed, reasoned as follows:

> "*The 1993 regulations made under the 1978 Act continue to govern the constitution and procedures of industrial tribunals by virtue of s 1(2) of the Industrial Tribunals Act 1996. Rule 11 of Sch 1 to the 1993 regulations gives industrial tribunals a limited power to review their decision but does not give them any general right to reopen proceedings once they have been disposed of by a final decision. It follows, in my judgment, that an industrial tribunal, like any other tribunal, has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before it. Thereafter, apart from the limited power of review given by r 11 of Sch 1 to the 1993 regulations, it has no power to reopen the hearing or reconsider its decision unless the matter is remitted to it for that purpose by the Employment Appeal Tribunal. The Employment Appeal Tribunal, now established under s 20(1) of the Industrial Tribunals Act 1996, has power to hear appeals on questions of law arising out of decisions of industrial tribunals. Under s 35(1)(b) it has power for the purposes of disposing of an appeal to remit the case to the industrial tribunal for further consideration. That power is clearly wide enough to allow it to remit the case for reconsideration generally or for a more limited purpose as appropriate.*
>
> *The effect of an order remitting a case to a tribunal which had otherwise exhausted its jurisdiction was considered by this court in the context of arbitral proceedings in* Interbulk Ltd v Aiden Shipping Co Ltd, The Vimeira (No 1) *[1985] 2 Lloyd's Rep 410. Ackner LJ pointed out that the extent to which the tribunal's jurisdiction is revived in consequence of an order remitting the matter to it depends entirely on the scope of the remission. If, as occurred in the present case, the matter is remitted for the tribunal to consider certain specific issues, it will have no jurisdiction to hear or determine matters outside the scope of those issues, and it must follow that it has no power to allow one party to amend its case to raise issues which were not previously before it. In the present case it is clear from the passages in the judgment of the Employment Appeal Tribunal to which I have already referred that remission was ordered in very limited terms simply to enable the industrial tribunal to reconsider whether Iceland's new terms of employment had been accepted by Mrs Aparau. That being so, the tribunal did not by virtue of the remission have jurisdiction to reopen the case generally, nor did it have jurisdiction to hear or determine any argument on the part of Iceland relating to the fairness of any dismissal. Although Mr Glennie sought to persuade us to the contrary, I for my part am quite satisfied that that was not an*

> *issue which had previously been raised in the proceedings and it was certainly not within the scope of the remission.*"

9. The Court of Appeal in this passage clearly contemplates two separate issues: first, and generally, "*that an industrial tribunal, like any other tribunal, has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before it*"; and secondly that, if a separate appellate body has power to remit issues to the original tribunal, then "*[i]f, as occurred in the present case, the matter is remitted for the tribunal to consider certain specific issues, it will have no jurisdiction to hear or determine matters outside the scope of those issues*". A further illustration of these principles in a different context is provided by *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 All ER 375, [1994] 1 WLR 621, a case concerning the possible reopening of an investigation by the PCA, following submission of his report to the MP in question. Simon Brown LJ dealt with the matter briefly as follows:

> "*I come finally to Miss Dyer's complaint about the PCA's refusal to reopen this investigation. This I can deal with altogether more shortly. It seems to me that the PCA is clearly correct in his view that, once his report had been sent to Mr Hattersley and the DSS (as required by s 10(1) and (2)), he was functus officio and unable to reopen the investigation without a further referral under s 5(1). Section 5(5), as already indicated, confers a wide discretion indeed; it does not, however, purport to empower the PCA to reopen an investigation once his report is submitted. It would seem to me unfair to the department and outside the scheme of this legislation to suppose that the PCA could do as Miss Dyer wished.*"

10. The High Court proceedings which were settled by consent in connection with Mr Snoddy's applications, by an order dated 20 July 2000, took place pursuant to the provision for statutory review contained in paragraph 12 of schedule 15 to the 1981 Act, which provides that the High Court may, if satisfied of certain matters "quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant". The effect of the 2000 consent order was simply to quash the 1997 Modification Order generally (together with making provision for costs).

11. The question is therefore whether the Council remains *functus officio* after the making of that consent order, or whether its jurisdiction to determine Mr Snoddy's applications was thereby revived. (I say "remains", because I have no

doubt that it would have been appropriate to have described the Council as *functus officio* from the point when it submitted the Modification Order for consideration by the Secretary of State (as an 'opposed' order, pursuant to paragraph 7 of Schedule 15 to the 1981 Act) until the High Court consent order took effect. Clearly the Council had no jurisdiction to do anything further with respect to the Modification Order while it waited first for the Secretary of State to determine whether or not to confirm it, and then for the outcome of the High Court challenge.[4])

12. The Joint Opinion is correct to observe that the High Court did not specifically remit the matter to the Council for further consideration: it simply quashed the, until-then confirmed, Modification Order. Again, and equally clearly, that ended any role for the Secretary of State in the matter – there was no longer any submitted Modification Order for the Secretary of State to consider. But where did that leave the Council?

13. In my opinion the better view is that the effect of the consent order was indeed to revive the Council's jurisdiction to consider Mr Snoddy's applications concerning routes 1 and 2. Bearing in mind the existing authorities on the operation of *functus officio*, this is so for two reasons.

First (and relying on the Halsbury definition of *functus officio* set out at paragraph 7 above[5]) once the High Court order had taken effect it was no longer true to say that the Council had taken "*a valid decision*" which had "*exhaust[ed] its powers such that any further decision on the same matter will be made without jurisdiction or vires.*" In terms of the way in which the Council's jurisdiction is helpfully broken down in paragraph 4 of the Joint Opinion, the last 3 of the 7 elements of the Council's jurisdiction (i.e. making, advertising and submitting the Modification Order) had no longer validly been done: they had been quashed. And the effect of such a quashing order, once it has taken effect – and whatever may be true of the Modification Order's status prior to its being quashed – is clear. As Lord Irvine of Lairg LC put it in *Boddington v British Transport Police* [1999] 2 AC 143 at 155, [1998] 2 All ER 203 at 210:

[4] No doubt it could have applied to be joined in the proceedings: the point is that it (as opposed to the High Court at that stage) had no jurisdiction to do anything further, directly, itself, as regards the status of the Modification Order.

[5] And the passage from *Aparau* set out at paragraph 9 above: "*that an industrial tribunal, like any other tribunal, has exhausted its jurisdiction* ***once it has delivered a final decision disposing of all the issues before it***" [***emphasis added***].

> "*Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively ... In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful,* ***but is then recognised as never having had any legal effect at all***." [***emphasis added***].

14. In my view the Council cannot be *functus officio* as a result of acts now properly "*recognised as never having had any legal effect at all*".[6]

15. The further reason why I suggest that this is the better analysis is that clear analogies exist elsewhere. In the context of judicial review generally, there is of course express provision (see section 31(5) of the Senior Courts Act 1981) for the High Court to remit a matter back to be determined properly by the decision making tribunal according to law:

> "*31 (5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition—*
>
> *(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or*
>
> *(b) substitute its own decision for the decision in question.*"

16. But such an express power is not always provided in instances of specific statutory review (just as it is not in paragraph 12 of Schedule 15 to the 1981 Act).

[6] Nor can it assist the contrary view to suggest that the Council is somehow rendered *functus officio* by its previous *decision* to make the Modification Order in this case, as opposed to the making, advertising and submitting of the actual order (which *decision* has not been quashed). It is clear on first principles that the Council remains free to revisit that decision unless and until it actually seals a valid order – as is of course recognized by the procedure now being adopted in connection with the new order(s) now proposed to be made - i.e. of pausing before acting upon them. There is no suggestion (in the Joint Opinion, nor now on behalf of the Council) that the Council is rendered *functus* by its recent (3 March 2011) resolution in respect of route 3. Nor can there be any suggestion that the Council had no power to reconsider its earlier *decision* to make the order in respect of the other routes prior to the making (and, we say, continuing existence) of a valid Modification Order. Such a decision alone is clearly incapable of providing the basis for an argument based upon *functus officio*; and, since all subsequent steps which the Council had power to make have been quashed, there simply is no legal substratum for the *functus* argument.

17. For example, in the well-known context of section 288(5)(b) of the Town and Country Planning act 1980, the power to quash is not (unlike in the instance of judicial review) accompanied by an express power either for the High Court itself to determine the matter, or for it to be remitted back to the relevant decision maker for further consideration. Nevertheless it is well-established that, if the High Court is appropriately satisfied, the effect of the Court's quashing order is that the planning inquiry must be reopened to enable a fresh determination to be made. See for example Sachs J in *Hartnell v Minister of Housing and Local Government* [1963] 3 All ER 130 at 138 (decided under a predecessor section to section 288):

> "*In those circumstances, the minister's order, in so far as it dismisses the appeal to him in relation to those two conditions, must be quashed. It is, however, to be noted that under the terms of s 31(6) of the Town and Country Planning Act, 1959, which govern the present application to the High Court it is not open to this court to substitute any order for that made by the minister: the order quashing the minister's decision is thus in the present case somewhat akin to an order remitting the matter to him for further consideration. The result is that the appeal to him as initiated by the notice dated 12 December 1961, is still pending. It is thus for him in due course to make such order as he may deem proper after ascertaining such further facts as may be necessary to enable him to make a decision in accordance with a correct view of the law.*"

18. Here the matter goes back to the Secretary of State rather than to a prior decision-making body; but the principle is clear. There is nothing in a quashing order without more to justify an argument that the appropriate decision-making body is thus rendered unable to re-determine the matter properly. Quite the opposite. And it would of course undermine one of the key justifications for providing for judicial involvement in errors of law made by inferior tribunals at all. Such involvement is not provided such that hollow victories can be won, and decision-making stymied. It is provided so that errors can be reconsidered and put right.[7]

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[7] See also *H Sabey & Co Ltd v Secretary of State for the Environment* [1978] 1 All ER 586, [1977] JPL 661 in which the High Court considered an alleged breach of natural justice where the Secretary of State determined a planning matter without giving the losing side a sufficient opportunity to address the particular issue ("the moisture question") on which the decision was founded. Willis J concluded his decision as follows:

> "*In the circumstances of this case I do not think anyone is to blame, but I am left with the strong feeling that justice will not be done unless the applicants are afforded an opportunity to present their evidence on the 'moisture question' before the Secretary of State reaches his final conclusion. Accordingly the decision must be quashed.*

19. For all of these reasons my opinion is that the better view is that the Council is not *functus officio* in respect of these matters as suggested by the Joint Opinion. The point is not a straightforward one, and there are arguments in each direction; but the weight of authority assembled here, and consideration of the matter from the standpoint of fundamental principles of public law, is in my view convincing. My estimation of the prospects of their success, on this ground alone, were the landowners concerned to seek an injunction to prevent the Council making the orders that it has determined to make in respect of routes 1 and 2, is that they are no better than around 25-30%. I.e. I think that it is 70-75% likely that no injunction would be granted in respect of routes 1 and 2 on the basis of the *functus officio* argument.

The section 67(3) argument

20. It seems ultimately to be accepted in the Joint Opinion that this argument can only succeed if the *functus officio* argument also succeeds, and so I do not propose to deal with it in any detail. I am not convinced, however, as the Joint Opinion appears to suggest, that it makes a difference whether such an (earlier) application was in due course determined by the relevant authority in favour of the claimed vehicular routes or against them: in either case section 67(3) serves to save the vehicular rights from statutory extinguishment while their existence or non-existence is finally determined under the old law through the 1981 Act process (for example in circumstances where an initial decision by the relevant authority not to make an order were to be successfully overturned by a schedule 14 appeal to the Secretary of State; such a chain of events would, appropriately and fairly, be allowed to run its course). Section 67(3)(b) is as similarly broad as is section 67(3)(a) in this respect, i.e. it does not restrict its saving effect to an initial determination in favour of the vehicular rights by the relevant authority:[8] which is again support for the wide-ranging effect of these exemptions. They appear to have been crafted to protect the *status quo* whilst matters were in train under the 1981 Act processes, rather than only when those processes were inclining towards

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> *I only add that while, of course, it is a matter entirely for the Secretary of State, there being no longer any criticism of the decision save in this one particular, one can naturally hope that any rehearing can be limited to this single question.*"

The Court clearly regarded the quashing order alone as sufficient to revivify the Secretary of State's jurisdiction – albeit expressing the hope that it might be possible for any reconsideration to be confined to a particular issue.

[8] Based after all only on the reasonable allegation of the rights concerned (see section 53(3)(c)(i) of the 1981 Act, and *R v Secretary of State for Wales, ex p Emery* [1996] 4 All ER 1.

confirming the claimed rights. But I agree with the Joint Opinion that, in this case, and assuming that the DEFRA Guidance referred to in paragraph 11 of the Joint Opinion is right that the application of section 67(3) is limited to "outstanding" applications,[9] then the matter ultimately comes back to the *functus officio* point: is there still a 1981 Act process in train or not? I have already indicated my view on that question.

The *Winchester* argument

21. I agree with the Joint Opinion that the issue of whether Mr Snoddy's applications were validly 'made' raises the kinds of questions – and they are not straightforward questions – listed within paragraph 13 of the Joint Opinion. In particular, and taking route 2 by way of example, it raises directly the question of whether a written Commentary describing the claimed effect of two Inclosure Awards (the Hamsterley, Lynesack, Softly and South Bedburn; and Wolsingham Common Awards[10]), and setting out elements of the Awards on which the applicant relies, and attaching an "index sheet" for each Award (bearing the Durham University Library stamp, and which provides a modern summary of the content of each award), and in each case including an explanation that:

> "*This inclosure is available for inspection at Durham University, 5 The College, Durham City (Tel: 091 374 3610). Due to the considerable expense of copying, I am unable to provide copies of the inclosure in this submission*"

together with an offer to meet with Council officers to discuss the application at a mutually convenient time, gains the benefit of one or more of the principles that *lex non cogit ad impossibilia* (the law will not compel the impossible), *de minimis non curat lex* (the law is not concerned with small things), or of the Court of Appeal's express recognition that "minor departures from paragraph 1 will not invalidate an application", or, in circumstances where there is no suggestion that the surveying authority[11] challenged Mr Snoddy's

[9] Although it obviously remains possible to assert (although I do not advise the Council to do so) a literal interpretation of section 67(3), which would preserve vehicular rights wherever applications have previously been made at all prior to the relevant date, or such applications determined – one way or the other – prior to commencement.

[10] The first award running in full to some 150 pages, and the second to more than 300 pages.

[11] No doubt aware of the practicality and advantage of directing the authority to full originals of large, fragile, old, manuscript documents, which would need to be looked at in due course as originals in any event - as they frequently have to be as highway officers prepare advice to surveying authorities and as Inspectors at public inquiries prepare advice to the Secretary of State.

explanation, of Dyson LJ's indication that "[i]t should not be difficult for a surveying authority (or if necessary the court) to verify the explanation given by the applicant for his failure to copy a particular document."

22. I also agree that these issues were simply not decided in either of the *Winchester* or *Maroudas* cases. Those two authorities provide straightforward examples of applications that were clearly not properly made, but give rather less indication of how exactly the line is to be drawn in more difficult cases.

23. I also agree, generally, with the view expressed in paragraph 14 of the Joint Opinion that it cannot be necessary to provide a copy of an entire document if only part of it will be relevant to the decision making body (although I do not accept, as is suggested within the same paragraph, that an application would fail to be properly made merely through the failure also to provide a copy of the title page). Nor that an application would cease to be properly made if, on further investigation by the surveying authority, or by a landowner, or by an expert witness, or whomsoever, it emerged that material relevant to the application was contained in parts of documents that had not been provided. I do not consider, whatever may have been said by the Court of Appeal in the context of the clear failures in the *Winchester* and *Maroudas* decisions, that 'failures' of this type would be held by a court, with the facts of Mr Snoddy's applications in front of it, to denature the applications. I accordingly remain of the opinion, and without rehearsing the full detail of my earlier Advice, that the applications concerning routes 1 and 2 were properly made, and accordingly rights for mechanically-propelled preserved by section 67(3) of the 2006 Act.

24. The Joint Opinion concludes at paragraph 22 that the prospects of persuading a court to hold now, rather than leave for an Inspector to decide, that these applications were non-compliant to a more than *de minimis* extent "are reasonably good"; and that, combined with the view taken of the prospects of success of the *functus* and section 67(3) arguments, there is "a good prospect (well over 50%) that the court will be persuaded to restrain the Council from making orders showing the routes as byways on the basis that it will plainly be erring in law in so doing."

25. I do not agree. I have already indicated my view that the prospects of success of an application for an injunction on the basis of the *functus* (and section 67(3) argument) are no better than 25-30%. I think it is right to be a little more cautious

in respect of the *Winchester* argument, because those authorities clearly do provide an *apparent* basis for such an application; but, as I have indicated, I am not of the view that that apparent basis would survive full examination by the court. I accordingly estimate the prospects of success of the *Winchester* argument in leading to an injunction being granted as no higher than 40%. I.e. I think it at least 60% likely that an injunction would not be granted in respect of routes 1 and 2 on the basis of the *Winchester* argument.

Route 6

26. Of the routes addressed directly by the Joint Opinion, route 6 is the one where no question of the *functus* argument arises (as it also does not do in relation to routes 4 and 5). The Joint Opinion therefore accepts that all turns on the *Winchester* argument, and (looking at it from the landowners' point of view) the *Winchester* argument appears weaker because the application is not based upon inclosure evidence, but on maps, extracts from which accompanied the application. Despite what is argued in paragraphs 23 to 32 of the Joint Opinion, I consider that the prospects of the landowners obtaining an injunction in respect of route 6, based as it would have to be solely on the *Winchester* argument are no stronger than 25%. I.e. I think it at least 75% likely that an injunction would not be granted in respect of route 6 on the basis of the *Winchester* argument.

The significance of the possible existence of rights for non-mechanically propelled vehicles

27. The Joint Opinion does not address the fact that the *Winchester* argument, even if ultimately successful to disapply the saving provision of section 67(3), would still leave untouched any question of the existence of highway rights for non-mechanically propelled vehicles, or indeed for the existence of bridleway or footpath rights. It is true that the *functus* argument, if successful, would prevent the surveying authority from determining Mr Snoddy's applications as such, but it would still leave it subject to its general section 53 duty to consider whether to make such orders – unaffected by the section 67(3) point so far as such lesser rights are concerned. In my view this important point makes it all the more unlikely that a court would be persuaded to grant an injunction preventing these orders from being made on the basis that a clear error of law has been made by the authority, as in the *Wiltshire* case. By far the better process is for the various arguments to be considered together by an Inspector, who will in any event need to consider – even if the landowners were successful both in respect of the *functus*

and the *Winchester* arguments – whether or not lesser rights existed, which matter he, unlike the High Court, would be in a position to resolve by, if appropriate, modifying the orders so as, for example, to show restricted byways or bridleways.

Edwin Simpson
New Square Chambers
Lincoln's Inn

30 September 2011

Durham County Council

Wildlife and Countryside Act 1981, Section 53

Definitive Map Modification Applications concerning Pikestone Fell, Stanhope Road, Middleton Lane, Hartop Lane, Old Stanhope Road, Coal Lane and Houselop Lane

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Further Advice
in the light of the Joint Opinion
of George Laurence QC and Ross Crail
dated 31 March 2011

C Longbottom
County Hall
Durham

Appendix C

Extract from Highways Committee report of 3 March 2011

'The Winchester argument'

12 The Natural Environment and Rural Communities Act (NERC) 2006 determined that where a route was not shown on the Definitive Map and Statement as of 2 May 2006 then rights for mechanically propelled vehicles would be extinguished other than where a specified exception applies. One of the legislation's aims was to prevent rights for motor vehicles over routes, like those being considered here, being established where they had been created as highways at a time before motor vehicles existed. All the applications were made prior to 20 January 2005 and therefore on the face of it meet one of the specified exemptions set out in Section 67 (3) of the NERC Act.

13 However the saving provisions of this subsection were closely considered by the Court of Appeal in the case of *R (Warden and Fellows of Winchester College and another) v Hampshire County Council 2008.)*. That case turned on whether the application had been properly 'made' for the purposes of Section 67(3). The Court held that an application can only be properly made if it complies with all the provisions of paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 (i.e. it is made in the prescribed form, accompanied by a map drawn to the prescribed scale and accompanied by any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application).

14 Therefore it is important to decide whether or not these applications were properly 'made' and meet all the provisions of paragraph 1 of Schedule 14 to the 1981 Act. The effect of Section 67(1) of the NERC Act means that if a right of way for mechanically propelled vehicles can be established on the documentary evidence presented but the application is not properly 'made', then the application for byway status would fail with the appropriate status being that of restricted byway.

15 Given the detailed findings in the *Winchester* case, Counsel's advice was obtained on whether each of the applications before this Committee could be considered to be properly 'made' under the above mentioned statutory provisions. The Advice is attached at Document **0M**. However it is a matter for this Committee to decide on the evidence before it as to whether the applications meet these criteria.