GLEAM

Green Lanes Environmental Action Movement
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A NEWSLETTER for those interested in protecting ancient ways from the ravages of use by motorised recreational vehicles.
AUTUMN 2010

Encouraging Developments in the Yorkshire Dales

Michael Bartholomew, *Chairman of the Yorkshire Dales Green Lanes Alliance, explains how successive developments in the Dales have gone our way.*

The Dales landscape is unusual in having so many of its key rights of way in the form of green lanes. Grassy tracks, bordered by dry stone walls, winding across the fells, are emblems of the Dales. (They are so evocative of the Dales that Taylor's Yorkshire Tea uses a picture of one in its advertising material.) If you think of the Dales, you think of Mastiles Lane, Foxup Road, Arncliffe Cote, etc, etc; ancient green lanes that cross the fells from dale to dale.

The NERC Act 2006 gave National Park Authorities the power to impose Traffic Regulation Orders (TROs) on green lanes. As soon as the Act came into force, the Yorkshire Dales National Park Authority, to its great credit, began to exercise its new powers. After exhaustive surveys of the routes, and a scrupulous public consultation, it imposed orders on ten of the most fragile of the lanes. Notably, it did not impose them on grounds of the damage that 4x4s and motorbikes had done to the lanes, even though it was clear that long sections of some of the lanes had been turned into impassable morasses. If orders are imposed on grounds of damage, they are open to the swift rejoinder from 4x4 and motorbike users; 'Get on and repair the damage and re-open the lanes, so that we can continue our activities.' The Authority imposed its orders on grounds of the preservation of the amenity of non-motorised users, and of the protection of the national park's special qualities, among which 'peace and tranquillity' is especially valued.

Horseriders enjoying Gorbeck Road during the period when the first TRO was in force. In the foreground, the ruts left by 4 x 4s and motorbikes can be seen but they are steadily healing.

However, in exercising its powers, the Park Authority failed publicly to document its compliance with Section 122 of the Road Traffic Regulation Act 1984. This lays on authorities the duty to keep their ways open to legal users, unless there are special circumstances. This lapse gave the vehicle users an opening: they took the authority to the High Court, and won. The authority argued that compliance with section 122 was implicit in the whole process of making the orders; but the judge held that the documentation was missing. He quashed a specimen quartet of these orders. The litigants, understandably, were jubilant. But they did not have the last laugh.

First, the 'Winchester' judgment came over the hill, like the Seventh Cavalry, to nullify pending BOAT applications on several of the 10 green lanes in question. Secondly, the authority's investigations of the historic rights on the 4 lanes whose TROs were quashed showed that one was a bridleway, and two had only short, dead-end sections of vehicular rights along their length. Only one, Gorbeck Road, is indisputably a BOAT. Again to its great credit, far from retiring permanently from the fray following its defeat in the High Court, the Park Authority began, all over again, the process of surveying the route and conducting a public consultation on the desirability of imposing a TRO on Gorbeck Road.

This time, the Authority made sure to document its compliance with Section 122. The result of this second attempt to use the powers conferred on it by the NERC Act, was a fresh TRO prohibiting recreational vehicles from the route.

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Gorbeck Road is part of the new Pennine Bridleway. The Park Authority has spent a great deal of money repairing the damage inflicted by motorbikes and 4x4s, and making the route accessible, once again, to equestrians, mountain bikers and walkers – and of course to the local farmers who need the track to take fodder to their sheep during the winter. Gorbeck has a spur track that links across to another fine green lane called Stockdale Lane. The two connected lanes had been designated as the 'Settle Loop' of the Pennine Bridleway, and offered a superb day's expedition on horseback, on a mountain bike, or on foot. Unfortunately, Stockdale Lane, which is a definitive bridleway, has had the dreary cloud of a BOAT application hanging over it for years. The application, from a TRF member, beat the cut-off date set by NERC and therefore had to be investigated to a conclusion. The authority's finding was that no vehicular rights could be established, but the applicant did not accept this finding. He exercised his right to appeal to the Secretary of State. Meanwhile, off-roaders regularly motored along the route, hoping to escape prosecution by pointing to the BOAT application that was pending. The appeal dragged on for two years, but eventually was withdrawn. We do not know the reasons for its withdrawal, but it is reasonable to suppose that the lack of records of vehicular rights, coupled with the Winchester judgment, persuaded the applicant that his appeal would fail.

What happened when off-roaders won their Pyrric victory in the High Court and began using the route once again. With the imposition of a re-made order, this damage too will have a chance to heal.

Overall, then, the number of routes in the Dales open to recreational vehicle users has been substantially reduced. This reduction has been the result of the commitment of the Park Authority to the conservation of the landscapes in its charge, and its determination to use the powers conferred on it by the NERC Act.

Other authorities please take note: the Yorkshire Dales National Park Authority has hammered out a template for producing orders that will keep green lanes free from the blight of motorbikes and 4x4s. TRO-making powers are there to be used!

Lastly, although these welcome changes are ultimately due to the work of the Park Authority, the Yorkshire Dales Green Lanes Alliance can claim to have mobilised the general public's dislike of off-road vehicle use in the Dales. Looking wider, in areas where Authorities are too timid, or too lackadaisical, to tackle their green lane problems, sharply-focussed public campaigns, directed at particular green lanes, such as the campaign for The Ridgeway, can produce gratifying results.

Winchester + NERCA; can Coniston Old Man R.I.P?

by Graham Plumbe (Hon Adviser to GLEAM; Vice Chairman GLPG)

Who can fail to enjoy the **Lake District** and the walk to Coniston Old Man? Who can fail to resent noisy 4x4s or motorbikes ruining the tranquillity? The well known bridleway pass from Coniston to Seathwaite known as Walna Scar has been hammered by motorbikes since 1917 when they started hill climbing. NERCA was to provide potential salvation by extinguishing unrecorded rights for motor vehicles. An exemption however arises if vehicular rights can be shown to have been created before December 1930 by regular use in motor vehicles before that date. A BOAT claim was lodged by Alan Kind for the TRF in September 2005 which was too late for pre-cut off exemption but relied instead on the historic records of hill climbing in the 1920s. The National Park as highway authority decided that vehicular rights existed historically and these had not therefore been created by MPVs. A restricted byway order was therefore made. This went to inquiry and the inspector decided to modify the order to BOAT status. GLPG took up the challenge and made copious representations backed by extensive evidence that quarry and other traffic in carts created public vehicular rights, and that the hill climbing was in any case insufficient to do so. Rights for motor vehicles had therefore been extinguished. In one of the most perverse and legally misguided decisions on record the inspector confirmed BOAT status.

Walna Scar Pass is of national importance but none of the four landowners had sufficient conviction to brave the financial risks of an appeal. One of GLEAM's Honorary Advisers - James Pavey of Knights Solicitors - addresses elsewhere the difficulties of legal challenge. GLPG has no standing to lodge appeals in the High Court and has little in the way of funds.

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Although the appeal prospects were regarded as good, instruction of Counsel for an opinion simply to persuade owners to shoulder the risk involved an expense which might not be recoverable. An appeal was therefore lodged personally. Nine grounds were identified, seven of them being elementary errors of law including perverse treatment of the evidence. The eighth however was on procedure in that the final submission for the TRF, containing a number of misleading statements, had not been circulated to the objectors. Thus the opportunity for asking "to be heard" was lost, which was important given the extent of reliance on that submission by the inspector. The Planning Inspectorate (PINS) apologised, but it was too late. James was instructed and presented the claim to PINS who helpfully agreed to support a High Court order quashing the decision. The appeal was made and endorsed by the court on 20 August, with costs against Defra. Although this means that a new RB order has to be made, and has to run the gauntlet of objections, GLPG is very confident of success finally. Meanwhile the way reverts to being a bridleway, and it is once again an offence to drive on it. Progress is unfortunately now under threat by Government cuts which may affect definitive map modification orders. Against that is the public pressure from media attention and the problem of enforcement, particularly as the true extent of the grounds of appeal is being misunderstood by off-roaders.

When we first reported this case, mention was made of using the "public nuisance" argument given that dedication cannot arise from criminal activity. This was the ninth ground of appeal. The inspector, in the context of "notoriety" as a factor in MPV dedication, had found on the TRF's own evidence that hill climbing made a dreadful noise, of which the whole area must have been aware. When this was quoted by GLPG at the next stage as being a clear declaration of nuisance, the inspector did a complete U-turn and speculated that the noise would have been drowned out by quarry noise, of which there had been no evidence at all. So much for impartiality! The point of law however was whether it is necessary to prove that there had been complaint in the 1920s. This question was ignored altogether by the inspector and remains open to debate.

Meanwhile, war is being waged on another fell pass - Garburn Pass from Troutbeck to Kentmere - where another BOAT claim is based on hill climbing in the 1920s. Watch this space.

Winchester

The string of successes resulting from this appeal judgment continues to grow longer. Readers of "Byway and Bridleway" will have noted the number of decisions around the country where Winchester has prevailed. Many have yet to come. For two years, **Dorset CC** has refused to accept that a 1:50,000 map blown up on computer is not the same thing as a map "drawn to a scale of not less than 1:25,000" which is what NERCA requires for exempting BOAT claims. Sanity has at long last prevailed following a high level meeting with legal officers, and 12 claims are expected now to bite the dust.

In the **Yorkshire Dales**, Winchester has defeated a number of claims. Three were on routes where traffic regulation orders fell foul of the law as seen by LARA whose temporary victory in the High Court was Pyrrhic. More on that from Mike Bartholomew. In **Warwickshire**, we previously reported that an inspector thought she could introduce points of law herself and, without consulting the parties, decided without apparently reading the Act that one of the NERCA exemptions applied. GLPG advised the landowners to appeal and PINS apologised for the error. The order was quashed by consent, with costs against Defra. A new order was made, this time for a restricted byway, and the TRF objected, simply on the basis that grounds might be found for overturning Winchester. PINS would have nothing of it and the RB order was confirmed under a little used provision whereby no inquiry is required if the inspector is of the view that none of the objections are relevant.

In **Northumberland**, an inspector failed to understand the procedural rules and refused to admit arguments, identified by GLPG and advanced by the Council, as to the effect of Winchester. He chose instead to apply the law himself and went sadly wrong. PINS again graciously apologised for the error and the order was quashed by consent with costs against Defra. Start again. What a waste of time! In **Hampshire**, 21 BOAT claims fell foul of Winchester as soon as the ink was dry in 2008. One (at least) was appealed to the Secretary of State who rejected it. The fun now begins with a 1988 diversion order that was unlawful, but MPV rights have gone.

In **Lincolnshire**, we have been told of four parishes afflicted by BOAT claims/orders. The County Council has been very receptive to the extensive help given as to both the Winchester and Maroudas judgments. With the help of a GLEAM team, the whiskered claim reported in our last newsletter, made 20 years ago by a parish council and since regretted, resulted in a restricted byway interim decision in

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May this year. In August another was finalised as a restricted byway after an interim success in November 2009 resulting from an attack by a GLEAM member.

Where is GONE going?

Several members have experienced long delays at the hands of the Secretary of State aka Government Office for the North East (GONE) aka NATROW. They handle appeals against rejection of claims by Councils, with decisions (based in most cases on inspector reports) commonly taking two years or more and with confusion as to what GONE can look at in terms of evidence. GLPG has been pressing Defra for clarification of both issues, and two Parliamentary Questions last year addressed delay. A meeting between Defra and GONE took place and we were assured of improvement and of clearer guidance. In fact, their Head of Statutory Casework, Geri Christie, has only been in place since November 2009 and assures us that the backlog which she inherited is now reducing.

Recent statements assert that GONE have received legal advice and their policy is unchanged. They will only take into account evidence that was available to the Council when the decision to reject was taken. The Act requires a decision by GONE as to whether an order "should be made" which is being interpreted by Defra as "should have been made". This means that in cases where new evidence has come to light it is disregarded and in some cases GONE's decisions will as a result be at best meaningless and at worst known to be wrong. Apart from an incredible waste of time, that perhaps matters little, because if GONE direct the making of an order all the evidence will then come out. If they reject the appeal a new application can be made. The argument against looking at new evidence is that this would effectively be rehearsing the inquiry process. So what? It still leads only to a trigger for the full process and may offer a much better interim decision.

An important aspect of all this is whether law changes post-determination should be taken into account. That includes not only radical changes like NERCA itself, but also important case law such as **Winchester** and **Maroudas**. Policy currently is to "apply the new law accordingly from [the point when it is made public] forward". Thus, new evidence is disregarded but new law is not. We have pointed out that such ambivalence means that the new law may be applied without knowledge of facts that may not have been relevant at the time. A shining example of that is the procedural detail of applications on which depends compliance for Winchester purposes. Inspectors have been floundering on this with some peculiar results. So too have the front office at GONE, which carries through to the public.

Not surprisingly Ms Christie herself has asked for further guidance on law and process. We patiently await the outcome.

List of Streets (LoS)

NERCA provides for exemption from extinguishment of unrecorded motor vehicular rights where the way is NOT on the Definitive Map but IS on the LoS - ie as being public maintainable but without authority as to rights. Such Lists are a haphazard concoction of records, based on statutory requirement as to content but without any form of statutory process for consulting or compiling. The question has arisen in a number of cases as to whether Lists that fail to meet the content requirement serve to provide exemption under NERCA. A complex case known as **Fortune and others v Wiltshire CC** included this as one of many issues and was heard in or before September 2009. Draft judgment extending to over 230 pages was issued in May 2010 subject to comment from the parties. Final handing down was postponed and is now expected in the "autumn" of this year. This must surely be a candidate for the Guinness Book of Records. Many people are watching this space.

In **Leicestershire**, as part of a longer route, NERCA destroyed over a full 2 metres - yes, two metres - the right to drive to church. The way was on the LoS but not legally so and in any case as a privately maintainable way. It is not ungodly to suggest that a prescriptive easement can be relied on in that case, but GLPG cannot let slip a clear error of law by an inspector who found in favour of BOAT status. Just think of the precedent. The revised decision is awaited. The second **Lincolnshire** case referred to above also involved LoS argument.

NERCA and Winchester march on, hand in hand.

WHICH WAY TO THE HIGH COURT: STATUTORY APPLICATION OR JUDICIAL REVIEW?

By James Pavey, Partner, Knights Solicitors

In practice, there is often confusion as to when it is appropriate to challenge a decision relating to rights of way by judicial review proceedings and when an application under the Wildlife and Countryside Act 1981 should be made. Both forms of proceedings are heard by the Administrative Court (part of the High Court) and the grounds of challenge are similar. This article briefly examines and explains which is appropriate in which circumstances and the procedural differences between them.

Schedule 15 Wildlife and Countryside Act (WCA) 1981 or Judicial Review?

Schedule 15, paragraph 12 WCA 1981 provides a right to challenge a Definitive Map Modification Order (DMMO) which has been confirmed by an Inspector, typically after an inquiry into objections to that DMMO as made by a surveying authority. The DMMO, as confirmed, can be challenged on two bases - that:

- It was not properly made within the powers laid down in the statute - for example, because there was a mistake in applying the law on dedication, such that no right of way could have arisen.
- There was a procedural failure – for example, notice was not properly given to landholders.

If it is satisfied that the DMMO was not properly made or, in the case of a procedural failure, that the failure caused substantial prejudice, the Administrative Court can quash (ie, overturn) the DMMO. It is important to note that it is the DMMO that is quashed, not the Order Decision of the Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs. So, the effect of quashing is to return the matter to the surveying authority to re-consider, not to return it to the Inspector to consider at a further inquiry.

Judicial review is the appropriate means of challenge in other circumstances, principally where:

- A surveying authority has decided not to make a DMMO; the applicant has appealed to the Secretary of State under Schedule 14 WCA 1981; and the Secretary of State has decided not to direct the surveying authority to make a DMMO.
- A surveying authority has made a DMMO to which there is an objection; an Inspector appointed by the Secretary of State considers whether to confirm the DMMO at an inquiry; and the Inspector decides not to confirm the DMMO.

In both cases, the proceedings will be brought against the Secretary of State.

The Administrative Court will usually wish to be satisfied that the applicant has exhausted all rights of appeal before applying for judicial review. So, if a surveying authority made a DMMO on the basis of a legal error, the normal route of challenge would be to object to the DMMO, which would lead to an inquiry before an Inspector. It would not be normal to commence judicial review proceedings against the surveying authority.

An exception to this rule might be where there is an important point of law on which the High Court's decision is sought. So, for example, in the Winchester case, the claimants judicially reviewed Hampshire County Council's decision that it would make DMMOs based on a misunderstanding of the Natural Environment and Rural Communities Act 2006, before it had actually made those DMMOs.

It is also important to recognise that a judicial review claim is neither an appeal nor an opportunity to re-visit all the evidence before the surveying authority or Secretary of State. Rather, it is a more limited exercise in scrutinising whether there were any legal errors in the decision and/or whether it was made reasonably, in the sense that it was not wholly illogical.

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Time limits

Judicial review proceedings must be commenced promptly and, in any event, within three months of the decision or act challenged. Although the Court is usually strict about the three-month time limit, it does have a discretion to hear proceedings that are started after three months of the date of the decision or act.

An application under Schedule 15, paragraph 12 WCA 1981 must be made within 42 days of the publication of the notice of the decision by the Secretary of State's Inspector. By contrast with judicial review proceedings, the Court has no discretion to extend that 42-day time limit.

Who may bring a claim?

To bring a judicial review claim, it is necessary to have a "sufficient interest" in the matter to which the claim relates. The High Court interprets this widely.

Any "person aggrieved" by the DMMO may make an application under Schedule 15, paragraph 12 WCA 1981. Again, this is interpreted widely.

Procedural differences

There are key procedural differences between the two different routes to the Administrative Court.

In judicial review proceedings, interested parties (ie, third parties who are affected) must be identified and notified in the correspondence that precedes the claim; and the claim form must be served on them. There is no such requirement in an application under Schedule 15, paragraph 12 WCA 1981.

Further, in judicial review proceedings it is necessary to file a detailed statement of the case and a witness statement and documents at the Court at the same time as the claim form. By contrast, the witness statement and documents and any statement of case may be filed up to 14 days after the claim form in an application under Schedule 15, paragraph 12 WCA 1981. Given the limited time available to commence the claim (42 days), those additional 14 days may be helpful to the applicant.

Lastly, judicial review proceedings comprise a two-stage process: applicants require permission of the Court to proceed to a full hearing. (This permission stage enables the Court to filter out claims that lack merit.) A High Court Judge will consider the judicial review claim form and its accompanying documents, as well as any response from the defendant and interested parties, to decide whether to grant permission. (This will be a paper-based exercise and will not require a hearing.) If the Judge refuses permission, the applicant may then ask for a hearing to explain to the Court why permission should be granted. Only after permission has been granted can the claim proceed to be considered at a full hearing.

By contrast, there is no requirement to satisfy the Court that permission is required for an application under Schedule 15, paragraph 12 WCA 1981. Once an application has been commenced, it will proceed to a full hearing.

Do the differences matter?

The differences outlined above are, in certain cases, more than just a matter of form. For example, the Court has no discretion to consider an application under Schedule 15, paragraph 12 WCA 1981 brought outside the 42-day time limit – and nothing short of legislation by Parliament would enable it to do so.

Other differences are formal: for example, what documents must accompany the claim form. There are, nevertheless, good reasons to appreciate these differences. For example, the Court may not accept the application under Schedule 15, paragraph 12 WCA 1981 if it has been made on the wrong claim form – and, if it is made late in the 42-day period, there may not be time to correct the error.

James Pavey is a Partner of Knights Solicitors and an Honorary Legal Adviser to GLEAM. His property litigation practice includes advice and representation in relation to public rights of way, public access and towns and village greens. He has acted in a number of reported judicial review cases and in statutory appeals. He can be contacted on 01892 537311.

Friends at Court – or in the Government

GLEAM is extremely fortunate in two of the ministerial appointments in the new Government. Both appointments are as Ministers of State within Defra, and both are long-standing Honorary Members and staunch supporters of GLEAM, to whom they are very well known.

Jim Paice (MP for South-East Cambridgeshire) has been appointed Minister of State for Agriculture and Food. During the Natural Environment and Rural Communities (NERC) Bill in 2005-06 he was GLEAM's and GLPG's main contact in the Commons. His presentation of our case and his demolition of LARA and the Trail Riders Fellowship were masterly.

Richard Benyon (MP for Newbury, GLEAM's 'home territory') has been appointed Minister of State for the Natural Environment and Fisheries. Access and Rights of Way are part of his portfolio. He is a most valuable source of parliamentary advice, and he regularly attends GLEAM's Annual General Meeting in Newbury. At present we are in active contact with him in opposing LARA and TRF's campaign to get s67 NERC Act repealed.

GLEAM counters LARA Campaign

During June LARA (the Land Access and Recreational Association), the umbrella organisation for all the off-roading clubs, launched a campaign among its members to repeal Section 67 of the Natural Environment and Rural Communities (NERC) Act 2006. This was in response to a quasi-Government invitation.

Section 67 is closely linked with all the other sections in Part 6 of the NERC Act and, to repeal it, it would be necessary to repeal the whole of Part 6. This area of the Act was introduced by Alun Michael in 2003 in response to widespread public concern. This was not just about mechanically propelled vehicles damaging the countryside environment, and about the dangers of confrontation. It was mainly about the archaic law (described by Defra as "perverse") under which utilitarian use by horse and cart in earlier centuries was giving rise to "rights" to use the same green lanes by high-powered 4x4s, motorbikes and even articulated lorries.

Section 67 is the key section of Part 6. It has deterred an estimated 3,000-4,000 claims for byway status from being made. Hence it is not surprising that the off-roaders want to see it repealed.

LARA's campaign followed the Deputy Prime Minister Nick Clegg's suggestion that members of the public should write to their MP suggesting unnecessary legislation that should be repealed. LARA urged their members to do this, addressing what they called "unintended consequences" of the Countryside and Rights of Way Act 2000 and the NERC Act, such as:

- Cul-de-sac byways.
- Homes with no vehicular access.
- Loss of amenity.
- Loss of heritage and history.
- Unsustainable routes open to motorists without proportionate regulation.
- Sustainable routes closed to motorists.
- Increased workload for highway authorities.
- Injustice.

The Trail Riders Fellowship (TRF, members of LARA) then added to the campaign by calling for the repeal of Section 59 Police Reform Act 2002.

As soon as we learned of this campaign, GLEAM countered it at ministerial level. We wrote to Richard Benyon MP, a long-standing Honorary Member and staunch supporter of GLEAM, who is now Minister of State for the Natural Environment and Fisheries, and who includes Rights of Way in his portfolio. We countered each one of LARA's campaign points in detail, on grounds that it was either environmentally undesirable, or unworkable, or irrelevant, or would be retrospectively ineffective. In this way, when Mr Benyon had letters passed to him by MPs or by the Deputy Prime Minister, he would have the answers readily available to him.

We received an e-mail of thanks back from Mr Benyon in which he said "I have sent your thoughts on to Officials. Don't worry, s67 is safe with me."

Requests for Advice from GLEAM

As you may have seen from our Membership Application Form or from our website, GLEAM cannot undertake an advisory service in individual cases, but introductions can be made, if requested, to recommended specialist professional advisers.

While GLEAM has become the leading organisation for protecting Green Lanes from damage, there are very few of us who have the necessary knowledge of the law to give authoritative advice. None of us are professionals in this field. We all work on a voluntary and unpaid basis, we all have other work to do, and GLEAM's subscriptions only cover administration costs. If we are overburdened with long, complicated and repeated requests for advice, accompanied by volumes of documents to be read and digested, we cannot promptly give the range of help that we would wish.

GLEAM works very closely with the Green Lanes Protection Group (founded by GLEAM) which is an alliance of some 21 organisations and whose aim is to resist any increase in motor vehicular rights in the countryside. GLEAM shares its website with GLPG and benefits from the extensive reports and guidance which GLPG has contributed. The same difficulty of overburden does however apply to becoming involved in individual cases.

Of our three Honorary Advisers, two are practising solicitors who specialise in the Rights of Way field and can give excellent advice. To use them on a free-of-charge basis we would only pass general questions on to them. For anything more we would only pass on enquiries on a professional instruction basis, for which they would charge their normal fees. Non-professional advice based simply on extensive working knowledge is also available from us, but there is a limit to what can be offered.

We would therefore ask members, whose requests for advice are welcome, to respect the limitations of the service that we are able to provide free of charge, and to make your requests as succinct as possible.

David Gardiner

GLEAM aims to protect public paths from wanton and illegal damage.
If you would like more information or wish to assist please write to:
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