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# Rights of Way Circular (1/09)

## Guidance for Local Authorities

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## **1. Introduction**

1.1 The information contained in this circular is applicable only within England.

1.2 This circular gives advice to local authorities on recording, managing and maintaining, protecting and changing public rights of way. It replaces previous advice and guidance in circulars: 1/08, 2/93, 3/93, 17/90, 18/90, 32/81, which are now no longer valid.

1.3 At all points in the delivery of the rights of way service within the area for which they are responsible, authorities should be aware of the obligations placed upon them by the Disability Discrimination Act 1995 (as amended by the Disability Discrimination Act 2005).

1.4 England's extensive network of public rights of way is a unique and valuable resource, which provides the opportunity to experience the immense variety of English landscape and the settlements within it. Rights of way are both a significant part of our heritage and a major recreational and transport resource. They enable people to get away from roads used mainly by motor vehicles and enjoy the beauty and tranquillity of large parts of the countryside to which they would not otherwise have access. Rights of way provide for various forms of sustainable transport and can play a significant part in reducing traffic congestion and harmful emissions. They are becoming more important as increases in the volume and speed of traffic are turning many once-quiet country roads into unpleasant and sometimes dangerous places for cyclists, equestrians, walkers and carriage drivers.

1.5 In many areas, rights of way help to boost tourism and contribute to rural economies. They can also provide a convenient means of travelling, particularly for short journeys, in both rural and urban areas. They are important in the daily lives of many people who use them for fresh air and exercise on bicycle, on foot, on horseback or in a horse-drawn vehicle, to walk the dog, to improve their fitness, or to visit local shops and other facilities. Local authorities should regard public rights of way as an integral part of the complex of recreational and transport facilities within their area.

1.6 This advice and guidance sets out Defra's policy on public rights of way and its view of the law. It does not take the place of the legislation, but seeks to give an overview of it within a policy context.

### ***Further information***

1.7 Throughout this guidance, references are made to other guidance and publications and, where these are available online, hyperlinks are provided. A list of additional sources of information is set out in Annex C.

## ***Local authority resourcing***

1.8 The content of this circular does not place any extra obligations on local authorities and therefore in itself has no further implications for additional manpower or increased expenditure. Funding for rights of way functions, including additional burdens imposed through the Countryside and Rights of Way Act 2000, is provided through the revenue support grant. Authorities should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way, and that the rights of way network is in a fit condition for those who wish to use it.

## **Acts**

1.9 The relevant Acts are referenced in the remainder of this document as follows:

- The 1949 Act means the National Parks and Access to the Countryside Act 1949
- The 1968 Act means the Countryside Act 1968
- The 1980 Act means the Highways Act 1980
- The 1981 Act means the Wildlife and Countryside Act 1981
- The 1990 Act means the Town and Country Planning Act 1990
- The 2000 Act means the Countryside and Rights of Way Act 2000
- The 2004 Act means the Highways (Obstruction by Body Corporate) Act 2004
- The 2006 Act means the Natural Environment and Rural Communities Act 2006
- DDA means the Disability Discrimination Act 1995 as amended by the Disability Discrimination Act 2005

## ***Responsible bodies***

1.10 The responsibilities of relevant bodies are defined as follows:

- Surveying authority: Where there are two tiers of authority, the county council is the surveying authority. Unitary authorities are the surveying authorities for their areas. Surveying authorities are responsible for the definitive map and statement.
- Local highway authority: Where there are two tiers of authority, the county council is the local highway authority. Unitary authorities are the local highway authorities for their areas. Broadly, local highway authorities are responsible for the management and maintenance of the rights of way network. A national park authority or a district council may take over the rights of way functions from highway authorities by agreement.

- Local planning authority: In National Parks, the national park authority is the local planning authority. Where there are two tiers of authority, the district council is the local planning authority, although for some matters, such as mineral working, the county council is the planning authority. Unitary authorities are the local planning authorities for their areas. Local planning authorities are responsible, amongst other things, for development control.

Parish council includes town council and parish meeting.

- The Secretary of State for Environment, Food and Rural Affairs: The Government Minister responsible for all matters relating to public rights of way.

## **2. Information about the network**

2.1 Local authorities should aim to provide the public with information on the full range of choices available for enjoying the rights of way network itself and the many other publicly accessible routes, such as permissive paths, and public open space such as commons, woodlands and parks. Information should be accessible, comprehensive and well promoted and it should be a key element in rights of way improvement plans. Authorities will tailor their publicity planning to local needs, opportunities and constraints but imaginative schemes already in place in the country include production of walking, riding and cycling leaflets, offering guided walks and rides, organising or participating in festivals and making information available on a website that shows the availability of public rights of way and their relationship to other areas of publicly accessible land. Publicity also provides an opportunity to promote understanding of the countryside and of environmental concerns.

### ***Definitive maps and statements***

2.2 Definitive maps and statements are documentary records of public rights of way. They indicate where the public may lawfully walk, ride or drive. Section 56 of the 1981 Act makes it explicit that the definitive map and statement, taken together, are legally conclusive evidence of the existence of the highways of the description shown and of the rights and limitations existing over those highways at the relevant date assigned to each definitive map, unless there is a subsequently confirmed legal order amending those rights. Any such legal order will, in turn, duly be reflected in the subsequent amendment of the definitive map and statement. The relevant date is the specified point in time at which definitive maps and statements, following their original production, review or consolidation, represent the legally established rights of way unless they have been amended by order. If they have been amended by order then the relevant date applicable to the particular way(s) affected by the order is defined within that order. Because there may be other public rights of way which are not recorded on the definitive map and statement, or higher rights which are not recorded over ways which are currently recorded on the definitive map and statement with lower rights, the evidential effect of the map is without prejudice as to whether the public has, at the relevant date, any right of way other than the rights recorded. This proviso protects other rights, where they exist, against the conclusive evidential effect of the definitive map.

2.3 Authorities must make copies of their definitive map and statement and modification orders available for public inspection at one or more places within each district in their area, usually at the offices of the district council or county council, and within each parish where there are offices or other places where the public can inspect them. The copies deposited with a parish or district need only cover the area relevant to that parish or district. Authorities are required to keep at least one copy of previous maps and statements together with the orders modifying them available for public inspection. Authorities may also make working copies of their definitive map available for public inspection. Authorities are also required to bring

to the attention of the public the fact that copies of definitive maps and statements and orders are available for inspection.

2.4 [Guidance](#)<sup>1</sup> and advice on providing copies of Ordnance Survey mapping for public rights of way purposes has been provided by the Ordnance Survey and the Improvement and Development Agency.

### **Registers**

2.5 Local authorities are required to establish and maintain two public registers. In each case the register must be published on the authority's website and a paper copy must be made freely available to the public at the authority's principal office free of charge.

2.6 Section 53B of the 1981 Act requires surveying authorities to keep a register of applications for definitive map modification orders. The statutory requirements for registers are set out in regulations, but authorities need not be constrained by the regulations and if they wish to record additional information they are encouraged to do so. Further information and guidance from Defra is [available](#)<sup>2</sup>

2.7 Section 31A of the 1980 Act requires authorities (the relevant county, metropolitan or London borough council) to set up a register containing information with respect to declarations lodged and maps and statements deposited under section 31(6) of the 1980 Act. Such declarations and deposits enable landowners formally to acknowledge the rights of way across their land and, in doing so, create a presumption that they have no intention to dedicate any further routes across their land. Further information and guidance is [available](#)<sup>3</sup>

### **Finding the way on the ground**

2.8 Ordnance Survey maps include public rights of way and so are important tools for the public in using the network. It is in everyone's interest that these maps accurately reflect the public's rights and on completion of any orders the surveying authority are required to submit the relevant information to the Ordnance Survey as described in paragraphs 4.29 and 5.59.

2.9 Local highway authorities are responsible for erecting and maintaining way marks, fingerposts and other signs. Signs should conform to the Department for Transport [regulations](#)<sup>4</sup> except that the use of the colour Victoria Plum (dark purple) should be used on waymarks indicating the route on restricted byways as described in Natural England's [guidance](#)<sup>5</sup>.

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<sup>1</sup> Access to Public Rights of Way Information in England and Wales : OS & IDEA 2008

<sup>2</sup> Register of definitive map modification order applications. Guidance for English surveying authorities to accompany Statutory Instrument 2005 no 2461 : Defra 2005

<sup>3</sup> Register of Highway Act Declarations, Statement and Maps. Guidance for English local authorities to accompany Statutory Instrument 2007/2334 : Defra 2007

<sup>4</sup> Traffic Signs Regulations and General Directions (S.I. 2002/3113)

<sup>5</sup> Waymarking public rights of way : Natural England 2008

2.10 Section 27 of the 1968 Act (as amended) requires authorities to signpost footpaths, bridleways, restricted byways and byways open to all traffic where they leave metalled roads and, where it is considered necessary, to assist anyone unfamiliar with the locality to follow the line of the path or way. A (metalled) road is taken to be any highway and any other road to which the public has access and therefore includes (metalled) rights of way. Authorities need not erect signposts at the junction of a way with a metalled road where the parish council agrees that it is not necessary.

2.11 The term “signpost” also includes other signs such as a painted waymark. Signposting and waymarking of public rights of way are of considerable benefit to path users and also assist landowners by helping to prevent trespass. Authorities should ensure that members of the public are provided with sufficient information, by means of appropriate signs or notices, particularly at path junctions, to enable them to use the local rights of way network. This is especially important where paths have been altered by means of statutory orders since the most recent version of publicly available maps, such as Ordnance Survey, was published.

2.12 The owner or occupier of the land crossed by a right of way must always be consulted before any sign is erected and their consent must be obtained if the sign is to be placed on his or her property. In the majority of cases a signpost at the point where a right of way leaves a metalled road will be installed in a roadside verge or footway that is in the ownership of the highway authority and therefore most of the cases where the duty to obtain consent will apply are those where waymarks are installed to guide the public along the correct route.

### **3. Liaising with the public**

#### ***Local Access Forums***

3.1 Section 94 of the 2000 Act places a duty on local highway authorities and national park authorities to establish Local Access Forums to advise on public access to land for any lawful purpose and outdoor recreation, including public rights of way and the right of access to open country. London borough councils are not required to establish Local Access Forums but may resolve to do so.

3.2 Membership of Local Access Forums includes users of rights of way and the right of access to open country, landowners and occupiers, together with any other interests especially relevant to the area. Local Access Forums should focus on those issues that are most relevant to their own area, considering issues at the strategic level, taking care to direct advice to the most appropriate recipients and adopting a proactive approach. Authorities must have regard to Forums' views in reaching decisions on access and public rights of way issues. Further information on Local Access Forums is [available](#)<sup>6</sup>

3.3 Natural England has published a handbook for all Local Access Forum members in England. In addition to including guidance about the general practicalities of running a Local Access Forum, it contains key facts and useful information about all aspects of access. Further information is available in [the LAF handbook](#).<sup>7</sup>

#### ***Informing individuals and other groups***

3.4 To complement Local Access Forums' strategic rôle, authorities may wish to establish, or maintain, liaison groups that, like Local Access Forums, draw together the representatives of all interests in the rights of way network. In those areas where changes to the network are needed to ensure that it is better suited to the needs of users, or to help the efficient use of land for agriculture or protect wildlife, liaison groups can also play a valuable rôle in helping to define proposals and in ensuring that they represent the best possible balance between, and confer the greatest mutual benefit to, all interests. The more detailed scrutiny that liaison groups can give to rights of way proposals is a valuable adjunct to the work of Local Access Forums and many Local Access Forums have sub-groups to perform this type of function.

3.5 Authorities must also notify any person or groups who require them to do so of orders made over a given period proposing to add to or amend the definitive map and statement or to change the network. This requirement may apply to every order made by the authority or orders of a particular description and may relate to the whole or any part of their area. Authorities may make a reasonable charge for doing so.

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<sup>6</sup> Guidance on Local Access Forums in England : Defra 2007

<sup>7</sup> Handbook for LAF members : Natural England 2008

## ***Wardens***

3.6 The countryside serves many purposes, as workplace and home as well as a place for recreation. Local authorities have powers to appoint wardens, both within the countryside generally and, by virtue of section 62 of the 1981 Act, to act on public rights of way. Wardens can help, advise and assist members of the public on the use of rights of way. They can also guard against thoughtless and irresponsible behaviour which can sour relationships between landowners and rights of way users.

## 4. Recording the network

### *The definitive map and statement*

4.1 Surveying authorities are responsible for definitive maps and statements. They have a duty to keep them as up to date as possible, referring to all of the available evidence in order to maintain an authoritative map and statement of the highest attainable accuracy. Authorities should give priority to producing an up to date map and statement on which all public rights of way are recorded and which covers all of the area for which they are currently responsible.

4.2 Section 53 of the 1981 Act requires authorities to keep their definitive maps and statements under continuous review and to modify them by way of orders where they are shown to be wrong or incomplete. The starting point is the definitive map and statement for a particular area as defined in section 53(1) and may be:

- the latest definitive map and statement following the completion of a review carried out under section 33 of the 1949 Act as originally enacted or as amended by the 1968 Act; or
- where no review took place, or the first review was abandoned under the provisions of section 55 of the 1981 Act, the original definitive map and statement prepared under section 32 of the 1949 Act; or
- for those former county boroughs and other excluded areas for which the survey provisions were never adopted or for areas where a survey was begun, but abandoned, the map and statement prepared under section 55(3) of the 1981 Act.

until replaced by a modified map and statement prepared in accordance with the provisions of section 57(3). Section 57(3) of the 1981 Act enables authorities to consolidate modification orders into a new map and statement. Section 57A enables authorities to prepare a consolidated map for the whole of the area for which they are currently responsible. The relevant date of a new map and statement should be not more than six months before the date on which it is prepared, and should be later than the relevant date of the last modification order consolidated into it.

4.3 Section 53(2) of the 1981 Act requires surveying authorities to modify their definitive maps and statements by order as soon as reasonably practicable after the occurrence of any of the events specified in section 53(3). Section 53(2) distinguishes between events which occurred before and those which occurred on or after 28 February 1983. The second part also includes the requirement for definitive maps and statements to be kept under continuous review. However, authorities were not required to complete the modification of their maps and statements for events which preceded the commencement of the new procedure before embarking on modifications relating to subsequent events: the process is simultaneous. Moreover, in making orders there is no need for authorities to differentiate between events which preceded and those which succeeded the

commencement of the new procedure. It is possible for both to feature in the same order.

### ***Modifying the definitive map and statement***

4.4 The events to be taken into consideration in connection with the modification of definitive maps and statements are set out in section 53(3) of the 1981 Act.

- Subsection 3(a) concerns necessary changes to the definitive map and statement consequent upon the confirmation of orders under highways and other legislation and magistrates' court orders under s.116 of the Highways Act 1980.
- Subsection 3(b) concerns the presumed dedication of footpaths, bridleways and restricted byways at common law or by virtue of section 31 of the Highways Act 1980. It can apply to ways shown on the definitive map and statement but over which higher rights are now presumed to have been dedicated.
- Subsection 3(c) relates to the discovery by authorities of evidence which shows that a right of way not shown on the map and statement subsists, or is reasonably alleged to subsist, and should be shown; or that a right of way already shown ought to be shown as a right of way of a different description; or that a right of way does not exist and should be removed, or that the particulars contained in the map and statement require modification.

4.5 Surveying authorities should not make an order to update the definitive map and statement under subsection 3(a) until, where they are required to do so, certification or notification has been issued that the effect of the relevant public path order or magistrates' court order has taken place on the ground. These subsection 3(a) definitive map modification orders take effect on being made. [Regulations](#)<sup>8</sup> made under section 53A of the 1981 Act enable authorities to include in the same order both a substantive change to a right of way and a direction to modify the definitive map and statement in line with that change, thus eliminating the need to deal with each in a separate order (paragraph 5.56). Separate orders can still be made if required.

### ***Applications for definitive map modification orders***

4.6 Section 53(5) of the 1981 Act enables any person to apply to the authority for an order to be made modifying a definitive map and statement as respects any of the events specified in section 53(3)(b) or (c) of the 1981 Act. The procedure for making and determining applications is set out in Schedule 14 to the 1981 Act. Persons are not entitled to apply for a legal event definitive map modification order under section 53(3)(a) of the 1981 Act.

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<sup>8</sup> The Public Rights of Way (Combined Orders) (England) Regulations 2008 (S.I. 2008/442)

4.7 The form of application is prescribed in regulation 8 of the [Wildlife and Countryside \(Definitive Maps and Statements\) Regulations 1993](#)<sup>9</sup> and set out in Schedule 7 to those regulations. Submitted applications must be accompanied by a map to a scale of not less than 1:25000 showing the rights of way which are the subject of the application, copies of any supporting evidence, including statements of witnesses. While a surveying authority may waive some of the requirements of Schedule 14 of the 1981 Act in deciding whether or not to accept an application, case law has made it clear that in the case of an application to recognise byway open to all traffic status (whether by upgrading an existing way or by the first recording of any public rights on a way) the claimed mechanically propelled vehicle rights, otherwise automatically extinguished, are preserved under section 67(3) and (6) of the 2006 Act only if the full stated requirements of Schedule 14 to the 1981 Act are met.

4.8 Notice that an application for an order has been made must be served by the applicant on every owner and occupier of the land involved. Applicants who cannot find out the name or address of the owner or occupier of the land may apply to the surveying authority for exemption from the requirement to serve a personal notice, and for its direction that notice be served instead by addressing it to the owner or occupier of the land (as described in the notice) and affixing it to a conspicuous object on the land. Such a direction should not normally be withheld if the applicant can show that he or she has made every reasonable effort to identify the owner or occupier of the land. Finally, a certificate must be supplied to the authority, by the applicant, to inform it that notice of the application has been served on all of the landowners and occupiers concerned, subject to the provisions made for instances where land ownership cannot be determined. The forms of the notice and certificate are prescribed by regulation 8 of, and Schedules 8 and 9 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993.

4.9 Authorities are required to investigate applications as soon as reasonably practicable and, after consulting the relevant district and parish councils, decide whether to make an order on the basis of the evidence discovered. Applicants have the right to ask the Secretary of State to direct a surveying authority to reach a decision on an application if no decision has been reached within twelve months of the authority's receipt of certification that the applicant has served notice of the application on affected landowners and occupiers. The Secretary of State in considering whether, in response to such a request, to direct an authority to determine an application for an order within a specified period, will take into account any statement made by the authority setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the authority or expressed intentions of further action on the application in question, the circumstances of the case and any views expressed by the applicant.

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<sup>9</sup> The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (S.I. 1993/12)

4.10 Decisions on applications must be served on the applicant and on the owner and occupier of the land involved. Reasons should be given where an application is refused.

4.11 In the event of an authority refusing to make an order, the applicant has a right of appeal to the Secretary of State against that decision. Appeals must be lodged with Defra's National Rights of Way Casework Team within 28 days from the date on which the authority serves notice on the applicant of its decision. Appeals should be made in writing, giving grounds for the appeal, and be accompanied by copies of the application, the map showing the way concerned, the supporting documentation and the authority's decision. A copy of the notice of appeal must also be served on the surveying authority but without the accompaniments. The Secretary of State, in considering an appeal, is required to decide, following review of the available information, whether an order should be made and if so direct the authority accordingly. He is not empowered to authorise the modification of the definitive map and statement or to make an order himself.

4.12 Authorities must record all applications for definitive map modification orders and the outcomes of those applications in a register that is available to the public – see paragraph 2.6.

### ***Order making***

4.13 Before making an order, authorities must consult other local authorities (including parish councils) in whose area the way is located but, in accordance with section 53(2)(b) of the 1981 Act, authorities should make the order as soon as reasonably practicable after they have concluded that one should be made or after having been directed by the Secretary of State to do so following a successful appeal under schedule 14 of the 1981 Act.

4.14 Orders made under the 1981 Act reflect specified rights which are already claimed to exist (or not to exist in the case of downgrading or deletions as described in paragraphs 4.30 to 4.35) based on evidence gathered and therefore there is no wider statutory duty to consult beyond other local authorities. Nevertheless, seeking information more widely about a proposed 1981 Act order could produce additional material relating to its existence or true status and may pre-empt misunderstandings, resolve objections and reduce conflict. The prescribed organisations (see Annex A) are a starting point for the organisations to be consulted, but authorities should not regard these as the only organisations that they should consult.

4.15 The forms of the various orders provided for by the 1981 Act are prescribed in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (S.I. 1993/12) (as amended). Where appropriate, the prescribed form makes provision for alternative entries in the schedule to the order for the different modifications that can be made to definitive maps and statements i.e. additions, deletions, changes in status and the modification of written statements as the circumstances of each case may require.

4.16 Authorities should include sufficient, accurate information to allow the way to be unambiguously identified. They should include in orders information about the width of ways to be added to the definitive map and statement. Defra [guidance](#)<sup>10</sup> on recording widths is available. Authorities should also record limitations and conditions, for example: gates and stiles along the way, and any other specification information which is appropriate. This provision is only applicable where the dedication of the route was subject to such limitations. For example it would be inappropriate to include a gate as a limitation where the gate was installed after a period of use giving rise to a statutory dedication. Under this circumstance the gate, or any other structure, would be regarded as an obstruction unless its installation fulfilled certain conditions and was formally authorised by the highway authority (see paragraph 6.7).

4.17 The scale of the map referred to in the order is prescribed in the 1993 Regulations and must be not less than 1:25,000 although larger scale maps should be used wherever practicable. The scale, orientation and grid references should be clearly shown on the map. Apart from deletions, the notation used to depict the various classes of right of way is prescribed in the Regulations for definitive maps and statements. For deletions a continuous bold black line is recommended.

4.18 Since there is no procedure for the correction of errors once an order has been confirmed (paragraph 10.9 describes limited powers of an Inspector to modify orders prior to confirmation), other than the result of the discovery of evidence, particular attention should be paid to the preparation of orders to ensure that the order map and schedule do not conflict. Moreover since orders effectively modify the definitive map and statement on confirmation and are therefore subject to the provisions of section 56(1) of the 1981 Act regarding the conclusive evidential effect of definitive maps and statements, the order map and schedule serve effectively the same function respectively as the definitive map and statement.

4.19 The procedure for making and determining whether or not to confirm definitive map modification orders under section 3(b) and (c) is set out in Schedule 15 to the 1981 Act. The Schedule provides for the publication of notices announcing the making of orders, the consideration of representations and objections and the modification of orders.

### ***Publicity for orders***

4.20 The content of notices announcing the making of orders and the publicity to be given to them are set out in paragraph 3 of Schedule 15 to the 1981 Act. The notice must be published in at least one local newspaper circulating in the area in which the land to which the order relates is situated and a copy, together with a copy of the order or relevant extract from the order, served on every owner and occupier of that land; the relevant district and parish council; the prescribed organisations; and such other persons as the authority considers appropriate, such

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<sup>10</sup> Non statutory guidance on the recording of widths on public path, rail crossing and definitive map modification orders : Defra letter to Order Making Authorities in England February 2007

as a national park authority and other local organisations which are recognised as being representative of user interests.

4.21 The description in the notice of the general effect of the order should be sufficient to enable the public to understand its fundamental purpose and to identify the rights of way involved. The notice published in the local newspaper will not be accompanied by a plan and therefore key points of the route should be referenced to features on the ground as well as being specified by grid references.

4.22 A copy of the notice must be displayed in a prominent position at both ends of the way. The notice must be accompanied by a plan illustrating the effect of the order. The notice must also be displayed at council offices in the locality and any other places considered by the authority to be appropriate. The places should be reasonably accessible to local people.

### ***Representations and objections***

4.23 Authorities should seek to forestall representations and objections by prior discussion with landowners, users and representative organisations. Authorities should have regard to the code of practice on consultation in the Rights of Way Review Committee's Practice Guidance [Note 1](#)<sup>11</sup>. They should also try to resolve representations and objections when they have been made as described in the Rights of Way Review Committee's Practice Guidance [Note 3](#)<sup>12</sup>.

4.24 The period for making representations and objections must be not less than 42 days from the date of publication of the notice that an order has been made and at least 42 days after service and display of the notice has taken place. Authorities should publish the notice in a newspaper that circulates widely and reliably within the area. They should serve and display notices of the making of an order at the same time as the notice is published. Authorities should ensure that a copy of the order and accompanying map are available for inspection at all reasonable hours during the period.

4.25 Paragraph 3(8) of Schedule 15 to the 1981 Act permits any person, at any time before the objection period expires, to require the authority to provide, within 14 days of the receipt of the request, details of any documents it took into account in making the order. There is also provision for people to inspect and take copies of relevant documents in the possession of the authority and to be informed by the authority of the whereabouts of such documents not in its possession.

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<sup>11</sup> Practice Guidance Note 1 : Consultation on changes to public rights of way and definitive maps : Rights of Way Review Committee December 2007

<sup>12</sup> Practice Guidance Note 3 : Minimising representations and objections to definitive map modification orders : Rights of Way Review Committee December 2007

### **Confirmation of orders**

4.26 Authorities may confirm orders that are unopposed or to which all the representations and objections have been withdrawn. Authorities must submit orders to which there are representations or objections and orders which are unopposed but require modification to the Secretary of State. The Planning Inspectorate, which administers the submission on behalf of the Secretary of State, has a [checklist](#)<sup>13</sup> of documents which must accompany orders submitted for a decision on whether or not they should be confirmed. Paragraph 10.8 describes in outline the process that is followed once an order is submitted to the Secretary of State.

4.27 Paragraph 5 of Schedule 15 to the 1981 Act provides that where one order contains one or more modifications to the definitive map or statement to which there are representations or objections and other modifications to which there are none, the authority can confirm the unopposed part of the order, which has the effect of modifying the definitive map and statement to the extent of the confirmed part. The authority must then submit that part of the order to which there are representations or objections, to the Secretary of State to consider whether or not to confirm it. Authorities must notify the Planning Inspectorate, which administers the process on behalf of the Secretary of State, where they intend to do this. Any element of an order that is subdivided for partial confirmation in this way must appear to be capable of confirmation in its own right.

### **Publicising decisions on orders**

4.28 The requirements for publicising confirmed orders and the non-confirmation of orders are specified in paragraph 11 of Schedule 15 to the 1981 Act. Confirmed orders are given the same publicity as that given to made orders. A copy of the decision not to confirm an order must be served on the same persons on whom notice of the making of the order was served.

4.29 Copies of all confirmed orders made under section 53 (including orders made under section 53A which have the effect of modifying the definitive map and statement) and section 54 (where outstanding orders to reclassify Roads Used as Public Paths (RUPP) are being determined to a conclusion) must be sent to the Ordnance Survey at the time of confirmation.

### **Deletion or downgrading of ways shown on the definitive map and statement**

4.30 The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such

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<sup>13</sup> Document required by the Planning Inspectorate – Checklist for Order Making Authorities : The Planning Inspectorate June 2008

a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.

4.31 Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.

4.32 Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways described in paragraphs 4.30 and 4.31, the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the definitive map and statement in cases where evidence shows that rights did not exist at the time when they were first shown on the map. In making an order the authority must be able to say, in accordance with Section 53(3) (c) (ii) or (iii), that a highway of a particular description ought to be shown on the map and statement as a highway of a different description; or that there is no public right of way over land shown in the map and statement as a highway of any description.

4.33 The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:

- the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
- the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
- the evidence must be cogent.

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.

4.34 Applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application; however it is not for the authority to

demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way.

4.35 In the case of deletions, earlier guidance indicated that a case for presumed dedication could be established on a way that had previously been recorded on the definitive map but which was found, subsequently, to have been recorded in error. This was based on the belief that user, between the time of the first recording of the way on the definitive map and statement and the time when it was determined that an error had been made could give rise to presumed dedication. The date of first recording means either the date of the original publication of the first definitive map; the date of publication of a review; or the relevant date of an order adding the path to the definitive map, whichever was appropriate. The date of first recording would have been the first point in time at which it could have been legally recognised that rights over the way were recorded in the form being challenged. Defra believes that this advice was wrong. Defra's view is that use of the way in such circumstances cannot be seen to be as of right, as rights that cannot be prevented cannot be acquired. It not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed.

#### ***Preparation of definitive maps and statements for excluded areas***

4.36 Only the area of the former London County Council, i.e. broadly the area of the present Inner London Boroughs, is now excluded from the survey provisions of the 1949 Act. Under section 58(2) of the 1981 Act, the London borough councils may by resolution adopt the provisions of sections 53-57 for the whole or any part of their area.

4.37 The provisions enable an authority to prepare a definitive map and statement by building up from nothing a comprehensive record of the rights of way within its area through adding rights of way to a blank map and statement by means of orders made under section 53 of the 1981 Act. Once modified, that map and statement becomes the definitive map and statement for the area.

#### ***Definition of byway open to all traffic***

4.38 A byway open to all traffic (BOAT) is a vehicular right of way carrying rights for users of mechanically propelled vehicles which is used by the public mainly for the purposes for which footpaths and bridleways are used. When deciding whether a way ought to be shown on the definitive map and statements as a BOAT, authorities should examine the characteristics of the way. Relevant case law suggests that, for a carriageway to be a BOAT, it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test also relates to its character or type and whether it is more suitable for use by walkers and horse riders than vehicles. Further information is available in the Planning Inspectorate's rights of way [Advice Note 8](#)<sup>14</sup>. Where a way presumed

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<sup>14</sup> Advice note 8 – Advice on the definition of byway open to all traffic – the effect of *Masters v Secretary of State for the Environment, Transport and the Regions* : February 2001

to have been dedicated as a highway for all purposes under section 31 of the Highways Act 1980 also satisfies the definition of a byway open to all traffic, authorities may make an order to add the way to the definitive map and statement under section 53(3)(c)(i) of the Act subject to the provisions described in paragraph 4.39.

### ***Extinguishment of certain rights under part 6 of the 2006 Act***

4.39 Section 67(1) of the 2006 Act extinguished, with effect from 2nd May 2006, all unrecorded public rights of way for mechanically propelled vehicles, with certain exceptions. The exceptions were, broadly, for highways that were part of the 'ordinary roads' network or highways that had been expressly created or dedicated as a public right of way for mechanically propelled vehicles. The Act provided for additional exceptions where, in certain cases, there were long standing applications, under section 53(5) of the 1981 Act, to have a BOAT added to the definitive map and statement. The Act also curtailed the scope for the future creation of public rights of way for mechanically propelled vehicles by providing that they could only come into existence where they were expressly created for such vehicles. Further [guidance](#)<sup>15</sup> is available.

### ***Restricted byways***

4.40 The 2000 Act created a new category of highway - restricted byways - carrying a public right of way on foot, on horseback or leading a horse, and for vehicles other than mechanically propelled vehicles. From 2nd May 2006, ways which were shown in definitive maps and statements as roads used as public paths (RUPPs) were reclassified as restricted byways. The restricted byways implementing legislation provides that restricted byways may also be created. The 2006 Act amended the 1980 Act to permit the addition of restricted byways, by means of an order made under the 1981 Act, to the definitive map and statement on the basis of user or documentary evidence. Part 6, section 68 of the 2006 Act also amends the 1980 Act so as to clarify that a qualifying period of use by pedal cycles may give rise to a restricted byway.

4.41 Where, with regard to former RUPPs, a way is shown in the map with the restricted byway notation but is described in the statement as a highway of another description, authorities should establish the correct status of the way and, in accordance with their duty under section 53 of the 1981 Act, modify the map and statement appropriately. Any orders or applications for orders modifying the status of a road used as public path which were made before 2nd May 2006 are to be processed to a final determination under the 1981 Act subject to the provisions of section 67 of the 2006 Act.

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<sup>15</sup> Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways – a guide for local authorities, enforcement agencies, rights of way users and practitioners version 5 : Defra May 2008

### ***Unclassified roads on the list of streets***

4.42 In relation to an application under the 1981 Act to add a route to a definitive map of rights of way, the inclusion of an unclassified road on the 1980 Act list of highways maintained at public expense may provide evidence of vehicular rights. However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights. It would be possible for a way described as an unclassified road on a list prepared under the 1980 Act, or elsewhere, to be added to a definitive map of public rights of way provided the route fulfils the criteria set out in Part III of the 1981 Act. However, authorities will need to examine the history of such routes and the rights that may exist over them on a case by case basis in order to determine their status.

## 5. Changing the network

5.1 Improved management, combined with better information and the creation of new routes in carefully chosen locations would make a significant difference to people who use, or who would like to use, footpaths, bridleways, restricted byways and BOATs. In areas where rights of way are fragmented, new links between existing routes would provide a more extensive and useful local network than exists at present. Local highway authorities also need to improve the management and maintenance of the existing network. In order to meet the Government's aim of better provision for cyclists, equestrians, walkers and people with mobility problems, highway authorities need to understand the use and demand for rights of way. They will, thereby, be able to meet the spectrum of needs and expectations of people with all levels of interest and ability.

### ***Rights of Way Improvement Plans***

5.2 Rights of way improvement plans, which are being progressively integrated into Local Transport Plans, are intended to be the prime means by which local highway authorities will identify the changes to be made, in respect of management and improvement, to their local rights of way network in order to meet the Government's aim of better provision for cyclists, equestrians, walkers and people with mobility problems. Authorities should follow the [guidance](#)<sup>16</sup> on implementing the 2000 Act provisions on rights of way improvement plans.

### ***Consulting the public before making orders***

5.3 Local authorities should consult widely on proposals which could result in orders affecting public rights of way. This applies especially to proposed orders to be made under the 1980 Act or the 1990 Act, where there may be alternative options. The Rights of Way Review Committee has made recommendations in its [Practice Guidance Note 4: Securing Agreement to Public Path Orders](#)<sup>17</sup> about publishing accompanying statements to the orders in so that it is made clear to the public why the order has been made and why it is believed that the order meets the necessary legal tests. The prescribed organisations (see Annex A) are a starting point for the organisations to be consulted, but authorities should not regard these as the only organisations that they should consult.

### ***Disability Discrimination Act***

5.4 Note that all aspects of the specification of Public Path Orders (unlike Definitive Map Modification Orders which represent what is believed to have been the route, width and structures existing when a way was dedicated) will be affected by the DDA, particularly in relation to the limitations and conditions to be defined in the statement.

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<sup>16</sup> Rights of Way Improvement Plans – Statutory Guidance to Local Highway Authorities in England : Defra November 2002

<sup>17</sup> Practice Guidance Note 4 : Securing Agreement to Public Path Orders : Rights of Way Review Committee December 2007

## ***Highways Act 1980: creating, diverting and extinguishing rights of way***

5.5 The statutory provisions for creating, diverting and extinguishing public rights of way in the 1980 Act have been framed to protect both the public's rights and the interests of owners and occupiers. They also protect the interests of bodies such as statutory undertakers. The requirements for making, confirming and publicising orders are set out in Schedule 6 to the 1980 Act. The provisions also apply to rail crossing orders and special orders.

### ***Consents and consultations***

5.6 Every other council (county, district, unitary or parish) or national park in whose area the way or proposed way is situated must be consulted before a council makes an order. If a way to be extinguished or diverted lies partly within the area of an adjoining council that authority's consent must be obtained. Natural England must be consulted about any way or proposed way which lies within a national park or affects a National Trail (Long Distance Route).

5.7 In addition to the statutory requirements, authorities should consider wider publicity through prescribed organisations (Annex A), other user groups, local access forums, and liaison groups. This approach should help authorities to forestall representations and objections before they make orders, by means of discussion and negotiation with landowners, users and representative organisations. Authorities should have regard to the code of practice on consultation in the Rights of Way Review Committee's Practice Guidance [Note 1](#)<sup>18</sup>.

5.8 Statutory undertakers should be consulted before an order is made and where necessary their consent obtained. Section 121(4) of the 1980 Act provides that they may refuse to consent to the confirmation of extinguishment and diversion orders. Section 24(2) of the 1980 Act requires the Secretary of State for Transport to give his approval if a proposed right of way is to connect with a trunk road. Where notices are required to be served on owners of land and the land belongs to an ecclesiastical benefice, paragraph 1(4) of schedule 6 to the 1980 Act specifies that notice must also be served on the Church Commissioners. The consent of the appropriate authority as defined in section 327 of the 1980 Act is required in respect of the Act's application to Crown land.

### ***Protection for agriculture and forestry and other environmental concerns***

5.9 In making creation agreements and creation, diversion and extinguishment orders under the 1980 Act, authorities are required under sections 29 and 121(3) of the Act to have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features. Section 40 of the 2006 Act places a general duty on every public authority in

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<sup>18</sup> Practice Guidance Note 1 : Consultation on changes to public rights of way and definitive maps : Rights of Way Review Committee December 2007

exercising its functions to have regard to the conservation of biodiversity. General guidance on the wider biodiversity responsibilities of authorities is [available](#)<sup>19</sup>.

5.10 In respect of land designated as a national park or an area of outstanding natural beauty, the relevant legislation, respectively section 11A(2) of the 1949 Act and section 85 of the 2000 Act, requires an authority, in carrying out its functions (which will include the making of orders and agreements to create, divert or extinguish public rights of way), to have regard to the purposes for which the national park or area of outstanding national beauty was created.

### ***Forms of orders***

5.11 The forms of the various orders and notices provided for by the 1980 Act are prescribed in the Public Path Orders Regulations 1993 (S.I. 1993/11) (as amended).

5.12 The limitations and conditions set out in the schedule to a form of order should only be limitations and conditions affecting the actual exercise of the public right of user e.g. design, position, number of gates, conditions for removal of structure or minimisation of its effect on users.

5.13 There are no standard widths for ways which are created or diverted under the 1980 Act. Local circumstances affecting the widths that are appropriate or achievable will vary, however authorities should specify widths in every 1980 Act order. Defra [guidance](#)<sup>20</sup> on recording widths is available.

5.14 The maps contained in an order should be on a scale of not less than 1:2,500 or, if no such map is available, on the largest scale readily available. Extracts from a current edition of an Ordnance Survey map should be used and it should be endorsed with the copyright conditions required by the Ordnance Survey. The scale and orientation should be clearly shown as well as the grid references to enable the public to identify the rights of way concerned. The map should also contain sufficient detail to show the effect, not just on the path or way to be stopped up or diverted, but on those highways connected to it. In the case of diversion orders made under the 1980 Act, the order map must show whether part of the new route to be followed comprises an existing path or way and, if so, define that part.

### ***Publicity for orders***

5.15 The notice must be published in at least one local newspaper circulating widely and reliably in the area in which the land to which the order relates is situated. At the same time that the notice is published, a copy of the same notice together with a copy of the draft order or relevant extract from the draft order and a copy of the accompanying map must also be served on every owner and occupier of that land; the relevant county, district and parish council; the prescribed

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<sup>19</sup> Guidance for Public Authorities on implementing Biodiversity Duty : Defra 2007

<sup>20</sup> Non statutory guidance on the recording of widths on public path, rail crossing and definitive map modification orders : Defra letter to Order Making Authorities in England February 2007

organisations (Annex A); and, where required, other persons or bodies such as a national park authority and Natural England.

5.16 The description in the notice of the general effect of the order should be sufficient to enable the public to understand its fundamental purpose and to identify the rights of way involved. The notice published in the local newspaper will not be accompanied by a plan and therefore key points of the route should be referenced to features on the ground as well as being specified by grid references.

5.17 A copy of the notice must be displayed in a prominent position at both ends of the section of the way to be created, diverted or stopped up by the order. The notice must be accompanied by a plan illustrating the effect of the order. The notice must also be displayed at council offices in the locality and any other places considered by the authority to be appropriate. The places should be reasonably accessible to local people.

### ***Representations and objections***

5.18 The period for making representations and objections must be not less than 28 days from the date of publication of the notice that an order has been made. Authorities should ensure that a copy of the order and accompanying map are available for inspection at all reasonable hours for the period.

5.19 Authorities should try to resolve any representations and objections which are duly made.

### ***Public path creation agreements***

5.20 Section 25 of the 1980 Act provides for the creation of a footpath, bridleway or restricted byway by agreement. Notice of the agreement must be given in at least one local newspaper circulating in the area. While an authority must consult other local authorities if the land affected lies within the adjoining authority's area, there is no requirement to consult users before entering into an agreement. Authorities should, however, notify parish councils and user organisations about the ways thus created. In making an agreement under section 25 of the 1980 Act the authority should give consideration to any necessary works that will be required to bring the way into a fit condition for public use. If necessary the agreement should state that it does not take effect until any conditions specified have been complied with.

### ***Public path creation orders***

5.21 Under section 26 of the 1980 Act authorities can make orders creating footpaths, bridleways and restricted byways where it appears to the authority that there is a need for them. Before making an order, an authority must be satisfied that it is expedient that a way should be created, having regard to the extent to which it would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and the effect that the creation would have on the rights of persons interested in the land, account being taken of

the Act's provisions as to compensation. In making an order under section 26 of the 1980 Act the authority should give consideration to any necessary works that will be required to bring the way in to a fit condition for public use. If necessary the order should state that it does not take effect for a stated number of days following confirmation in order that works can be undertaken.

### ***Public path extinguishment orders***

5.22 Section 118 of the 1980 Act enables authorities to make orders extinguishing footpaths, bridleways and restricted byways. Ways need not be shown on the definitive map and statement before they can be extinguished but authorities must be satisfied as to the status of ways before making an order and take care to ensure that no unrecorded or unacknowledged rights are overlooked in the order-making process.

5.23 An extinguishment order can be made only if the authority considers it expedient that the way should be stopped-up because it is not needed for public use. Authorities must disregard temporary circumstances, including any buildings or other structures preventing or diminishing the use of the way. Further information is available in the Planning Inspectorate [Advice Note 9](#)<sup>21</sup> (s18).

### ***Public path diversion orders***

5.24 Section 119 of the 1980 Act enables authorities to make orders diverting footpaths, bridleways and restricted byways. Ways need not be shown on the definitive map and statement before they can be diverted but, as with section 118 orders, authorities must be satisfied as to the status of ways before making an order and take care to ensure that no unrecorded or unacknowledged rights are overlooked in the order-making process.

5.25 Section 119 of the 1980 Act does not specifically entitle an authority to disregard temporary circumstances, including any buildings or structures preventing or diminishing the use of the existing way in considering whether or not to make an order and the consideration is equally not available to the body confirming the order. The Planning Inspectorate [Advice Note 9](#)<sup>22</sup> (s28) indicates that in forming an opinion on whether the replacement route is not substantially less convenient to the public, a fair determination can only be made on the assumption that the existing route is available to the public to its full legal extent.

5.26 A public path diversion order may not propose the alteration of the terminating point of a way if that point is not on a highway or, if it is on a highway, it must be to another point on the same highway or a highway connected with it and which is substantially as convenient to the public. Where appropriate, authorities

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<sup>21</sup> Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

<sup>22</sup> Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

may consider a concurrent order (paragraph 5.54) if these exclusions apply to a proposed diversion order.

5.27 Section 119(1) of the 1980 Act provides that a diversion order can be made in the interests of the owner, lessee or occupier or of the public. A diversion order may therefore be made as long as it is expedient to divert all or part of a way in the interests of at least one of the parties.

5.28 In making an order under section 119 of the 1980 Act, subsection (3) requires that the authority should give consideration to any necessary works that will be required to bring the way in to a fit condition for public use. If necessary the order should state that, firstly, the public rights across the replacement section of the diversion do not take effect for a specified number of days following confirmation to allow for the necessary physical implementation of the way and, secondly, that the extinguishment element of the diversion does not come in to force until the highway authority certifies that the physical implementation has been carried out.

### ***Confirming orders***

5.29 Authorities may confirm orders which are unopposed or to which all duly made representations and objections have been withdrawn. Authorities have the discretion not to proceed with orders to which there are representations or objections or may withdraw an order for other reasons, such as external factors making a scheme no longer appropriate. In order to bring the procedure to an end, the authority must make a formal resolution not to proceed, and should notify the applicant and those who have made representations or objections of the passing of the resolution.

5.30 In the case of an order to which there are duly made representations or objections, or which require modification, an Inspector appointed by the Secretary of State will determine whether or not to confirm it. Once an order is submitted to the Secretary of State the power of decision passes to him, or his appointed Inspector, however if all the representations and objections to a 1980 Act order are subsequently withdrawn, the authority will be asked whether it wants to confirm the order itself. The Planning Inspectorate, which administers the submission on behalf of the Secretary of State, has a [checklist](#)<sup>23</sup> of documents which must accompany an order submitted for a decision on whether or not it should be confirmed. Paragraph 10.8 describes in outline the process that is followed once an order is submitted to the Secretary of State.

5.31 When considering whether to confirm a creation, extinguishment or diversion order, the Secretary of State or the order making authority, must give consideration to any material provision within a right of way improvement plan for the relevant area.

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<sup>23</sup> Document required by the Planning Inspectorate – Checklist for Order Making Authorities : The Planning Inspectorate June 2008

5.32 Section 119(6) of the 1980 Act provides - with direct reference to section 119(1) - that in deciding whether or not to confirm a diversion order, the Secretary of State (or the order making authority if the order is unopposed) must be satisfied that, in the interests of the owner, lessee or occupier or the public, it is expedient to divert the way. In the case of an opposed order, this does not mean that the Inspector's rôle is confined to auditing the reasons for which the order making authority made the order. The Inspector is entitled to take his or her own view, on the basis of the evidence submitted by interested parties, and may confirm an order, even where the reasons, under section 119(1), for doing so do not align with those of the order-making authority, provided that the Inspector is satisfied that in the interests of the owner, lessee or occupier or the public, it is expedient to divert the way.

5.33 In deciding whether or not it is expedient to confirm a diversion order under section 119 of the 1981 Act the Secretary of State, or the order making authority if there are no outstanding objections, must have regard to the effect that

- the diversion would have on the public enjoyment of the path as a whole
- the coming into operation of the order would have as respects other land served by the existing right of way
- any new public right of way created by the order would have with respect to any land held with it.

given that there are rights to compensation for those affected under the second and third of these considerations.

### ***Charges for making orders***

5.34 An application may be made to an authority requesting that it exercises its powers to make a Public Path Order to divert or extinguish a right of way in the interests of a landowner, lessee or occupier. Should the authority decide to proceed with the application, then the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (S.I. 1993/407), amended by regulation 3 of the Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 (S.I. 1996/1978), permit authorities to charge applicants the costs of making orders under: sections 26, 118, 118A, 119 and 119A of the 1980 Act. There is no provision for authorities to impose charges for SSSI diversion orders under sections 119D and 119E of the 1980 Act.

5.35 Authorities should publish their scales of charges and should inform applicants in advance of the maximum charge for their application. Authorities must not charge more than the costs they have incurred.

5.36 Examples of the costs which authorities may incur in making an order are:

- notifications to landowners, statutory undertakers, prescribed organisations, other local authorities and other persons;
- posting notices on site and elsewhere;
- an advertisement in one local newspaper for each of the stages of the order; namely making the order, confirming the order and coming in to force of the order (where the final stage is separately required). The newspaper must circulate widely and reliably in the area covering the order and under the requirement to obtain best value less conventional publications such as free sheets may satisfy the requirement.
- site inspections;
- research into the status and previous history of the way;
- negotiations with applicants and other interested parties before making the order;
- preparing reports for Committee; and
- preparing orders and notices.

Authorities can recover from applicants the costs of informal consultations (such as negotiations between authorities, applicants, landowners, user groups and any other interested parties) where they lead to orders being made. It is for the authorities themselves to decide what services are necessary to the making of a particular order and applicants should be made aware that these may vary according to the circumstances of the particular case.

5.37 Objections to an order, and the decision taken by the Secretary of State on whether or not the order should be confirmed, fall within the public domain and, as such, are outside the applicant's control. It is considered unreasonable to expect the applicant to bear the extra expense incurred by the local authority in pursuing opposed orders through to confirmation. All costs relating to the submission of an order to the Secretary of State and the subsequent decision on whether or not it should be confirmed have therefore been excluded from the power to charge. The authority will nevertheless wish to ensure that the applicant is afforded every opportunity to participate in any public inquiry or hearing. Although objectors have the right to be heard by the Secretary of State, such matters can also be considered on the basis of written representations if, for instance, there are only 2 or 3 objectors. Such arrangements have proved to be cost effective and all parties should consider this procedure wherever possible.

5.38 Applicants are not entitled to a refund other than under the following conditions:

- where the authority fails to confirm an unopposed order
- in the case of unopposed orders the authority fails to submit the order for confirmation to the Secretary of State without the agreement of the person who requested the order
- where proceedings preliminary to the confirmation of a public path creation order are not taken concurrently with proceedings for a public path extinguishment order.
- where the order cannot be confirmed because it has been invalidly made.

5.39 Authorities may not seek payment in advance of the incurring of costs. Payment should therefore be sought after the advertisement of the making of the order has been placed with the local newspaper. Payment for subsequent advertisements in relation to the confirmation of the order, or certification of the new path, should similarly only be sought after these have been placed with the newspaper. Authorities may defer confirmation or, in the case of opposed orders, referral to the Secretary of State, until payment has been made.

5.40 The power to charge is discretionary and local authorities may choose not to charge for this service at all. It is expected that authorities will normally seek to use this power to recover their costs incurred in making these orders, but it is accepted that in some circumstances it may not be cost effective to do so. Applicants should therefore normally expect to bear the cost of making an order. Authorities, however, have discretion not to charge, or to charge part of the cost, and may choose to take account of factors such as financial hardship or potential benefit to rights of way users and waive part or all of the charge where this is considered appropriate. Proposals which may be of benefit to rights of way users might include the creation of additional paths as part of a wider improvement of the rights of way network or improvement of access for the disabled. There is no standard definition of hardship against which authorities can assess the personal circumstances of the applicant, nor are there any rules for determining what may or may not be of benefit to the public, and authorities will need to judge each case on its merits.

5.41 Before making an order proposing to divert a right of way under section 119 of the 1980 Act, authorities can require the owner, lessee or occupier of the land to enter into an agreement under section 119(5) to defray or contribute towards expenses incurred by the authority in bringing a new way into a fit condition for use by the public.

### ***Claims for compensation***

5.42 Claims for compensation under section 28 of the 1980 Act (or as applied by section 121(2) as amended) from persons with an interest in the land affected by an order must be made in writing to the authority and served on it within six months from the date on which the order comes into operation.

### ***Crime prevention special orders***

5.43 Sections 118B and 119B of the 1980 Act enable highway authorities to close or divert rights of way on the grounds of crime prevention in areas designated for this purpose by Defra. The first stage of the process is for the relevant highway authority to apply to Defra to have an area designated. If successful, they can then make special extinguishment or diversion orders in much the same way as they are currently able to close or divert rights of way for other reasons. Further [guidance](#)<sup>24</sup> is available. Note that the provisions making the extinguishment element of the order subject to the satisfactory physical implementation the replacement section of the way, as described in paragraph 5.28, also apply under section 119B(8). The powers laid out in sections 118B and 119B of the 1980 Act are not available to national park authorities. Gating orders (paragraph 6.31) may be a more appropriate approach to problems of crime and antisocial behaviour if it desired to preserve the public rights for possible physical reinstatement of a route at a later date.

### ***Schools protection special orders***

5.44 Sections 118B and 119B of the 1980 Act as read, respectively, with sections 118C and 119C of the Act, also enable highway authorities to close or divert a right of way that crosses school land, if necessary, for the purpose of protecting pupils or staff from violence or the threat of violence, harassment, alarm or distress arising from unlawful activity or any other risk to their health or safety arising from such activity. Prior to the confirmation of an order made under sections 118B and 119B the Secretary of State or, in the case of uncontested orders, the authority must consider the expediency of doing so with regard to other measures that could have been taken to securing the school and the likelihood of substantial improvement to security as well as the effects on the land served by the extinguished right of way or the diversion. The powers are not available to national park authorities.

### ***SSSI diversions***

5.45 Sections 119D and 119E of the 1980 Act enable a local highway authority, at the request of Natural England, to make an order to divert a public right of way where the public use of the highway is causing, or continued public use is likely to cause, significant damage to a site of special scientific interest (SSSI). Further information and [guidance](#)<sup>25</sup> is available

### ***Rail crossing orders***

5.46 Rail operators have the right to apply, under section 118A or 119A of the 1980 Act, as appropriate, to an authority for rail crossing orders, which extinguish or divert footpaths, bridleways or restricted byways that cross railways by means of

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<sup>24</sup> Defra Circular 1/2003 Guidance for Local Authorities: On crime prevention on public rights of way – designation of areas. Sections 118B and 119B Highways Act 1980 : Defra February 2003

<sup>25</sup> Non-statutory advice on new provisions relating to diversions of rights of way for the protection of sites of special scientific interest (SSSIs) : Defra 2007

level crossings. The Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (S.I. 1993/9) prescribe the information the rail operator must supply when applying for a rail crossing order, and the form of orders and notices. It will usually be for the operator to justify the need for the order and, while some information relating to the use of the path may be available from the highway authority or other sources, the operator is expected to make the best assessment on the information available. Applications which are not in the appropriate form (i.e. as prescribed in these regulations or in a form substantially to the like effect), or which fail to supply the required information, cannot be accepted as validly made.

5.47 Since rail crossing orders are intended primarily to address the question of public safety, it is essential that authorities deal with all such applications promptly. Where a valid application has been made and an authority has neither confirmed the order, nor submitted it to the Secretary of State for confirmation within 6 months of receipt, section 120(3A) of the 1980 Act provides that the Secretary of State may make the order without consulting the authority, although he will normally only do so in response to a written request from the operator.

### ***Rail crossing extinguishment orders (section 118A of the 1980 Act)***

5.48 Section 118A(1) provides for the extinguishment of a footpath, bridleway or restricted byway that crosses a railway otherwise than by a tunnel or bridge where it appears to the council expedient in the interests of the safety of members of the public using it or likely to use it. Care should be taken to avoid the creation of a cul-de-sac that would encourage trespass on to the railway. Section 118A(2) provides that the order may extinguish the right of way on the crossing itself and for so much of its length as the authority deems expedient from the crossing to its intersection with another highway over which there subsists a like right of way.

5.49 Before confirming the order, the Secretary of State, or the local authority in the case of unopposed orders, must be satisfied in accordance with section 118(4) that it is expedient to do so having regard to all the circumstances. This provision enables all the relevant factors to be taken in to consideration, which may include the use currently made of the existing path, the risk to the public of continuing such use, the effect that the loss of the path would have on users of the public rights of way network as a whole, the opportunity for taking alternative measures to deal with the problem, such as a diversion order or a bridge or tunnel and the relative cost of such alternative measures.

5.50 Where an order is confirmed, signs should be erected at both ends of the extinguished way informing users that of the extinguishment and advising them of the nearest alternative route. Authorities should also consider whether to provide a map or to erect signposts and waymarks showing the alternative route. Section 118A(5) provides that authorities may require the operator to enter into an agreement to defray, or contribute towards, any expenses incurred in connection with the erection or maintenance of any barriers or signs.

### ***Rail crossing diversion orders (section 119A of the 1980 Act)***

5.51 Section 119A(1) provides for the diversion of a footpath, bridleway or restricted byway that crosses a railway otherwise than by a tunnel or bridge where it appears to the council expedient in the interests of the safety of members of the public using it or likely to use it. While other criteria are not specified in section 119A, the new way should be reasonably convenient to the public and authorities should have regard to the effect that the proposal will have on the land served by the existing path or way and on the land over which the new path or way is to be created. Consideration should also be given to the effect that the diverted way will have on the rights of way network as a whole and the safety of the diversion, particularly where it passes along or across a vehicular highway.

5.52 Under section 119A (6) the diversion order may require the operator to maintain all or part of the way created by the order and under section 119A(8) the authority may require the operator to enter into an agreement to defray part or all of any compensation that may be payable together with any expenses reasonably incurred in connection with the erection and maintenance of barriers and signs or in making up the new way. As with rail crossing extinguishment orders, the operator must ensure that suitable fencing is erected to bar access to the railway and that appropriate signs are provided advising potential users that the path has been diverted. Authorities should consider whether it is necessary to provide a map showing the alternative route, or to erect signposts and waymarks for this purpose.

5.53 The provisions making the extinguishment element of a rail crossing diversion order subject to the satisfactory physical implementation of the replacement section of the way, as described in section 5.28, also applies under section 119A(7).

### ***Concurrent orders***

5.54 The extent to which a creation or diversion order (but not a public path creation agreement) or rail crossing diversion order, made in association with an extinguishment order would, if confirmed, provide an alternative way to that proposed for extinguishment may be taken into consideration in determining whether or not to confirm the extinguishment order. Account should be taken of the convenience of the alternative path compared to that which is to be extinguished and if this is significantly less than that enjoyed by users of the existing path, authorities will need to consider whether the criteria set out in section 118(1) of the 1980 Act have been met. Care should also be taken to ensure that full consideration is given to all of the matters set out in both section 26 (or 119 or 119A in the case of diversion orders) and section 118.

5.55 Where related extinguishment and creation or diversion orders have been made concurrently and representations or objections have been made to one but not the other, authorities are advised to submit both orders to the Secretary of State for confirmation. There is no provision for combining both creation and extinguishment in one order. Concurrent creation and extinguishment orders should

only be made to effect a diversion of a public right of way in circumstances where section 119 cannot be used, for example where the new route is of a different status, or where one end is not on a public highway. Otherwise section 119 should be used in every case. Further information is available in the Planning Inspectorate's [Advice Note 9](#) (s31&32)<sup>26</sup>

### ***Joint/Combined orders***

5.56 The Public Rights of Way (Combined Orders) (England) Regulations 2008 (S.I. 2008/442), made under section 53A of the 1981 Act enable surveying authorities to include directions to modify the definitive map and statement in certain of the same orders as make changes made to the rights of way network by creation, diversion and extinguishment under the 1980 and 1990 (and associated) Acts. The provision eliminates the previous requirement for two separate orders (substantive change followed by directions to modify the map and statement), although separate orders can still be made if required. Copies of the [regulations](#)<sup>27</sup> and associated [guidance](#)<sup>28</sup> are available.

### ***Extinguishment or diversion of rights through application to a magistrates' court***

5.57 Section 116 of the 1980 Act enables authorities to apply to a magistrates' court for an order to extinguish or divert a highway of any description other than a trunk or special road. These provisions apply therefore to footpaths, bridleways, restricted byways and byways open to all traffic, even though there are powers available in sections 118 and 119 of the 1980 Act and other legislation to extinguish and divert all of these rights of way, other than byways open to all traffic.

5.58 There may be specific circumstances where it is appropriate to use the magistrates' court procedure under section 116 of the 1980 Act. It is considered, however, that authorities should make use of the other powers available to extinguish or divert rights of way unless there are good reasons for not doing so. For example, section 116 could be used to extinguish or divert a footpath or bridleway (or retain such rights) and simultaneously extinguish a vehicular right of way. It could also be used to extinguish vehicular rights and preserve footpath, bridleway or restricted byway rights over byways open to all traffic - although authorities should be aware that this could expose a resulting footpath or bridleway to ploughing with the result that its character and appearance as a landscape feature is destroyed. Paragraph 9.9 describes the costs regime that applies to orders determined at a magistrates' court.

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<sup>26</sup> Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

<sup>27</sup> Statutory Instrument 2008/442 The Public Rights of Way (Combined Orders)(England) Regulations 2008

<sup>28</sup> Combined orders and the power to include modifications in other orders. Guidance for English Surveying Authorities to accompany Statutory Instrument no 442 : Defra 2008

## **Cycle Tracks Act 1984**

5.59 The Cycle Tracks Act 1984 gives highway authorities powers to convert footpaths into cycle tracks, thus adding a right to use the way on a pedal cycle to the right to use it on foot. The process for carrying out the conversion is very similar to that for Public Path Orders other than absence of a requirement to notify prescribed bodies. A cycle track may not be shown on the definitive map and statement and a legal event order may be required to remove a converted footpath from the record following the confirmation of an order.

### **Informing the Ordnance Survey of changes**

5.60 Authorities must send copies of confirmed orders to Ordnance Survey. Authorities should send copies of orders which involve the authority certifying that a change has come into effect to Ordnance Survey after the authority has so certified. This is so that Ordnance Survey maps show, as far as possible, the ways that are available on the ground. Other orders should be sent after they have been confirmed.

**Table 1: when authorities should send copies of orders<sup>1</sup> to Ordnance Survey**

<b>Provision</b>	<b>Ordnance Survey</b>
<i>Highways Act 1980</i>	
s.26 Compulsory powers for creation of footpaths, bridleways and restricted byways	Order on confirmation
s.116 Power of magistrates' court to authorise stopping up or diversion of highway	On decision of the magistrate
s.118 Stopping up of footpaths, bridleways and restricted byways	Order on confirmation
s.118A Stopping up of footpaths, bridleways and restricted byways crossing railways	Order on confirmation
s.118B Stopping up of certain highways for purposes of crime prevention, etc	Order on confirmation
s.119 Diversion of footpaths, bridleways and restricted byways	Order on certification
s.119A Diversion of footpaths, bridleways and restricted byways crossing railways	Order on certification
s.119B Diversion of certain highways for purposes of crime prevention, etc	Order on certification
s.119D Diversion of certain highways for protection of sites of special scientific interest	Order on certification
<i>Wildlife and Countryside Act 1981</i>	
s.53(2) definitive map modification order	Order on confirmation
<i>Town and Country Planning Act 1990</i>	
s.257 Footpaths, bridleways and restricted byways affected by development : orders by other [than Secretary of State] authorities	Order on certification
s.258 Extinguishment of public rights of way over land held for planning purposes	Order on confirmation
<i>Acquisition of Land Act 1981</i>	
s.32 Power to extinguish certain public rights of way	Order on confirmation

1. Including orders which also have the effect of modifying the definitive map and statement (s.53A of the Wildlife and Countryside Act 1981).

5.61 Authorities are also asked to send to Ordnance Survey copies of other orders which affect the network of public rights of way, for example under section 3

of the Cycle Tracks Act 1984 or under section 294 of the Housing Act 1985, and copies of notices of dedication of public rights of way under section 25 of the 1980 Act.

## **6. Managing and maintaining the network**

6.1 Most public rights of way are maintainable at public expense. The duty to maintain highways rests with local highway authorities. Authorities may also maintain public rights of way that are not publicly maintainable.

6.2 Non-metropolitan district councils can assume responsibility for the maintenance of footpaths, bridleways and restricted byways in their area in accordance with section 42 of the 1980 Act. They can also undertake the work on behalf of the authority under section 101 of the Local Government Act 1972.

6.3 Under section 43 of the 1980 Act parish councils can maintain footpaths, bridleways and restricted byways in their area without the prior consent or agreement of the authority, but maintenance by parish councils does not absolve local highway authorities from discharging their own responsibilities. Under section 50 of the 1980 Act, non-metropolitan district and parish councils can maintain those footpaths and bridleways not maintainable at public expense without prejudice to the responsible owners' rights and duties.

6.4 By agreement with the highway authority a national park authority may take over rights of way duties within the park.

6.5 Maintenance should be such that ways are capable of meeting the use that is made of them by ordinary traffic at all times of the year. Under appropriate circumstances this might require the importation and application of suitable hard materials. Maintenance need not conform to an arbitrary standard of construction or appearance, but it should harmonise with the general appearance and character of the surroundings. Guidance has been issued on best practice in the maintenance of [byways](#)<sup>29</sup>

6.6 Authorities should make use of available help from landowners and voluntary groups in carrying out their duties towards maintaining public rights of way.

### ***Gates and stiles***

6.7 Stiles, gates and other structures on a public right of way are unlawful obstructions on a public right of way unless they are recorded on the definitive statement as a limitation or it can be shown that the way was dedicated with such a structure despite not being recorded on the definitive statement (i.e. the statement requires updating) or have been authorised by the highway authority under section 147 of the 1980 Act. Authorisation to install a structure may only be granted in relation to footpaths or bridleways (but not restricted byways or byways open to all traffic) where the owner or occupier of agricultural land, or land being brought into such use, makes an application showing that the structures are necessary for preventing the ingress or egress of animals. Section 145 of the 1980 Act specifies

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<sup>29</sup> Making the best of byways. A practical guide for local authorities managing and maintaining byways which carry motor vehicles : Defra December 2005

that a minimum width of 5 feet must be provided for gate across a bridleway. On granting consent for a structure an authority may impose conditions for maintenance or ease of use by members of the public. A highway authority is required to keep a record of any authorisations granted and it is considered good practice to make such records publicly available. It is known that some authorities have poor records of structure authorisations and it would clarify matters if any shortcomings were addressed by reassessment of the validity of structures erected under claimed section 147 agreements.

6.8 The requirements of the Disability Discrimination Act 1995 (as amended by the Disability Discrimination Act 2005) will be particularly relevant in specifying limitations or authorised structures. In authorising a structure, section 147 of the 1980 Act requires the authority to have regard to the needs of persons with mobility problems. Whilst there are no mandatory standards laid down for structures which, if met, will satisfy the requirements of the Disability Discrimination Acts, the British Standards Institute has developed a comprehensive standard, the current version of which has been published as BS5709:2006. The Pittecroft Trust has produced an explanatory [document](#)<sup>30</sup> to describe BS5709:2006. Authorities may develop their own comprehensive standards for the purpose of meeting the requirements of the Acts.

6.9 Unless a way is dedicated with a limitation of a gate, restricted byways and byways open to all traffic may not have such a structure placed across them. Section 145 of the 1980 Act specifies that a byway gate must have a minimum width of 10 feet in circumstances where such a gate may be installed.

6.10 Under section 146(1) of the 1980 Act, landowners are responsible for maintaining gates, stiles and similar structures across footpaths, bridleways or restricted byways, whether or not they are shown on the definitive map. Authorities must contribute not less than a quarter of the expenses reasonably incurred by landowners in doing so. Where it appears to an authority that the landowner is not complying with his statutory duty, the authority may give notice to the landowner of their intention to take the necessary steps for repairing and making good the stile, gate or other works. The authority may recover the expenses reasonably incurred on doing so from the landowner.

6.11 Under the provisions of section 147ZA of the 1980 Act a highway authority may enter in to an agreement with a landowner, lessee or occupier for the replacement or improvement of a structure which will make the structure safer or more convenient for members of the public with mobility problems. The agreement may include any temporary or permanent conditions that the authority thinks fit.

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<sup>30</sup> Understanding the British Standard for Gaps, Gates and Stiles. BS5709:2006 explained : The Pittecroft Trust 2007

### ***Keeping ways clear of overhanging vegetation***

6.12 Section 154(1) of the 1980 Act enables local highway authorities and non-metropolitan district councils to require owners and occupiers of land whose trees, shrubs or hedges overhang highways to the extent of endangering or obstructing the passage of vehicles, pedestrians or horse-riders, to cut the vegetation back. These provisions also apply to permissive paths (section 154(1)(c)). Authorities may serve notice on land owners or occupiers to remove hedges, trees or shrubs likely to cause danger by falling. Where the authority cuts back vegetation or removes dangerous trees, shrubs or other vegetation, it may recover the expenses reasonably incurred on doing so from the person in default.

### ***Cattle on land crossed by public rights of way***

6.13 It is an offence under section 59 of the 1981 Act for an occupier to permit a bull to be at large in a field or enclosure crossed by a public right of way except where the bull either does not exceed 10 months of age or is not of a recognised dairy breed and is accompanied by cows or heifers. These provisions do not affect the obligations that employers and others have under the Health and Safety at Work Act 1974 not to put at risk the health and safety of third parties. In addition, under certain circumstances, the keeper of any animal may be liable, under section 2(2) of the Animals Act 1971, for any damage caused by that animal.

6.14 A Health and Safety Executive (HSE) study reports that most of the incidents on rights of way involving cattle arise when cows and suckler calves are at large in fields. The HSE have summarised their findings and provided guidance for the public and for farmers in an [information sheet](#)<sup>31</sup>.

### ***Obstructions***

6.15 Under section 130(1) of the 1980 Act highway authorities are under a duty to assert and protect the rights of the public to use and enjoy those public rights of way for which they are responsible. They are also under a duty under section 130(3) of the 1980 Act to prevent, as far as possible, the stopping-up or obstruction of those public rights of way for which they are responsible. Authorities are also empowered to safeguard public enjoyment of those highways for which they are not responsible, and to prevent the obstruction or stopping up of such highways where this is considered to be prejudicial to the interests of their area. In addition authorities are required under section 130(6) of the 1980 Act to take proper proceedings whenever they receive representations from a parish council or parish meeting that a way has been obstructed or stopped-up, or that unlawful encroachment on to roadside waste has taken place. The Act empowers highway and other authorities to institute legal proceedings or take whatever steps they deem expedient in discharging these duties.

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<sup>31</sup> Agricultural Information Sheet no 17EW Cattle and Public Access in England and Wales Health and Safety Executive 2006

6.16 The public are entitled to expect that all rights of way will be kept open and available for use. It is important that authorities act quickly to investigate any complaint made to them. Authorities should ensure that any obstructions they discover or have reported to them are removed as soon as is reasonably practicable. Section 143 of the 1980 Act enables authorities to secure the removal of structures on the highway by serving notice on the person responsible and by removing the obstruction themselves at the person's expense should that person fail to comply with the notice. Section 149 of the 1980 Act also enables an authority to have any 'thing' deposited on a highway so as to constitute a nuisance or danger to users removed forthwith. Where voluntary means do not work, authorities should give preference to using the powers which enable them to carry out works and recover the costs of doing so from the person responsible.

6.17 In dealing with obstructions, authorities should be aware that information recorded in the definitive statement about position or width or the limitations or conditions affecting a public right of way is conclusive evidence of the position, width, limitations or conditions. Where there are legitimate limitations, information should be recorded in the definitive statement describing the effect that they have in restricting the use of the way by those who are lawfully entitled to travel it. Where the information recorded is not about position or width or is not relevant to limitations or conditions, authorities should examine the evidence in each instance in order to resolve the inconsistencies and improve the accuracy of the definitive map and statement in line with the duties imposed by section 53(2) of the 1981 Act.

6.18 Sections 130A-130D of the 1980 Act enable any person to serve a notice on a local highway authority, requesting it to secure the removal of an obstruction on a public right of way. Should the authority refuse or fail to take action, the applicant can seek a magistrates' court order compelling the authority to act. Further information is [available](#)<sup>32</sup>

### ***Wilful obstruction of a highway***

6.19 Under section 137ZA of the 1980 Act, when convicting a person under section 137 of that Act of wilfully obstructing a highway, the magistrates' court can order that person to remove the obstruction. A person who has been ordered to remove an obstruction cannot be prosecuted again under section 137 in respect of that obstruction during the period for removing it set by the court under section 137ZA. Nor can a person be prosecuted during any period for complying with directions set by the court under section 311(1) of the 1980 Act.

6.20 Authorities have powers at common law to remove unlawful obstructions in certain circumstances. Where authorities choose to exercise these powers after a person has been convicted under section 137ZA (3), section 137ZA (4) in conjunction with section 305 of the 1980 Act allows authorities to recover expenses reasonably incurred in doing so.

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<sup>32</sup> Removal of obstructions from highways: enforcement of local highway authorities duty to prevent obstruction on rights of way : Defra 2004

### ***Corporate responsibility***

6.21 The Highways (Obstruction by Body Corporate) Act 2004 addressed concerns that the setting up of a company to hold land over which a right of way runs might be seen as a way of circumventing the legislation to prevent the obstruction of highways. Before the 2004 Act, the rights of way provisions in the 1980 Act only allowed enforcement action to be taken against a company as a body corporate. This meant that even if the individual officers of a company had consented to or connived in the offence being committed, enforcement action could not be taken against them. In addition, if the corporate body concerned had few or no net assets, it could be very difficult for the courts to recover any fines imposed or enforce action to remove an obstruction. The 2004 Act amended the 1980 Act to apply section 314 of that Act (which enables criminal proceedings against officers or members of a body corporate) to sections 137 and 137ZA to ensure that directors and other officers of a company, as well as the body corporate, can be convicted of obstruction offences, and subject to fines (and a court order to remove the obstruction in the case of 137ZA), where they are culpable.

### ***Disturbing the surface of ways and encroachment***

6.22 Where the surface of a footpath, bridleway or any other highway which consists of or comprises a carriageway other than a made up carriageway has been so disturbed as to render it inconvenient for the exercise of the public right of way, authorities, or district councils where they are responsible for maintaining a highway under section 42 or 50 of the 1980 Act, may carry out necessary work and recover expenses reasonably incurred in doing so.

### ***Agricultural operations***

6.23 Under section 134 of the 1980 Act an occupier of agricultural land or land which is being brought into use for agriculture has the right to plough or otherwise disturb the surface of a cross-field footpath or bridleway so as to render it inconvenient for the exercise of the public right of way. Where this right is exercised it must be in accordance with the rules of good husbandry and the action can only be undertaken provided that it is not reasonably convenient to avoid doing so. The land occupier is subsequently responsible for making good the surface of the way to not less than the minimum width so that it is reasonably convenient for the exercise of the right of way and to indicate the line of the way on the ground. There is no right for land occupiers to disturb the surface of any restricted byway or byway open to all traffic, or field edge footpaths or bridleways. Section 134(7) sets out the relevant periods during which the surface of ways can be disturbed, and the requirements to subsequently make that surface good and to indicate the route of the way within a defined time period.

6.24 Under section 134(6), authorities have a duty to make sure that land occupiers comply with these provisions. Where an occupier fails to make good the surface of the way, the authority can enter onto the land, carry out any necessary works and recover expenses reasonably incurred in doing so.

6.25 Under section 135 of the 1980 Act, an authority can make an order authorising an excavation or engineering operation which will disturb the surface of a footpath, bridleway or restricted byway where it is reasonably necessary for the purposes of agriculture. The authority can also by order authorise the temporary diversion of the way where it is necessary to enable such works to be carried out. Authorities can recover from the applicant their reasonable expenses incurred in connection with the order.

6.26 Occupiers who fail to reinstate the surface of ways disturbed by ploughing or other works within the statutory periods, or where reinstatement is not sufficient to for the reasonably convenient for the exercise of the right of way, can be prosecuted. Anyone can prosecute an occupier under section 134 but only local highway authorities, or non-metropolitan district and parish councils with the consent of the local highway authority, can prosecute offences under section 135 of the 1980 Act.

### ***Width of paths for the purposes of reinstatement following disturbance and encroachment***

6.27 Minimum and maximum widths of footpaths, bridleways, restricted byways and byways open to all traffic for the purposes of restoration and the prevention of encroachment are set out in Schedule 12A to the 1980 Act. These minimum and maximum widths apply where no width is recorded in the definitive map and statement and only for the purpose of restoration of highways following disturbance or for keeping them clear of crops. The minimum width is the absolute minimum acceptable for path users. Where a width is recorded in the definitive statement then the way must be kept clear to that specification. For crops such as oil seed rape, which are prone to collapse across a cleared way as they reach maturity, it will be necessary to clear the plants to a greater width than the minimum to ensure convenient passage.

### ***Traffic regulation orders***

6.28 The Road Traffic Regulation Act 1984 gives traffic authorities power to make traffic regulation orders. The orders may be temporary or permanent and may be applied to any highway and are therefore relevant to all classifications of public rights of way. They may be used to secure the expeditious, convenient and safe movement of all traffic including all types of user of public rights of way. Such an order may restrict, prohibit or regulate use of roads by traffic and the full effect on specified classes of user will be defined in each order.

6.29 Information on traffic regulation orders relating to byways open to all traffic is published in the revised edition of [Making the Best of Byways 2005](#)<sup>33</sup> and the

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<sup>33</sup> Making the best of byways. A practical guide for local authorities managing and maintaining byways which carry motor vehicles : Defra December 2005

circular 'Regulating the use of motor vehicles on public rights of way and off road.' Further information is [available](#)<sup>34</sup>

6.30 Section 22BB of the Road Traffic Regulation Act 1984 gives national park authorities the power to make traffic regulation orders over rights of way and other, unsurfaced, highways within the national park boundary. Further guidance is [available](#)<sup>35</sup>

### **Gating orders**

6.31 Sections 129A to 129G of the 1980 Act, and the regulations made under them, allow authorities to make (or vary or revoke) gating orders on public highways other than trunk roads, special roads and classified roads. It is envisaged that the orders will be primarily aimed at such highways to be found in urban rather than rural areas. Gating orders may be used where the authority consider that a highway is facilitating high and persistent levels of crime and/or anti-social behaviour that adversely affects local residents or businesses. A gating order operates in a similar way to a traffic regulation order and restricts the public right of way over the highway and, where necessary, authorises the installation of gates or barriers to enforce the restrictions. Because the underlying highway status is not removed, the public right of way can be readily restored if the gating order is revoked and it is possible to make an order that imposes restrictions only at certain times of day. Note that the Highways Act 1980 (Gating Orders) (England) Regulations 2006 (S.I. 2006/537) require notice of proposed gating orders to be served on a number of persons and organisations, including Local Access Forums, and that the council must make a register of gating orders available for inspection at reasonable times. Further guidance is [available](#)<sup>36</sup>

### **Biodiversity**

6.32 Section 40 of the 2006 Act places a general duty on every public authority in exercising its functions to have regard in the conservation of biodiversity. General guidance on the wider biodiversity responsibilities of authorities is [available](#)<sup>37</sup>

6.33 Part 1 of the 1981 Act sets out the protection afforded to wild fauna and flora and the Schedules to the 1981 Act list those birds (Schedule 1), animals (Schedule 5) and plants (Schedule 8) given special protection. The deliberate killing, injury or taking of protected species, or damage, destruction or obstruction of places used by such species for shelter or protection is an offence under the Act, as is the disturbance of such species. Similar protection is afforded to badgers and their sets under the Protection of Badgers Act 1992.

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<sup>34</sup> Regulating the use of motor vehicles on public rights of way and off road. A guide for local authorities, Police and Community Safety Partnerships : Defra December 2005

<sup>35</sup> Guidance for national park authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984 : Defra 2007

<sup>36</sup> Clean Neighbourhoods and Environment Act 2005. Guidance relating to the making of Gating Orders : Home Office 2005

<sup>37</sup> Guidance for public authorities on implementing Biodiversity Duty : Defra 2007

6.34 Following the amendment (Conservation (Natural Habitats, &c.) Regulations 2007 - S.I. 2007/1843) of the Habitats Regulations (Conservation (Natural Habitats, &c.) Regulations 1994 – S.I. 1994/2716), if the offence of disturbing a member of a European Protected Species is committed, even as the incidental result of a lawful operation such as maintaining a highway, then it can no longer be assumed that the fact that there was no deliberate intent (“incidental result”) will be considered to be a valid defence. Guidance<sup>38</sup> is available.

6.35 Section 28 of the Wildlife and Countryside Act 1981 (as amended) provides for the notification of SSSIs and requires the owner or occupier of land in question to obtain permission from Natural England before certain potentially damaging operations can be carried out. These operations, which are notified to every owner and occupier within the SSSI, may include those activities normally associated with the creation or routine maintenance of highways. Highway authorities are therefore advised to consult informally with Natural England before carrying out any operation affecting an SSSI, including path maintenance. Further guidance on development and SSSIs is [available](#)<sup>39</sup>.

6.36 The requirement to have regard to the purposes for which a national park or area of outstanding national beauty was created, referred to in paragraph 5.10, will apply to a highway authority in relation to the carrying out of their duties to manage and maintain the public rights of way for which they are responsible.

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<sup>38</sup> Guidance note on the Conservation (Natural Habitats, &c.)(Amendment) Regulations 2007

<sup>39</sup> Planning Policy Statement 9: Biodiversity and Geological conservation : Office of the Deputy Prime Minister August 2005

## 7. Planning permission and public rights of way

7.1 Proposals for the development of land affecting public rights of way give rise to two matters of particular concern: the need for adequate consideration of the rights of way before the decision on the planning application is taken and the need, once planning permission has been granted, for the right of way to be kept open and unobstructed until the statutory procedures authorising closure or diversion have been completed.

7.2 The effect of development on a public right of way is a material consideration in the determination of applications for planning permission and local planning authorities should ensure that the potential consequences are taken into account whenever such applications are considered.

7.3 Most outline planning applications do not contain sufficient information to enable the effect on any right of way to be assessed (and are not required to do so) and consequently such matters are usually dealt with during consideration of the matters reserved under the planning permission for subsequent approval.

7.4 The Department for Communities and Local Government has introduced a document [The validation of planning applications](#)<sup>40</sup> and an associated [circular](#)<sup>41</sup> 2/08 which lays out the information to be supplied and validated with a planning application. The document specifies (in paragraph 40) that all public rights of way crossing or adjoining the proposed development site must be marked on the plan to be submitted with the full planning application. While the information supplied by an applicant should therefore make clear how the potential development will impinge on any rights of way, local planning authorities will need to ensure that all rights of way affected by the development are identified and take into account any applications for the addition of a path or way to the definitive map, any modifications that the highway authority itself may be proposing to make, the possible existence of any other rights on the ways shown on the definitive map and any ways not yet recorded on the definitive map.

7.5 Notwithstanding the existing position described in paragraphs 7.3 and 7.4, it is likely to be to the benefit of the planning authority, highway authority and the developer to be aware of the impact of a development scheme on the local rights of way network as early as possible in the process (this might be at the pre-application stage or the outline planning stage).

7.6 Any potential disadvantages to the public arising from alternative arrangements proposed for an affected right of way can be minimised by means of the early liaison between the developer, planning and highway authorities, local amenity groups, prescribed organisations (Appendix A) and affected individuals.

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<sup>40</sup> The Validation of Planning Applications – Guidance for local planning authorities : Department for Communities and Local Government December 2007

<sup>41</sup> Circular 02/2008 Standard application form and validation : Department for Communities and Local Government March 2008

This course of action will produce an acceptable scheme in many instances and enable the eventual proposals to gain a wide measure of public acceptance. Further, the approach should minimise uncertainty, costs in revising design schemes and delays. The most significant delay risked if the approach is not followed is due to the fact that the highway authority does not have the power to confirm an opposed public path order proposing to revise an affected right of way. An order made to divert or extinguish a right of way, made as the result of the granting of planning permission, that is opposed will have to be submitted to the Secretary of State for a decision on whether or not it should be confirmed and this will impose significant, unavoidable delays to the scheme.

7.7 The early and effective consultation described in paragraph 7.6 should ensure that all matters of concern are raised without delay and dealt with, and if agreement can be reached, any statutory procedures associated with the making and confirmation of the necessary order can be initiated without delay once the details have been approved.

7.8 In considering potential revisions to an existing right of way that are necessary to accommodate the planned development, but which are acceptable to the public, any alternative alignment should avoid the use of estate roads for the purpose wherever possible and preference should be given to the use of made up estate paths through landscaped or open space areas away from vehicular traffic.

7.9 Where the application is for full planning permission, such as mineral extraction, the decision on the application may be preceded by lengthy negotiation and discussion between the developer and the planning authority with the eight week period stipulated in the General Development Order for the determination of planning applications being set aside by mutual consent. If there is a reasonable expectation that planning permission will eventually be forthcoming there is clearly no reason why the proposals for any consequential stopping-up or diversion of public rights of way should not be considered concurrently with, and as part of, discussions on the proposed development rather than await the grant of planning permission. This should include, as far as possible, the preparation in draft of the order, and associated notices, the form of which is prescribed in the Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10).

7.10 The Town and Country Planning (General Development Procedure) Order 1995 (S.I. 1995/419) provides that development affecting a public right of way must be advertised in a local newspaper and by posting a notice on the site (this is entirely separate from any notices and advertisements required when making and confirming a subsequent extinguishment or diversion order).

7.11 The grant of planning permission does not entitle developers to obstruct a public right of way. It cannot be assumed that because planning permission has been granted that an order under section 247 or 257 of the 1990 Act, for the diversion or extinguishment of the right of way, will invariably be made or confirmed. Development, in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order

has come into effect. The requirement to keep a public right of way open for public use will preclude the developer from using the existing footpath, bridleway or restricted byway as a vehicular access to the site unless there are existing additional private rights. Planning authorities must ensure that applicants whose proposals may affect public rights of way are made aware of the limitations to their entitlement to start work at the time planning permission is granted. Authorities have on occasion granted planning permission on the condition that an order to stop-up or divert a right of way is obtained before the development commences. The view is taken that such a condition is unnecessary in that it duplicates the separate statutory procedure that exists for diverting or stopping-up the right of way, and would require the developer to do something outside his or her control.

### ***Procedure in anticipation of planning permission open to the Secretary of State***

7.12 Authorities cannot make public path orders in anticipation of the granting of planning permission. Section 253 of the 1990 Act enables the Secretary of State to make and advertise a draft order where an application for planning permission has been made to him by a local authority, statutory undertaker, or a national park authority; or the application stands referred to him in pursuance of a direction under section 77, or the applicant has appealed under section 78 against a refusal of planning permission or of approval required under a development order, or against a condition of such permission or approval.

7.13 Similar procedures also exist under regulation 15 of the Town and Country Planning General Regulations 1992 (SI 1992/1492) to enable the Secretary of State to publish notice of an order under section 251, extinguishing a public right of way over land held for planning purposes, concurrently with the acquisition of the land either by compulsory purchase order (section 226) or agreement (section 227). Once the land over which the right of way subsists has been acquired the Secretary of State may also make a compulsory purchase order under section 254 to acquire land to provide an alternative right of way.

### ***The making of an order***

7.14 Section 257 of the 1990 Act gives local planning authorities the power to make orders to extinguish or divert footpaths, bridleways or restricted byways where it is necessary to enable development for which planning permission has been granted or development by a government department to be carried out. Authorities have no power to make orders for extinguishing or diverting highways carrying rights for motorised vehicles in order to enable development to be carried out. Orders are made by the authority that granted the planning permission or, where permission was granted by the Secretary of State (including a permission contained in a special or general development order, or under an order designating an enterprise zone) or development by a government department, by the authority which in normal circumstances would have granted the planning permission. Note that in Greater London there are detailed variations to the authority to make, confirm and charge for orders under the 1990 Act and its associated regulations.

7.15 The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order.

7.16 Where the length of way to be stopped up or diverted straddles two planning authority areas, the order must be made jointly by both authorities unless one authority discharges the functions of the other by means of an agreement under section 101 of the Local Government Act 1972.

7.17 The procedure for diversion or extinguishment of rights of way made under the Town and Country Planning Act 1990 follows that described in chapter 5 of this document for Public Path Orders made under the 1980 Act. The relevant regulations are the Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10).

### ***Alternative highways***

7.18 The 1990 Act enables orders to include provision for the creation of an alternative highway, or the improvement of an existing one, for use as a replacement for one being stopped up or diverted. While a diversion must either commence or terminate at some point on the line of the original way, an alternative way need not do so and may, for instance, run parallel to the way being stopped up. However, to avoid the creation of a cul-de-sac and to enable the public, where appropriate, to return to that part of the original way not affected by the development, any alternative way provided should link by means of other highways to the original way.

7.19 When the diversion or alternative right of way is proposed to be provided and dedicated over land not owned by the developer, the consent of the landowner(s) to the proposed dedication must be obtained before the order is made.

7.20 In making a diversion order under section 257 of the 1990 Act the authority should give consideration to any necessary works that will be required to bring an alternative way in to a fit condition for public use. Where necessary the order, as specified by Schedule 1 of the Town and Country Planning (Public Path Orders) Regulations 1993 should state within its paragraph 3 that the diversion will not have effect until the authority certifies that the requirements defined in its paragraph 2 have been complied with. Note that certification achieved by completion of works must be advertised to the public in a local newspaper.

### ***Where development is complete***

7.21 Where the development, in so far as it affects a right of way, is completed before the necessary order to divert or extinguish the right of way has been made or confirmed, the powers under sections 257 and 259 of the 1990 Act to make and confirm orders that are no longer available since the development, which the order is intended to enable, has already been carried out. If such a development has already been completed there is no basis for an order to be made. It is, of course, open to the local authority to consider what action, if any, it might take to secure the diversion or extinguishment of the right of way by the exercise of such other powers as may be available. In this respect development should be regarded as completed if the work remaining to be carried out is minimal.

### ***Extinguishment of public rights of way over land held for planning purposes***

7.22 Section 258 of the 1990 Act enables an authority to make an order extinguishing a footpath, bridleway or restricted byway over land held for planning purposes if they are satisfied that an alternative right of way has been or will be provided or that an alternative is not required. The procedure for the making and confirmation of orders under section 258 is the same as that for orders under section 257. Similar powers are also available to the Secretary of State under section 251.

### ***Consents and consultations***

7.23 Orders made under section 257 of the 1990 Act which affect apparatus belonging to statutory undertakers cannot be confirmed without their consent.

7.24 If the proposed new highway connects with a trunk road the approval of the Secretary of State for Transport is necessary under section 24(2) of the 1980 Act.

### ***Planning permission for the construction or improvement of highways***

7.25 Where planning permission is granted for constructing or improving a highway and another highway crosses or enters the route of the highway or is or will be affected by such development, powers are available under section 248 of the 1990 Act to enable the Secretary of State to stop-up or divert such other highways where this is considered expedient in the interests of safety or to facilitate the movement of traffic on the highway. In addition, powers to make side road orders are available under section 14 of the 1980 Act in respect of trunk or classified roads (not being special roads). It is not appropriate to use sections 247 or 257 of the 1990 Act to stop-up or divert ways for these purposes.

### ***Surface workings for minerals***

7.26 Section 261(2) of the 1990 Act enables authorities to extinguish or divert footpaths, bridleways or restricted byways temporarily to enable the surface working of minerals to take place.

### ***Charges for making orders***

7.27 The entitlement to charge applicants for orders made under sections 257 and 261(2) of the 1990 Act is the same as is provided for orders made under the 1980 Act, described in paragraph 5.34.

7.28 Further information on the impact of planning on rights of way is available from the [Rights of Way Review Committee Guidance Note no6](#)<sup>42</sup>

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<sup>42</sup> Practice Guidance Note 6 : Planning and public rights of way : Rights of Way Review Committee December 2007

## **8. Other provisions**

### ***Extinguishing public rights of way under the Acquisition of Land Act 1981***

8.1 Section 32 of the Acquisition of Land Act 1981 enables local authorities empowered to acquire land compulsorily to make orders extinguishing non-vehicular public rights of way over land that has been or is being acquired compulsorily. This order-making power also applies where the land is being acquired by agreement, but only if it is also possible for the land to have been acquired compulsorily. The power applies generally to land acquired before similar provisions were first enacted in 1946 provided that the legislation under which the land was acquired was in force on that date. The exceptions are set out in section 33(2) of the Act. The power does not apply to land held for development purposes. Orders made in anticipation of the acquisition of land cannot take effect until after the acquiring local authority has taken possession of the land or the acquisition has been completed. Orders require confirmation by the Secretary of State, unless the order was made by him.

8.2 Before making an order the authority must be satisfied that a suitable alternative way has been or will be provided or is not required. Any alternative right of way should be provided by dedication if the local authority owns the land, or otherwise by way of a public path creation agreement or order. Authorities may make a single order to cover more than one way across the land in question, or where ways extend across adjoining land held by different local authorities.

8.3 Before making an order authorities must obtain the consent of statutory undertakers whose apparatus would be affected by the order. Local authorities are also recommended to obtain the views of the local planning authority (if different from the order-making authority), parish councils, user groups and other people who may be affected by the order.

### ***Housing Act 1985***

8.4 Section 294 enables local housing authorities, with the approval of the Secretary of State, to extinguish any public right of way over land acquired by them for clearance. The order-making authority must publish the order and if there are objections the Secretary of State must hold a public inquiry unless he considers that there are special circumstances that make an inquiry unnecessary.

## 9. Applications for costs

9.1 The parties<sup>43</sup> in rights of way proceedings that arise when a rights of way order is submitted to the Planning Inspectorate for confirmation are normally expected to meet their own expenses. In these cases, unlike with civil litigation, an award of costs does not necessarily follow the outcome. In other words costs are not simply awarded to the party in whose favour the judgement goes. Subject to the exceptions outlined in paragraphs 9.6 to 9.9 below, costs are awarded only on grounds of 'unreasonable' behaviour. The Planning Inspectorate may order<sup>44</sup> that one party pay the costs of another in a case where:

1. that party has behaved 'unreasonably' ; and,
2. the unreasonable behaviour has caused the other party to incur unnecessary costs that they would not otherwise have incurred.

9.2 Guidance on the principles of costs applications and awards is contained in Communities and Local Government (CLG) [Circular 03/2009](#), "Costs Awards in Appeals and Other Planning Proceedings"<sup>45</sup>. This guidance is applicable, by analogy, to the parties in rights of way cases<sup>46</sup> (as indicated in paragraphs 9 and C1), but with the following two key differences:

1. Costs may be awarded only in cases where a public inquiry or hearing is held and do not extend to rights of way cases determined by written representations and a site visit<sup>47</sup>.
2. Rights of way procedures do not enable applications for costs to be made in advance of the public inquiry or hearing – any application on the ground of another party's unreasonable behaviour should be made to the Inspector at the hearing or inquiry.

9.3 Costs will not be awarded simply because one of the order parties has asked to be 'heard', or simply because an objection has been made; these are statutory rights. But these rights should be exercised in a reasonable manner. In general, and consistent with the statutory and policy framework for rights of way explained in this circular, the parties to an inquiry or hearing will not be at risk of an

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<sup>43</sup> Statutory objectors, the surveying authority and persons making statutory supporting representations in relation to opposed orders made under the 1980 Act and the 1981 Act. They are defined as "principal parties", while any other interested persons are defined as "third parties". Awards to or against third parties will be made only in exceptional circumstances.

<sup>44</sup> Under the provisions of section 250(5) of the Local Government Act 1972, as applied by paragraph 9 of Schedule 15 to the 1981 Act.

<sup>45</sup> It replaces the former guidance in Circular 8/93 [*Award of costs incurred in planning and other (including compulsory purchase order) proceedings: Department of the Environment March 1993, as amended 2 August 2004 by Defra letter to local authorities*]. That guidance was cancelled by the new CLG circular (as stated in paragraph 11) but continues to apply to submitted orders published before 6 April 2009.

<sup>46</sup> In respect of submitted orders which were published on or after 6 April 2009.

<sup>47</sup> Such powers exist only for orders under section 249 of the 1990 Act (which also apply to highways other than rights of way), but, as a matter of policy, will not be applied to rights of way cases under this section.

adverse award of costs unless their behaviour has been manifestly unreasonable and has resulted in the other party, or parties, incurring additional costs. Examples of unreasonable behaviour that could result in a costs award are as follows:

- Failing to comply with the normal procedural requirements of inquiries and hearings, which are conducted under the '[Rights of Way \(Hearings and Inquiries Procedure\) \(England\) Rules 2007](#)', particularly where it causes another party to undertake identifiable, abortive work in preparing for the inquiry or hearing or it leads to an adjournment. Examples of this include: failing to provide documents when required by the rules; causing a party to call a professional witness to attend unnecessarily; introducing, without good reason, late evidence or issues; deliberately uncooperative behaviour.
- An objector(s) asking for an inquiry or hearing, and failing to attend that inquiry or hearing.
- Withdrawing an objection at the 'last minute', resulting in late cancellation of an inquiry or hearing arranged after the objector(s) asked to be heard..
- Pursuing an order with a fundamental defect that renders it incapable of confirmation.
- Pursuing an objection that the Secretary of State has advised, in writing, is not legally relevant.

9.4 In a case where the party against whom costs are being claimed is not present at the inquiry or hearing, the Inspector will not be able to hear their representations against the claim. In such cases the Inspector will report the application and circumstances, with provisional conclusions but no recommendation, to the Planning Inspectorate's Costs Branch, who will follow up and determine the claim after inviting the absent party to comment. Any comments received will be exchanged with the claiming party before a decision is issued.

9.5 In cases where there is an interim decision or inquiry and an application for costs is related to the substance of the order, as opposed to a matter of procedure, then it is likely the application will be determined only at the end of the process, when the merits of the order have been settled beyond doubt.

#### ***"Analogous" orders***

9.6 Public path creation orders made under section 26 of the Highways Act 1980 are considered to be analogous to compulsory purchase orders, in that the making or confirmation of the order could take away from an objector some right or interest in land for which the statute gives a right to compensation. Extinguishment and diversion orders made under sections 118-119B of the 1980 Act may also be analogous, depending on the particular circumstances. The other types of order listed at paragraph 10.9 are not considered to be analogous.

9.7 Therefore if a person with an interest in the land over which a path is to be created, extinguished or diverted successfully objects to such an order – that is the person attends, or is represented at, a hearing or inquiry and is heard as a statutory objector, and the order is not confirmed, or the order is modified in favour of the person's interest, whether wholly or in part – an award of costs will be made in the

person's favour unless there are exceptional reasons for not doing so. No application for costs need be made at the hearing or inquiry by such an objector as the Secretary of State will write to the party concerned at the end of the order proceedings. The award would be made against the authority making the order, although this would not, of itself, imply unreasonable behaviour by the authority.

9.8 General guidance on the award of costs in respect of compulsory purchase and analogous order procedure is provided in Part E of the new CLG Circular 3/2009.

***Orders determined at a magistrates' court***

9.9 The costs procedures described above apply where an Inspector, on behalf of the Secretary of State, determines whether or not to confirm an order through a public inquiry or hearing. If all parties act 'reasonably' then there is no risk of costs being awarded. In contrast, a contested diversion or extinguishment order made under section 116 of the 1980 Act will be determined at a Magistrates' Court under the civil litigation costs procedures, where the costs 'follow the event', in other words are dependent on the outcome of the case itself. This means that the party, or parties, that fail(s) to get the result they were seeking would be at risk of having to meet the costs of the successful party, or parties.

## **10. Rôle and powers of the Secretary of State**

### ***Town and Country Planning Act 1990***

10.1 The Secretary of State can make an order under section 247 of the 1990 Act where planning permission has been granted or, for example, where an application for planning permission is before him, either on appeal or following call-in, and it is considered expedient to invoke the concurrent procedure under section 253 of the Act. Otherwise, he will expect to exercise his power only in exceptional circumstances, for example in relation to development of strategic or national importance.

### ***Highways Act 1980***

10.2 The Secretary of State has powers under sections 26(2) and 120(3) of the 1980 Act to make public path orders. These powers will be exercised only exceptionally.

### ***Rail crossing orders***

10.3 Where a rail operator has made a valid application for a rail crossing order and the council has neither confirmed the order nor submitted it to the Secretary of State for confirmation within 6 months of receipt, section 120(3A) of the 1980 Act provides that the Secretary of State may make the order without consulting the council (paragraph 5.47).

### ***Wildlife and Countryside Act 1981***

10.4 If an authority has not reached a decision on an application within 12 months the applicant can apply to the Secretary of State to direct the authority to determine the application (Schedule 14 paragraph 3(2) to the 1981 Act). The Secretary of State will consult the authority before deciding whether to issue a direction and whether to specify a date by which the application must have been determined – see paragraph 4.9.

10.5 If an authority decides that the evidence before it does not meet the criteria specified in the 1981 Act to permit it to make an order, the applicant can appeal to the Secretary of State against that decision (Schedule 14 paragraph 4). Appeals must be made within 28 days from the date on which the authority issued its decision – see paragraph 4.10. If the Secretary of State decides to allow the appeal a direction will be made to the authority to make the order and that decision may include a specified date by which the order must be made.

### ***Orders to which there are representations or objections***

10.6 Once an order has been advertised, local authorities are expected to make every effort to resolve objections and to secure their withdrawal. A representation or objection is duly made to an order, provided it is within time and in the manner

specified in the notice. If duly made objections are not withdrawn then the order cannot be confirmed by the order making authority. A definitive map modification order which has been objected to must be referred to the Secretary of State so that he, or his appointed Inspector, can determine whether or not it should be confirmed. If the order making authority wishes to proceed with a public path order which has been objected to or to have it confirmed with amendments, then the order must also be submitted to the Secretary of State to determine whether or not it should be confirmed. The authority is not entitled to refuse to accept an objection based on its own judgement of whether or not the grounds of the objection or representation appear to be relevant, although it will need to make observations on the objection as part of its submission to the Secretary of State.

10.7 Decisions on the confirmation of opposed public path and definitive map modification orders are usually taken by an inspector appointed by the Secretary of State. Occasionally, an order will have to be submitted to a Government Office for the Region, or to Defra, for a decision on whether or not it should be confirmed (where an order is made in connection with a planning case, for example). Where this occurs, the order making authority and others with an interest will be advised of the reasons for doing so.

10.8 Opposed orders which are submitted to the Secretary of State for a determination of whether or not they should be confirmed, will be considered at either a public inquiry, a public hearing or by means of written representations. The initial assessment of each case for the most appropriate forum will be made on the perceived complexity of the case and the number of objections received. The supporters and objectors may always request a public inquiry if they believe that their case would otherwise be prejudiced. All opposed orders that have been submitted to the Secretary of State since the 1<sup>st</sup> October 2007 are now processed to a timetable designed to ensure that all parties submit and receive case documentation in sufficient time to ensure that the decision making process is concluded in a fair and efficient manner. The details of the timetable are laid out in the Planning Inspectorate document [available](#)<sup>48</sup> online

### ***Secretary of State's power to modify orders***

10.9 The Secretary of State can modify rights of way orders as follows:

- orders which require his confirmation under paragraph 2 of Schedule 6 to the 1980 Act (orders under sections 26 and 118 – 119D of the Act or section 32 of the Acquisition of Land Act 1981);
- orders which require his confirmation under paragraph 7(3) of Schedule 15 to the 1981 Act (orders made under sections 53 and 54 of the 1981 Act);
- draft orders made by him under sections 26(2) and 120(3) of the 1980 Act;

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<sup>48</sup> Guidance on procedures for considering objections to definitive map and public path orders in England : The Planning Inspectorate November 2008

- orders which require his confirmation under paragraph 3(4) of Schedule 14 to the 1990 Act (orders under section 257 or 258 of the 1990 Act); and
- draft orders made by him under section 247 of the Town and Country Planning Act 1990; and

if a proposed modification to a submitted order under the first four points listed above would affect land which was not affected by the order when made (e.g. by virtue of a proposed modification to vary the line or increase the width or length of the right of way), the requirements in each of the relevant statutory provisions as to the giving of notice, and the time specified within which, and the manner in which representations or objections may be made, must be complied with.

10.10 In addition, for orders made under sections 53 or 54 of the 1981 Act, where a modification has the effect of deleting a way shown in the order, or adding a way not shown, or showing a right of way as being of a different status to that shown, the Secretary of State must give such notice as he considers appropriate to the proposed modification (Schedule 15 paragraph 8).

10.11 Where he makes a draft order under section 247 of the 1990 Act and then proposes to modify it, the Secretary of State would be bound by the requirements of section 252 to treat the order as a new order, and so would ensure that the owner of the land and anyone who made representations or objections to the original draft order was given the opportunity to make further representations or objections.

### ***Secretary of State's power to modify orders which contain errors***

10.12 When asking for modifications to correct errors, authorities should bear in mind that an order is published to allow the public to consider the reasons for the order and the effect of the order, and to raise representations or objections if they wish. The prescribed form of order ensures that the public has sufficient information to enable an informed decision to be made about whether or not to object to the order. Thus, if an order contains an error that does not

- prejudice the interests of any person,
- render the order misleading in its purpose, or
- appear to result in incorrect information being recorded on the definitive map,

then that error may be disregarded. If the error is substantive however, the order will be returned to the authority with a written explanation as to why it was rejected, together with a written recommendation that the authority should notify all parties of the rejection and the reasons for it. See also the Planning Inspectorate's [Advice Note 20](#)<sup>49</sup> for information on the Secretary of State's power to modify definitive map orders which are defective.

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<sup>49</sup> Advice note 20. Inspectors' power to modify definitive map modification orders : The Planning Inspectorate February 2006

## Annex A – Prescribed organisations

Authorities must send copies of the statutory notices of orders made as specified below to the organisations listed. An asterisk (\*) indicates that the organisation wishes to have notice of proposals or preconsultations sent to their nominated local representative. Notice of the orders must always be sent to the organisation's head office.

Organisation	Head Office address Submission requirement
Auto Cycle Union	Wood Street, Rugby, CV21 2XY Submit All proposals except those relating to footpaths or bridleways unless there are possible byway (RB and BOAT) rights * All orders
British Horse Society	Stoneleigh Deer Park, Stareton Lane, Kenilworth, Warwickshire, CV8 2XZ Submit All proposals All orders
Byways and Bridleways Trust	PO Box 117, Newcastle upon Tyne, NE3 5YT Submit All proposals All orders
Cyclists' Touring Club	Parklands, Railton Road, Guildford, Surrey, GU2 9JX Submit All proposals except those affecting footpaths unless there are possible bridleway or byway rights All orders
Open Spaces Society	25A Bell Street, Henley on Thames, RG9 2BA Submit All proposals in areas notified by society * All orders
Ramblers' Association	2nd Floor, Camelford House, 87-90 Albert Embankment, London, SE1 7TW Submit All proposals * All orders
Chiltern Society	White Hill Centre, Chesham, Bucks, HP5 1AG Submit <i>All proposals affecting land in Dacorum borough, the districts of Chiltern, Wycombe, South Bucks, Aylesbury Vale, Three Rivers, North Hertfordshire, South Oxfordshire, South Bedfordshire, Mid Bedfordshire and Luton Borough*</i> <i>All orders affecting land in the areas defined above</i>
Peak and Northern Footpaths Society	Taylor House, 23 Turncroft Lane, Offerton, Stockport, SK1 4AB Submit <i>All proposals affecting land in Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire</i> <i>All orders affecting land in the areas defined above</i>

Organisation	Head Office address Submission requirement
British Driving Society	83 New Road, Helmingham, Stowmarket, Suffolk, IP14 6EA Submit All proposals except those relating to footpaths or bridleways unless there are possible byway (RB and BOAT) rights All definitive map modification orders
Network Rail	40 Melton Street, London, NW1 2EE Submit All orders creating footpaths, bridleways and restricted byways on land adjacent to operational railway lines

List taken from

- Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (S.I. 1993/9)
- Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10)
- Public Path Orders Regulations 1993 (S.I. 1993/11)
- Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (S.I. 1993/12)

with addresses updated as appropriate.

## **Annex B – Addresses**

### ***Defra (Recreation and Access Policy & Legislation)***

Room 1/02  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

### ***The Planning Inspectorate***

Room 3/01  
Kite Wing  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

### ***Natural England***

John Dower House  
Crescent Place  
Cheltenham  
Gloucester  
GL50 3RA

### ***Department for Transport***

Great Minster House  
76 Marsham Street  
London  
SW1P 4DR

### ***National Rights of Way Casework***

Government Office for the North East  
Citygate  
Gallowgate  
Newcastle upon Tyne  
NE1 4WH  
tel: 0191 202 3595  
fax: 0191 202 3744  
email: [national.rightsofway.casework@gone.gsi.gov.uk](mailto:national.rightsofway.casework@gone.gsi.gov.uk)

***Rail crossing orders submitted to the Secretary of State***

Room 1/02

Temple Quay House

2 The Square

Bristol

BS1 6PN

## Annex C – Other relevant/useful sources of information

Department for Environment, Food and Rural Affairs (Defra)

[Defra's rights of way web pages](#)

Planning Inspectorate

[Planning Inspectorate rights of way web pages](#)

Natural England

[Natural England rights of way web page](#)

[A guide to definitive maps and changes to public rights of way NE112 \(ex CA142\)](#)

[Waymarking public rights of way NE68](#)

[Managing Public Access CA210](#)

[The Countryside Code](#)

Institute for Public Rights of Way and Access Management

[Rights of way good practice guide](#)

Rights of Way Review Committee

[Practice guidance note 1](#) Consultation on changes to public rights of way and definitive maps.

[Practice guidance note 2](#) Deemed dedication of public rights of way: section 31(6) of the Highways Act 1980

[Practice guidance note 3](#) Minimising representations and objections to definitive map modification orders

[Practice guidance note 4](#) Securing agreement to public path orders

[Practice guidance note 5](#) Investigating the existence and status of public rights of way

[Practice guidance note 6](#) Planning and public rights of way

## **Annex D - Statutory Guidance/Instruments**

SI 1992/1492: The Town and Country Planning General Regulations 1992 [Link](#)

SI 1993/9: The Rail Crossing Extinguishment and Diversion Order Regulations 1993 [Link](#)

SI 1993/10: Town and Country Planning (Public Path Orders) Regulations 1993 [Link](#)

SI 1993/11: Public Path Orders Regulations 1993 [Link](#)

SI 1993/12: Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 [Link](#)

SI 1993/407: Local Authorities (Recovery of Costs for Public Path Orders) 1993 [Link](#)

SI 1994/2716: The Conservation (Natural Habitats, &c.) Regulations 1994 [Link](#)

SI 1995/419: The Town and Country Planning (General Development Procedure) Order 1995 [Link](#)

SI 1996/1978: The Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 [Link](#)

SI 2002/3113: The Traffic Signs Regulations and General Directions 2002 [Link](#)

SI 2004/370: Removal of Obstructions from Highways (Notices etc) (England) Regulations 2004 [Link](#)

SI 2005/2461: The Public Rights of Way (Register of Applications under section 53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005 [Link](#)

SI 2006/537: The Highways Act 1980 (Gating Orders) (England) Regulations 2006 [Link](#)

SI 2006/1177: The Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006 [Link](#)

SI 2007/268: Local Access Forums (England) Regulations 2007 [Link](#)

SI 2007/1494: The Highways (SSSI Diversion Orders) (England) Regulations 2007 [Link](#)

SI 2007/1843: The Conservation (Natural Habitats, &c) (Amendment) Regulations 2007 [Link](#)

SI 2007/2334: The Dedicated Highways (Registers under Section 31A of the Highways Act 1980) (England) Regulations 2007 [Link](#)

SI 2007/2542: The National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007 [Link](#)

SI 2008/442: The Public Rights of Way (Combined Orders) (England) Regulations 2008 [Link](#)

## Annex X – Document revision history

Version	Reason for revision	Date released
1	First issue Document supersedes Circular 1/08	March 2009
2	Second issue <ul style="list-style-type: none"><li>• Revised section 9 on applications for costs.</li><li>• Clarification in paragraph 4.27 (that any element of a subdivided order must appear to be capable of confirmation in its own right).</li><li>• Further guidance on concurrent orders added, to the end of paragraph 5.55</li></ul>	October 2009