Submission prepared on the Draft Deregulation Bill – Land Usage

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Personal background: City born and raised [and therefore well aware of "both sides of the story"] - 1958 married the late David H. Masters member of a longstanding Somerset farming family.

Opportunity to speak: I would welcome an opportunity to speak to the Committee.

<u>Issues for consideration by the Committee appointed to discuss the Deregulation Bill – Land Usage:</u>

- **Increased burden on the local taxpayer.** It is often the case the County Council officials find the complicated law incomprehensible and use the public purse to instruct Counsel to present their case.
- By contrast, County Councils regularly fail to obtain Counsel's Opinion when a landowner's case is "contentious" [*O'Keefe* guidelines.]
- **The landowner's burden.** ***"Inequality of arms" -*** whereas it can be demonstrated that County Councils use the public purse [as above] against an inexperienced landowner, the landowner often finds the necessary finance for legal rebuttal well beyond his/her reach. That is totally against the principle of natural justice.
- ***"Only the Court can interpret the law" -*** advice provided historically by Parliamentary officials and continued to this day by Planning Inspectorate officials. It can be shown that County Councils frequently try but fail miserably in their interpretation, not only of the law but in the interpretation of historical documents and maps.
- **The failure by *legally* unqualified County Council officials to properly comprehend legal authorities.**
- **Section 31(1) Highways Act 1980 –** provides a *proviso* concerning *presumption* but does not include any detail of *who* should apply the 'test' - whether there is *"sufficient evidence"* to demonstrate the landowner's "lack of intention to dedicate." This cannot be considered a "deficiency" because Section 32 is interactive not an "isolated" procedure.
- **Section 32 Highways Act 1980 provides the relevant '*test*' - i.e.** *"A Court or Tribunal . . ."* in short, determination - not by an administrative body such as a County Council and its unqualified officers, and certainly not by way of *quasi-judicial procedure* chaired by a legally unqualified Inspector who is appointed by the Secretary of State. Where is the fair, impartial and objective *test* which is or should be provided by a legally competent member appointed by the Lord Chancellor's department?
- **Section 32 is glossed over.** The necessity for a claim of public "rights" on private property to be determined by a Court or a properly convened Tribunal is fundamental law.

- **When a Tribunal "convened under the Rules of a Court" *is* convened, there is a legal requirement for all Witnesses to be on Oath.** A *quasi-judicial* "Inquiry" cannot be considered a properly convened "Tribunal" if the Witnesses are not on Oath. In my own personal experience of a Land [Registry] Tribunal the Court Rules are specific and strict – and non-compliance renders the alleged "evidence" or the calling of a Witness inadmissible.
- **Schedule 14 (4) (1) WCA 1981**: **at present there is no Statutory Appeal** procedure in place which allows errors of fact or law to be challenged without recourse to the High Court. Many landowners are aggrieved when they discover that Refusal of a Schedule 14 Appeal has been based on inaccurate findings [either of fact or law.] Lack of finance again prevents a High Court Application for Judicial Review. Appellants are advised that there is no right of Inquiry related to Refusal of a Schedule 14 Appeal – that the only procedure is Application for a Judicial Review. That advice appears to be legally at odds with the decision in *National Assembly for Wales v Secretary of State ex parte Robinson [11 April 2000]* - wherein the learned Judge decided that a Schedule 14 Appeal relevant to the claim of Deletion of an error – could, if formally requested – allow a non-statutory Inquiry given "**everyone is entitled to a fair hearing."**

- **Notwithstanding that the matter of public rights on private property should be determined by a legally qualified person chairing a properly convened Tribunal, the Committee is requested to consider the fact that at the very least an "Inquiry" should be chaired by a person legally qualified "for at least seven years" in the complicated matter of highway law. And not by a person who has no legal qualifications at all. Moreover, that all Witnesses should be on Oath.**

Experience: Occasioned by a series of irregular practices in law and fact on the part of Somerset County Council [which was described by then Parliamentary official Sir Paul Beresford as "complicating the matter"] my late husband and I drew on all available financial resources [thereby endangering the financial stability of our property and longstanding livelihood] to mount legal challenges as far as those resources allowed when we discovered in 1990 that Somerset County Council had "Added" a "CRF" [which Somerset County Council interpreted as a public vehicular road *used as a footpath*] to our property Lower Clapton Farm, Maperton . . *viz*

(a) represented by experienced London Counsel at a 5-day Public Inquiry in September 1995 –

(b) represented by George Laurence QC in 1998 - a High Court Application for permission for Judicial Review [Mr. Justice Collins] deemed [obiter] "*out of time but there is merit in the case and you should gain the relief you seek in the Statutory Appeal"* which had already been filed - –

(c) represented again by George Laurence QC in 1999 a Statutory Appeal in the High Court [Mr. Justice Hooper] ; -

(d) represented again by George Laurence QC 2000 in the Court of Appeal;

we endeavoured to identify not only errors of law but errors of fact finding which related to our property [the abovementioned Lower Clapton Farm] on which Somerset County Council, [later confirmed by an Inquiry Inspector "appointed by the Secretary of State"] decided that as a result of interpretation of "historical documents" [but accepting no public use, no

public maintenance] "public vehicular rights *had* been shown to exist" over and through our property [the abovementioned Lower Clapton Farm.]

A "Byway Open to All Traffic" ["BOAT"] was duly imposed over and through our property dividing our farmhouse from the farm buildings and continuing tortuously uphill through steep grazing land and through our late neighbour's land. [The stress was a contributory factor in his suicide.] Despite all our protestations, which included that the tortuous route which, on our land, has a professionally calculated gradient of 1.3:9 -and is impassable to wheeled vehicles not only by way of its gradient but of "articulation" - even that which may be related to private agriculture. Upon a view, this is blatantly obvious to anyone with a modicum of commonsense.

Since experiencing the incompetence and prejudice demonstrated by County Council officials in general and Somerset County Council in particular I have acted as a *pro bono* Consultant assisting others; I very swiftly became aware that each person who approached me for guidance believed they were an "isolated case" ; put simply - that they were "on their own." That is not the case; this is a nationwide concern.

With the benefit of experience those who approached me and who I have represented at Public Inquiry [among them the National Trust] became aware that there are organisations and single-issue User Groups, some quite extreme, who have a supporting "network" - which often also provides financial support leaving the landowner to source his/her/their own finance in defence of their own property.
Inquiry Costs do not "follow the event" - an Application for Costs must demonstrate "unreasonable behaviour" - - apparently the origin for this lies in Planning Law.
Faced with a claim of public rights, the legal *test* facing a defensive landowner is to "**prove a negative**." Which is entirely against the principle of English law. That he/she, the landowner, must "sufficiently demonstrate a ***lack of intention*** *to dedicate"* - even if the landowner was aware that the use was exercised by way of tolerance or generosity to neighbours his "word" and his evidence will be discounted in favour of the claim which will provide more access to the countryside for – it must be said – a minority of *local* users.

A case which has been a *cause celebre* in Somerset for over 40 years is the Peppard case. Siblings Archie and Ivy Peppard [both now deceased, Archie at 86 and Ivy at 81] discovered that Somerset County Council had "Added" a Public Footpath over and through the private [unmetalled] track which accessed the woodland cottage which has been their family's home for over 160 years. Of limited education and finance their several Statutory attempts to correct this blatant error were resisted and refused not only by Somerset Council but by an Inspector appointed by the Secretary of State, who considered the matter under the requirements of a Schedule 14 (4) (1) Appeal.
That the Inspector had erred in law on four grounds was agreed by the High Court on 4 October 2012 when as a litigant in person together with And speaking for the late Ivy's son Rodney permission was Granted for a Judicial Review of the Inspector's Decision. In July 2013 the Secretary of State signed a Consent Order – agreeing that the Inspector had erred in law. Not surprising, given she had no legal qualifications. The protracted procedure means I now have to prepare papers for a different Inspector to exercise an "independent" evaluation of the evidence.

In the case of the error on Lower Clapton Farm in 1991 I had embarked upon the necessary investigative research to demonstrate that historically the alleged BOAT claimed on ours and our late neighbour's land was no more than a historic **but disused** ***driftway*** **[**a "service road"/pathway used for driving cattle to water or pasture and therefore not legally open to the public, particularly with motorised or other vehicles] and therefore any record held by the Somerset County Council which suggested it was must be fundamentally flawed. I have continued with my investigative research in order to provide the evidence which will turn this grossly inaccurate and disingenuous Decision around. Based on legal authority this requires " *a single piece of new evidence."* My efforts have produced more than is legally required but I am faced with bias and the same incompetence from Somerset County Council when submitting another Application for a Definitive Map Modification Order to correct the error. Not to mention the advice that due to the enormous backlog of Applications [mostly for omnibus claims of Bridleways *allegedly* omitted from the Definitive Map] it will be *at least* 7-8 years before it can be investigated. This flies in the face of the Statute which says that I am entitled to a Decision "within 12 months." I am advised that the Secretary of State can set this *legislative requirement* aside if a County Council is unable to comply.

The incalculable distress the above has caused has had to be dissipated – alleviated in any way possible to remain sane. There is no intention to be "flippant" in this submission. The matter of alleged public rights of way, intrusive or not, is a grave one which is not to be treated lightly.

"This Act is a lawyer's beanfeast!" [Obiter comment in relation to The Wildlife and Countryside Act 1981 by Lord Justice Tuckey – Court of Appeal – D.H. & M.P. Masters v Secretary of State [2000.]

*"Fings **ain't** wot they used to be . . . !"*
The origin of footpaths in the countryside is accepted as use by those who

(i) walked to work
(ii) walked to school
(iii) walked to the Post Office
(iv) walked to the village pub
(v) walked to Church
(vi) walked anywhere in a local social capacity.

Acceptance of the abovementioned origin is recorded in Ministry files held in the National Archives, many of which I have personally studied over a great number of years. As foreseen by The Hobhouse Committee Report of 1947 . . . . Things *have* changed, Recreation [not necessity] is now paramount.

In 1947 Sir Arthur Hobhouse of Hadspen Estate near Castle Cary chaired a Committee of eminent people [who accepted legal advice from equally eminent Lord Justice Scott] in order to prepare a Report which would in turn serve to advise the Government on the preparation of a "Definitive" Map. This would enable the **general public** [not to be confused with the twofold definition of "public" as defined by Sir E. Coke in the 1650s - *to wit* - (i) all the King's [Queen's] subjects; (ii) "***between neighbour and neighbour"*** ; in short, not the public at

large - but "local inhabitants" who used paths - many [if not all] of whom would have been the Tenants or Employees of the Estate which more likely than not "owned" the Parish - usually under the terms of Strict Settlement. This meant "Tenant for Life" – ownership did not extend to the Freehold, only to the Rents and Profits of the Estate.

Obiter from Lord Justice Mance – Court of Appeal – D.H. & M.P. Masters v Secretary of State [2000.] Having retrieved The 1947 Hobhouse Committee Report from the Court library – and examined the contents –

> *"The purpose of the Definitive Map was to record Footpaths and Bridleways. It was not the intention of Parliament to record vehicular ways."*

The Hobhouse Committee Report made it absolutely clear that the only rights of way with which they were concerned were "Footpaths, Bridleways and Driftways." It explained that *driftways* were not legally open to vehicles. [Ministry files record that it was decided not to enlarge on the legal definition of a *driftway.*]

At that time [just after the Second World War] it was unequivocally accepted that the paths were used by local workmen going to work, etc. etc. Sir Arthur Hobhouse, well aware of his own Estate and those of others, could not have envisaged the sea change of rural life which now exists. However, in the 1947 Report he clearly advised that the needs of those who use the paths would change – the purpose of the paths would evolve. The inference to be drawn is that no path should be considered as "written in stone" - that the line will change in accordance with people's needs. Some paths will become redundant.
The ' Definitive' Map will require modification as and when necessary. "Historical" clearly played no part in his and his Committee's "intentions."
The 1947 Report also addressed the need to consider privacy - and that paths did not go through farmyards. All of this advice, supported by Lord Justice Scott, was either ignored or became "distorted" when applied or interpreted by local, inexperienced officials.

The guidance provided in the **non-statutory** 1950 Memorandum prepared by the Ramblers' Association and the Open Spaces Society and approved by the Ministry of Town and Country Planning added to the confusion, although acknowledging that "*accommodation **roads** are not legally open to vehicles"* and could only be claimed as Footpaths or Bridleways. An incalculable number of "ancient *accommodation* roads" were inexplicably recorded on the 1929 Somerset County Council Unclassified Road List [this is acknowledged in Section 6.9. of The Planning Inspectorate's "Consistency Guidlelines" wherein it says

> *"Inspectors should be mindful that some County Council's included private Access/Accommodation Roads in their List of Streets."*
> [My research revealed that this applied to **most** County Council's not simply **"*some*."**

and these, for the most part "unmetalled" green lanes, were simply transferred to and recorded on the Somerset [and other] Definitive Maps - more often than not by way of the **non-statutory** symbol "CRF [Cart road used mainly by the public as a Footpath] or CRB " . . . . used as a Bridleway." In a few cases the advice offered by The 1950 Memorandum was followed; private Accommodation Roads which were used mainly by the public as Footpaths or Bridleways were claimed as such. Whether the use was by way of "courtesy" and exercised by local inhabitants [who were simply employees or tenants of the landowners] or by the "public at large" is another story.

In turn, these ancient accommodation roads were erroneously regarded as "RUPPs" = Road used as a Public Path; in the absence of any investigation as to their true status many of these have now been automatically elevated to "Restricted Byway" meaning legally available for use by **non-motorised wheeled** traffic, horseriding, pedal cycling and walkers, when the more likely probability was the "intention" to record any green lane/Accommodation road which was "used as a footpath or a bridleway" by the general public given it was a disused *driftway.*

To add insult to injury, the records show the deficiency in the NPACA 1949 - landowners were not notified of the claims or even the latest legislative changes, but once again the burden of proof has been shifted in that landowners have to *prove a negative* if they claim that the only rights which could exist were those of Footpath – or Bridleway. Not vehicles.

All in all the intention of The Hobhouse Committee and Parliament went seriously *adrift* and Parliament has made several efforts to correct that ever since [*viz* - Countryside Act 1968; The Wildlife and Countryside Act 1981 – which did and does provide the legal mechanism to correct mistakes and delete paths recorded in error. Other legislation has followed.]

In summary - the proposals set out in the Land Usage section of the Deregulation Bill are singularly focused on saving money – but if invoked will create even more local chaos, confusion and further burden the local taxpayers who are already experiencing the effect of Government cuts. A straw which would seriously affect the "camel's back."

Public Rights of Access were carefully and legally addressed by the Hobhouse Committee and Lord Justice Scott in 1947 - it is clear their intentions have been diluted, even hijacked.

Saving money and using "sticking plaster" in various Acts is not the answer - major Reform is.

M.P. Masters - 12 September 2013.