FORM 2

NOTICE OF DECISION OF CABINET MEMBER

Pursuant Section 15(4) of the Local Government Act 2000, as amended by section 63 of the Local Government and Public Involvement in Health Act 2007, the senior executive member may discharge any of the functions that are the responsibility of the Cabinet or may arrange for them to be discharged by another member of the Cabinet or Officer. On 1st December 2010, the Council adopted the Strong Leader Model for Corporate Governance 2011 as required under Part 3 of The Local Government and Public Involvement in Health Act 2007 (The 2007 Act).

In accordance with the authority delegated to me, I have made the following decision:

Subject	**Decision**	**Reason for decision**	**Date for Decision to be taken**
Application to Divert a Public Footpath pursuant to s257 Town and Country Planning Act 1990 at Wyre Mill Cottage, Wolverley	To make and (if unopposed) to confirm the Wyre Forest District Council (Public Footpath No 635 (C) (Part) (Wolverley and Cookley) Diversion Order 2022 in the form attached SUBJECT TO: a. any minor amendments that may be required to the Order or the Order Map; b. the agreement of Worcestershire County Council with regards to the reasonable surfacing and connectivity works that it shall require to be carried out by the Applicant prior to the confirmation of the Order (the "WCC Works"); and c. any planning consents or other third party consent,	s257 of the Town and Country Planning Act 1990 gives Wyre Forest District Council the discretionary power to divert a public footpath where it is satisfied that it is necessary to enable development to be carried out in accordance with a planning permission. Footpath No 635 (C) (Part) (Wolverley and Cookley) runs through Wyre Mill Cottage, Wolverley. The applicant wishes to erect a fence which crosses the line of the Public Footpath No 635 (C) (Part) (Wolverley and Cookley). The erection of a fence amounts, under the General Permitted Development Order as a development with a planning permission and the development has not yet	

FORM 2

	licences or agreements required to carry out the WCC Works to be obtained prior to starting the WCC Works and the WCC Works are to be carried out in accordance with them.	commenced and so satisfies the criteria of s257. Although objections have been received, having reviewed disadvantages and losses to the public that were raised in the objections, on balance, it has been decided they are not of such significance or seriousness that the Council should refuse to make the Order.	

I confirm that the appropriate statutory officer consultation has taken place with regard to this decision.

Dated: 25th July 2022

Signed: H.E. Dyke

Councillor Helen Dyke, Leader:

FORM 3

To: The Leader of the Council and Cabinet Member for Economic Regeneration, Planning and Localism, Councillor Helen Dyke.

From: Head of Economic Development & Regeneration - North Worcs, Ostap Paparega.

Date 21 July 2022

Application to Divert a Public Footpath pursuant to s257 Town and Country Planning Act 1990 at Wyre Mill Cottage, Wolverley

Open with Annexes D, E, G, H and I; please note that Annexes A, B, C and F are **exempt** from disclosure as they contain personal information.

1. PURPOSE

a. To consider an application made to Wyre Forest District Council ("**the Council**") by the applicant named in **Annex A** ("**the Applicant**") to divert part of Public Footpath Number 635(C), at Wyre Mill Cottage, Wolverley, in accordance with the application dated 24 March 2022 set out at **Annex A**.

b. The current route of the Public Footpath Number 635(C) is shown by a solid black line between the points A and C ("**the Current Footpath**"). The proposed diverted route is shown a dotted navy blue line between the points A and B ("**the Proposed Footpath**"). The proposed diversion set out in the application at **Annex A** was informally consulted on 6 August 2021.

c. Please note that **Annex A** is a variation to an earlier application adjusted by the Applicant following the initial objections received. The previous proposal was sent out for informal consultation on 17 November 2020 and a copy of the original application and supporting papers is set out at **Annex B**.

d. Table 3 of Section 4 of the Wyre Forest District Council's Constitution delegates the decision to make orders relating to public rights of way to Officers subject to consultation with Ward Members. If a Ward Member objects then the Officer must consult the Cabinet before the decision is made whether or not to grant the Order.

e. The application site falls within the Wyre Forest Rural Ward and all three current Ward Members have objected to the making of the Order. Additional objections have also been received from Worcestershire County Council and Wolverley and Cookley Parish Council. The objections are set out at **Annex C**.

2. RECOMMENDATION

Recommend to make and (if unopposed) to confirm the Wyre Forest District Council (Public Footpath No 635 (C) (Part) (Wolverley and Cookley) Diversion Order 2022 in the form attached at **Annex D** SUBJECT TO:

a. any minor amendments that may be required to the Order or the Order Map;

b. the agreement of Worcestershire County Council with regards to the reasonable surfacing and connectivity works that it shall require to be carried out by the Applicant prior to the confirmation of the Order (the "**WCC Works**"); and

c. any planning consents or other third party consent, licences or agreements required to carry out the WCC Works to be obtained prior to starting the WCC Works and the WCC Works are to be carried out in accordance with them.

3. BACKGROUND

a. The Council has a discretionary power under s257 Town Country Planning Act 1990 ("**TCPA 90**") to divert a public footpath where it is satisfied that it is necessary to enable development to be carried out in accordance with a planning permission (the full wording of s257 TCPA 90 is set out at **Annex E**). In deciding whether to make an Order the Council is exercising a power, not a duty.

b. A "planning permission" includes General Permitted Development Rights and the Applicant has provided a copy of an Appeal Decision (a copy of which is attached at **Annex F**) which appends a Lawful Development Certificate for the proposed development. The commentary attached to the Appeal Decision at paragraph 19 states that: "*As the proposed fence would be below 2 metres in height, the fence would be development permitted by Article 3 (1) of the GDPO*". Therefore, for the avoidance of doubt, it is the proposal to erect a fence over the public footpath which constitutes the "planning permission" trigger for s257 TCPA 90 (and not the siting of the caravan or the beehives).

Please note that the Applicant has stated in his application that the fence will be 2 metres in height. Please note that notwithstanding the Law Development Certificate referring to "below 2 metres in height", Schedule 2, Part 2 of Class A of the GPDO does refer to the limitation on development as a fence exceeding 2 metres so this Applicant's fence would still satisfy this criterion.

c. Paragraph 7.11 of the Rights of Way Circular (1/09) (at **Annex G**) provides:

"*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.* […]"

d. The first part of paragraph 7.15 of the Rights of Way Circular (1/09) (at **Annex G**) provides:

"*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.*"

e. As noted above, planning permission has been granted for the purposes of s257 TCPA 90 and the Applicant has advised that it is necessary to divert the Current Footpath to enable the development in the location chosen by the Applicant, shown in his application at **Annex A,** to be carried out in accordance with that permission because:

"The location needs to be on level ground, 8m from the watercourse and away from the flood defence barrier and accessible from the rest of the garden."

"It also needs to be in an area consistently above the flood levels."

"*At present the hives are on the house lawns this can only be a temporary measures as it prevents the Environment Agency and ourselves maintaining the lawns, the hives are also a hazard to our dogs as they bees become more active in the summer. The hives need to be moved as soon as possible onto the other side of the fence into the wildflower meadow that has been planted.*

The fence is necessary to ensure the security of the hives."

f. In addition to the Applicant's comments on necessity, the Council should consider the case law when considering the full meaning of "necessary". The legal principles of necessity were addressed in the case of *Network Rail Infrastructure Limited, R (on application of) v The Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259 ("**the Eden DC Case**"). A copy of the case is set out at **Annex H**.

The Eden DC Case split the word necessary into two parts the "Necessity Test" and the "Merits Test" following the principles set out in the Court of Appeal decision in *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507. The relevant provisions for the current application can be summarised as follows:

Necessity Test:

i. The Council cannot make the Order unless it is satisfied that a planning permission exists for the development and that it necessary to authorise

the diversion of the public right of way to enable the development to take place.

ii. Necessity should be interpreted in accordance with the plans and conditions of a planning permission which allow the development to be carried out and is the Order needed for that purpose.

iii. The word "necessary" does not mean "essential" or "indispensable" but instead means "required for the circumstances of the case".

Merits Test:

i. The Council has the discretion to make the Order and therefore may refuse to do so.

ii. In exercising the Council's discretion, the Council should take into account the significant disadvantages or losses flowing directly from the diversion order made which have been raised for the public generally. The Council should also take into account any benefits that the public may receive, the planning benefits of, and the degree of importance attaching to, the development. The Council must balance these aspects and decide whether any of the disadvantages or losses to the public generally are of such significance or seriousness that they should refuse to make the Order.

iii. The Council should not re-open the merits of the grant of the planning permission (albeit please note that planning permission granted by the GDPO was not directly addressed in the Eden DC Case).

g. Therefore, even where a case of necessity is claimed by the Applicant, the Council still has the discretion whether or not to make the Order. However, there must be good reasons for deciding that an Order should not be made. The Council should consider the following:

i. The second part of paragraph 7.15 of the Rights of Way Circular (1/09) which provides:

"*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*."

ii. The comments on necessity and merits from the Eden DC Case set out in paragraph 3 f. above.

iii. The objections set out in **Annex C** and, in particular, to make a decision whether, on balance to the advantages sought by the Applicant, that the disadvantages and losses to the members of the public are of such significance or seriousness that the Council should refuse the Order**.**

iv. The Council should note that as the planning permission was "granted" without the need for a planning application made to the Local Planning Authority, this application can be distinguished from the Eden DC Case. This is because:

1. as referred to above, the Eden DC Case provided that necessity should be interpreted in accordance with the land and conditions of the planning permission. In this case, there are no "plans" just a right for the Applicant to carry out the permitted works within the red line boundary of the Lawful Development Certificate. The Lawful Development Certificate does not specify where the fence should be located;

2. the potential consequences that the effect of development might have on a public right of way has not been taken into account by the Local Planning Authority. Although the Circular states that the Council must not question the merits of the planning permission, this application is the first time that the Council has had an opportunity to review the effects of the Applicant's proposal on the public right of way; and

3. this application is the first opportunity that third parties have had to make objections to the proposed diversion and the effects of the Applicant's proposal on the public right of way. If a planning application had been made for planning permission, then under article 15 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 a development affecting a public right of way must be advertised in a local newspaper and by posting a site notice.

h. If the decision is made to make the Order and then objections are made once notice has been given (and before the Order is Confirmed) and not subsequently withdrawn, the decision to confirm may be tested at an inquiry, hearing or by written representations to the Secretary of State for Environment, Food and Rural Affairs (Defra) (by reference to the Planning Inspectorate). The Council do not have the power to Confirm the Order whilst there is still an outstanding objection.

i. The Current Footpath and the Proposed Footpath are shown on the application plan at **Annex A**. Worcestershire County Council have indicated that if the Council proceed with the Order (notwithstanding the initial objection lodged by Worcestershire County Council) that they will require some additional works being carried out to the Proposed Footpath, including but not limited to the junction of the Property Footpath with the current Footpath network. Therefore, any decision to proceed with the proposed Order will be subject to confirmation that Worcestershire County Council have agreed the WCC Works with the Applicant.

j. Please note that the Proposed Footpath crosses land in third party ownership. TG Builders Merchants Limited, the registered owner, have consented to the diversion.

4. FINANCIAL IMPLICATIONS

a. The Applicant pays the legal costs and advertisement costs incurred by the Council in the processing and making of the Order.

b. If the Council refuses to make an Order without good reasons it is liable to judicial review.

c. If an Order is made and opposed its confirmation will be determined by the Secretary of State by reference to the Planning Inspectorate. The cost of any consequential public inquiry or hearing would be borne by the Council. It is possible that the Inspectorate might chose written representations to determine the case.

d. If the Order is made and confirmed, the Council will not be financially responsible for the maintenance of the right of way in the future, the Proposed Footpath will following the confirmation of the Order become a Public Footpath which is maintained by Worcester County Council.

e. Any potential costs arising from the diversion order will be met from the general risk reserve.

5. SECTION 151 OFFICER'S COMMENTS

a. The s151 Officer has reviewed this report and has noted the potential financial implications.

6. LEGAL AND POLICY IMPLICATIONS

a. The Council, under s257 TCPA 90, has discretionary powers by order to divert footpaths if it is satisfied that it is necessary to do so in order to enable development to be carried out in accordance with planning permission.

b. s257 TCPA 90 should only be used where the development affecting the Current Footpath has not already been carried out. If a decision is made to grant the Order, then an inspection of the Current Footpath will be made prior to the making of the Order.

c. The Council should therefore consider if the proposal meets the requirements of the legislation. It should also consider all of the other relevant legislation, supplementary guidance and policy.

d. Once an Order is made, the Council does not have the authority to confirm it where it is opposed. In the event that objections cannot be resolved, the Order

must be submitted to the Secretary of State for a decision on whether or not it should be confirmed.

e. If the Order process is abandoned, there is no right of appeal for the Applicant under the TCPA 90. However, a decision not to proceed could trigger a judicial review challenge against Wyre Forest District Council.

7. CONCLUSION

a. Options for the Council to consider:

i. The Council may decide to refuse the application.

ii. The Council may decide to make an Order under s257 TCPA 90 to divert the Public Footpath as applied for.

b. Having reviewed the case law, the papers and objections in the case, the Officer is recommending that the Council proceeds with the grant of the Order. This is on the following basis:

i. the development has not been started (and this will be checked again following the agreement of the WCC Works) and therefore this requirement of s257 TCPA 90 has been satisfied;

ii. on the Necessity Test, the planning permission does not have any plans attached to it other than the redline of the land identified in the Lawful Development Certificate as the land within land at Wyre Mill Cottage, Mill Lane, Wolverley (the "**Redline**"). The Applicant has permitted rights to erect the fence within the Redline. As confirmed by the Planning Inspectorate in **Annex F**, the erection of the fence is development. Therefore, on a strict interpretation of s257 TCPA 90 and the Eden DC Case "tests" and as the Applicant is permitted to dictate the location of the fence, the application to divert the Current Footpath is necessary to enable the development to take place in accordance with the planning permission. In addition, the Eden DC Case also stated that necessary meant "required in the circumstances of the case". The circumstances of this application is that the planning permission is a statutory right to planning permission and location of the fence does not need to be approved by the Local Planning Authority. It should be noted, however, that the facts of the Eden DC Case are not identical but, as there are no cases testing the application of the necessity test to a planning permission granted by way of the GDPO, the Officer has erred on the side of caution in making its recommendation that the necessity test has been satisfied; and

iii. on the Merits Test, the Officer has noted the objections set out in **Annex C** but considers that in the light of:

1. the alternative route available to walkers in the area (either travelling along the footway on Wolverley Road to Footpaths 636(B) and

634(C) or travelling along the footways at Wolverley Road, Franche Road, Mill Lane and Footpaths 630 (C) and 633(C) – please see **Annex I**) providing the public with reasonable alternative access in the event of flooding; and

2. the effect that flooding has on the Current Footpath as well as the Proposed Footpath – albeit acknowledging that the Proposed Footpath is at a lower level and therefore more liable to flood – the Officer considers that Proposed Footpath will only be affected for a short period of each year,

that although such disadvantages or losses to the public generally raised in the objections are actual disadvantages and losses to be considered by the Council they are not of such significance or seriousness that the Council should refuse to make the Order.

8. RISK MANAGEMENT

There are no risk management issues arising from this report.

9. EQUALITY IMPACT NEEDS ASSESSMENT

Any footpath diverted need to be of a minimum width to satisfy Worcestershire County Council's Equalities Act compliance; this application complies with these requirements and therefore a further assessment is not required.

10. CONSULTEES

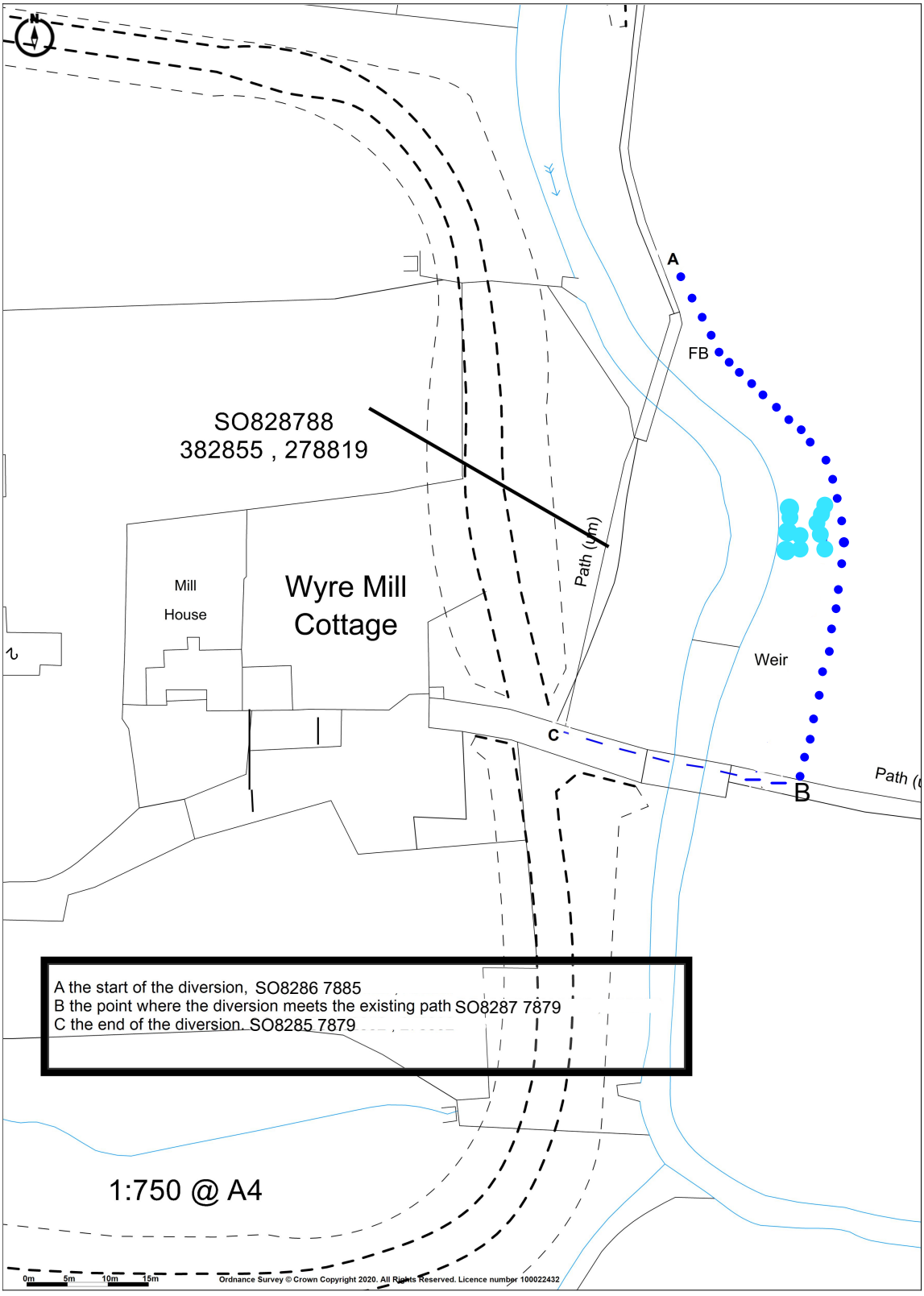
a. Councillor H Dyke
b. Councillor M J Hart
c. Councillor I Hardiman
d. Councillor L Jones
e. Worcestershire County Council
f. Parish Clerk Wolverley and Cookley
g. Byways & Bridleways Trust
h. Auto Cycle Union
i. British Horse Society
j. Cyclists' Touring Club (Cycling UK)
k. Open Spaces Society
l. Worcestershire Area Ramblers
m. British Driving Society
n. Western Power Distribution
o. British Telecom plc
p. Western Power Distribution (West Midlands) Plc
q. National Grid
r. Severn Trent Water Ltd

11. BACKGROUND PAPERS

a. s257 TCPA 90 and the TCPA 90 generally.

b. Rights of Way Circular 1/09 version 2 October 2009 (with particular reference to section 7).

c. *Network Rail Infrastructure Limited, R (on application of) v The Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259.



24.03.2022

DATED **2022**

PUBLIC PATH DIVERSION ORDER

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 257

WYRE FOREST DISTRICT COUNCIL

WYRE FOREST DISTRICT COUNCIL (PUBLIC FOOTPATH NO 635 (PART) (FORMERLY FOOTPATH 69) (IN THE PARISH OF WOLVERLEY AND COOKLEY) DIVERSION ORDER 2022

WYRE FOREST DISTRICT COUNCIL hereby }
confirms the within written Order without }
modification in exercise of its powers in that behalf }
this day of 2022 }

Authorised Signatory .....

PUBLIC PATH DIVERSION ORDER
TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257

Wyre Forest District Council (Public Footpath No 635 (part) (Formerly Footpath 69) in the Parish of Wolverley and Cookley) Diversion Order 2022

This order is made by Wyre Forest District Council under Section 257 of the Town and Country Planning Act 1990 because it is satisfied that it is necessary to divert the footpath to which this order relates in order to enable permitted development to be carried out in accordance with Part III of the Town and Country Planning Act 1990 namely: the proposed erection of a 2 metre fence as part of an apiary at Wyre Mill Cottage, Mill Lane, Wolverley DY11 5TR.

BY THIS ORDER:

1. The footpath over the land shown with a solid black line between the **Points A to C** on the attached map marked 1 and described in Part 1 of the Schedule to this order ('the Schedule') shall be diverted as provided below.

2. There shall be created to the reasonable satisfaction of Wyre Forest District Council an alternative highway for use as a replacement for the said footpath as provided in Part 2 of the Schedule and shown by a broken navy-blue line between the **Points A to B** on the attached map marked 1.

3. The following works shall be carried out by the owner of the land crossed by the footpath described in paragraph 1 of the Order before Wyre Forest District Council certifies that the terms of Article 2 above have been complied with:

(a) [WCC to confirm];

(b) [WCC to confirm] etc.

4. The diversion of the footpath shall have effect on the date on which Wyre Forest District Council certifies that the terms of Article 2 above have been complied with.

5. Where immediately before the date on which the footpath is diverted there is apparatus under, in, on, over, along or across it belonging to statutory undertakers for the purpose of carrying on their undertaking, the undertakers shall continue to have the same rights in respect of the apparatus as they then had.

THE COMMON SEAL of WYRE }

FOREST DISTRICT COUNCIL was }

hereunto affixed this day }

of 2022 in the presence of: }

Authorised Signatory

SCHEDULE

PART 1

Description of Site of Existing Footpath

FOOTPATH WC-635 (PART) (FORMERLY FOOTPATH 69)

The length and entire width of footpath 635 (part) in the parish of Wolverley and Cookley to be diverted commences at Ordnance Survey Grid Reference (OSGR) SO 8286 7885 (Point A on the Order map) and proceeds in a generally southerly direction for approximately 62 metres to OSGR SO 8285 7879 (Point C on the Order map)

Total distance of footpath to be diverted is approximately 62 metres.

PART 2

Description of Site of New Footpath

FOOTPATH WC-635 (PART) (FORMERLY FOOTPATH 69)

The length of footpath WC-635 (part) in the parish of Wolverley and Cookley commences at Ordnance Survey Grid Reference (OSGR) SO 8286 7885 (Point A on the Order map). It continues at a minimum 3 metres width over naturally occurring vegetation providing a flat even surface in a generally south-easterly and then southerly direction to OSGR SO 8287 7879 (Point B on the Order map) where it meets footpath WC-634.

Total distance approximately 66 metres.

PART 3

Limitations and Conditions

[None – WCC to confirm]

Town and Country Planning Act 1990 c. 8

s. 257 Footpaths, bridleways and restricted byways affected by development: orders by other authorities.

Law In Force With Amendments Pending

6 September 2015 - Present

257.— Footpaths [, bridleways and restricted byways][1] affected by development: orders by other authorities.

(1) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath [, bridleway or restricted byway][1] if they are satisfied that it is necessary to do so in order to enable development to be carried out—

(a) in accordance with planning permission granted under Part III[or section 293A][2], or

(b) by a government department.

[

(1A) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion [...][4] of any footpath, bridleway or restricted byway if they are satisfied that—

(a) an application for planning permission in respect of development has been made under Part 3, and

(b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.

][3]

(2) An order under this section may, if the competent authority are satisfied that it should do so, provide—

(a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;

(b) for authorising or requiring works to be carried out in relation to any footpath [, bridleway or restricted byway][1] for whose stopping up or diversion, creation or improvement provision is made by the order;

(c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the order is under, in, on, over, along or across any such footpath [, bridleway or restricted byway][1] ;

(d) for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works.

(3) An order may be made under this section authorising the stopping up or diversion of a footpath [, bridleway or restricted byway][1] which is temporarily stopped up or diverted under any other enactment.

(4) In this section *"competent authority"* means—

(a) in the case of development authorised by a planning permission, the local planning authority who granted the permission or, in the case of a permission granted by the Secretary of State [or by the Welsh Ministers][5] , who would have had power to grant it; [...][6]

(b) in the case of development carried out by a government department, the local planning authority who would have had power to grant planning permission on an application in respect of the development in question if such an application had fallen to be made [;][7]

[

(c) in the case of development in respect of which an application for planning permission has been made under Part 3, the local planning authority to whom the application has been made or, in the case of an application made to the Secretary of State under section 62A[or to the Welsh Ministers under section 62D, 62F, 62M or 62O][8], the local planning authority to whom the application would otherwise have been made.

][7]

Notes

1 Amended by Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006/1177 Sch.1(I) para.1 (July 11, 2006: July 2, 2006 in relation to England; July 11, 2006 otherwise)

Notes

2 Words inserted by Planning and Compulsory Purchase Act 2004 (Commencement No. 9 and Consequential Provisions) Order 2006/1281 art.5(c) (June 7, 2006)

3 Added by Growth and Infrastructure Act 2013 c. 27 s.12(2) (June 25, 2013)

4 Words repealed by Planning (Wales) Act 2015 anaw. 4 Pt 6 s.38(2) (September 6, 2015 for the purposes of enabling the Welsh Ministers to exercise any function of making regulations or orders by statutory instrument under any enactment as amended by 2015 anaw 4 Pts 3-8; March 16, 2016 otherwise)

5 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.14(a) (September 6, 2015 for the purposes of enabling the Welsh Ministers to exercise any function of making regulations or orders by statutory instrument under any enactment as amended by 2015 anaw 4 Pts 3-8; March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)

6 Word repealed by Growth and Infrastructure Act 2013 c. 27 s.12(3)(a) (June 25, 2013)

7 Added by Growth and Infrastructure Act 2013 c. 27 s.12(3)(b) (June 25, 2013)

8 Words inserted by Planning (Wales) Act 2015 anaw. 4 Sch.4 para.14(b) (September 6, 2015 for the purposes of enabling the Welsh Ministers to exercise any function of making regulations or orders by statutory instrument under any enactment as amended by 2015 anaw 4 Pts 3-8; March 1, 2016 in relation to developments of national significance and secondary consents; not yet in force otherwise)

www.defra.gov.uk

Rights of Way Circular (1/09)

Guidance for Local Authorities

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Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
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Telephone 020 7238 6000
Website: www.defra.gov.uk

Information about this publication is available from:

Sponsorship, Landscape and Recreation Division
1/02 Temple Quay House
2 The Square
Bristol
BS1 6EB
E-mail: recreation.access@defra.gsi.gov.uk
Telephone: 0117 372 6274

This document is also available on the Defra website at
http://www.defra.gov.uk/rural/documents/countryside/prow/rowcircular1-09.pdf

Published by the Department for Environment, Food and Rural Affairs

Contents

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*[1] 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*[2]

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*[3]

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*[4] 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*[5].

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[1] Access to Public Rights of Way Information in England and Wales : OS & IDEA 2008
[2] Register of definitive map modification order applications. Guidance for English surveying authorities to accompany Statutory Instrument 2005 no 2461 : Defra 2005
[3] Register of Highway Act Declarations, Statement and Maps. Guidance for English local authorities to accompany Statutory Instrument 2007/2334 : Defra 2007
[4] Traffic Signs Regulations and General Directions (S.I. 2002/3113)
[5] 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*[6]

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.*[7]

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.

[6] Guidance on Local Access Forums in England : Defra 2007
[7] 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*[8] 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.

[8] 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*[9] 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.

[9] 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*[10] 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

[10] 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*[11] . 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*[12].

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.

[11] Practice Guidance Note 1 : Consultation on changes to public rights of way and definitive maps : Rights of Way Review Committee December 2007

[12] 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*[13] 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

[13] 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*[14]. Where a way presumed

[14] 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* [15] 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.

[15] 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*[16] 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[17] 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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[16] Rights of Way Improvement Plans – Statutory Guidance to Local Highway Authorities in England : Defra November 2002

[17] 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*[18].

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

[18] 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*[19].

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*[20] 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

[19] Guidance for Public Authorities on implementing Biodiversity Duty : Defra 2007
[20] 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*[21] (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* [22] (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

[21] Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008
[22] 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*[23] 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.

[23] 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*[24] 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*[25] 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

[24] 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
[25] 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 section119 should be used in every case. Further information is available in the Planning Inspectorate's *Advice Note 9* (s31&32)[26]

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*[27] and associated *guidance*[28] 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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[26] Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

[27] Statutory Instrument 2008/442 The Public Rights of Way (Combined Orders)(England) Regulations 2008

[28] 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[1] to Ordnance Survey

Provision	Ordnance Survey
Highways Act 1980	
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
Wildlife and Countryside Act 1981	
s.53(2) definitive map modification order	Order on confirmation
Town and Country Planning Act 1990	
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
Acquisition of Land Act 1981	
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* [29]

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

[29] 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*[30] 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.

[30] 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*[31].

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.

[31] 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*[32]

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.

[32] 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* [33] and the

[33] 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*[34]

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*[35]

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*[36]

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*[37]

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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[34] 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

[35] Guidance for national park authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984 : Defra 2007

[36] Clean Neighbourhoods and Environment Act 2005. Guidance relating to the making of Gating Orders : Home Office 2005

[37] 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*[38] 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*[39].

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.

[38] Guidance note on the Conservation (Natural Habitats, &c.)(Amendment) Regulations 2007
[39] 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*[40] and an associated *circular*[41] 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.

[40] The Validation of Planning Applications – Guidance for local planning authorities : Department for Communities and Local Government December 2007
[41] 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*[42]

[42] 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[43] 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[44] 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"[45]. This guidance is applicable, by analogy, to the parties in rights of way cases[46] (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[47].
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

[43] 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.

[44] 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.

[45] 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.

[46] In respect of submitted orders which were published on or after 6 April 2009.

[47] 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 is 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 1st 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*[48] 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;

[48] 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*[49] for information on the Secretary of State's power to modify definitive map orders which are defective.

[49] 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 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** All orders *affecting land in the areas defined above*
Peak and Northern Footpaths Society	Taylor House, 23 Turncroft Lane, Offerton, Stockport, SK1 4AB Submit All proposals *affecting land in Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire* All orders *affecting land in the areas defined above*

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

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 • Revised section 9 on applications for costs. • Clarification in paragraph 4.27 (that any element of a subdivided order must appear to be capable of confirmation in its own right). • Further guidance on concurrent orders added, to the end of paragraph 5.55	October 2009

R (on the application of Network Rail Infrastructure Limited) v The Secretary of State for the Environment, Food and Rural Affairs v Eden District Council, Story Homes Limited

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
8 September 2017

Case No: CO/807/2017

High Court of Justice Queen's Bench Division Planning Court

[2017] EWHC 2259 (Admin), 2017 WL 03726383

Before: The Hon. Mr Justice Holgate

Date: 08/09/2017

Hearing dates: 25 and 26 July 2017

Representation

Juan Lopez (instructed by Bond Dickinson LLP) for the Claimant.
Tim Buley (instructed by Government Legal Department) for the Defendant.
Jonathan Easton (instructed by Shoosmiths LLP) for the Second Interested Party.

Approved Judgment

Mr Justice Holgate :

Introduction

1. The Claimant, Network Rail Infrastructure Ltd, (”NR”), applies for judicial review of the decision given by an Inspector on behalf of the Defendant, the Secretary of State for Environment, Food and Rural Affairs, by letter dated 4 January 2017. The Inspector decided that the order made under section 257 of the TCPA 1990 , known as the Eden District Council Public Path Stopping Up Order (No. 1) 2015 Cross Croft, Appleby (”the Order”), should not be confirmed. In summary, section 257 enables a local planning authority, in this case Eden District Council (”EDC”), to authorise by order the stopping up or diversion of any footpath, bridleway or restricted byway, if they are satisfied that it is necessary to do so in order to enable development to be carried out.

2. The recital to the Order stated that it was made to enable development to be carried out under two planning permissions granted by Eden District Council, namely 11/0989 granted on 30 July 2013 and 14/0594 granted on 13 May 2015. Both permissions authorised the construction of up to 142 houses, and the provision of open spaces and associated infrastructure at land off Cross Croft/Back Lane in Appleby. The site lies to the south west of the Settle-Carlisle railway line and just south of Appleby station. Both permissions were granted subject to a negative Grampian condition (see *Grampian Regional Council v City of Aberdeen District Council (1984) 47 P&CR 633*) which prevented more than 32 houses being constructed until a footpath diversion order had been made and confirmed. Currently the footpath runs close to the north-eastern boundary of the development site and then crosses both tracks of the railway line. The condition stated that the Order should provide for (a) the stopping up of the footpath so as to prevent any access from the development site to the railway crossing, (b) the stopping up of a section of the existing footpath and (c) the provision of an alternative route which would run inside the north-eastern boundary of the development site and connect with a highway crossing the railway line over a bridge further to the north west. The Order made by EDC gave effect to that requirement. The condition was imposed to address safety concerns which NR had said would result from the carrying out of the development.

3. The Order attracted objections from (inter alia) members of the public and associations representing the interests of footpath users. Consequently, by section 259 the Order could not take effect unless it was confirmed by the Defendant. He decided to hold a public local enquiry under schedule 14 of TCPA 1990 .

4. The inquiry was held on 29 November 2016. On the previous day, the Inspector made an unaccompanied inspection of the footpath and the site of the development. By the time of the public inquiry, the developer, Story Homes Limited (”SHL”), had applied under section 73 of

TCPA 1990 for the grant of a fresh planning permission for the same development but with amendments to the Grampian condition. the developer's planning application was made in the context of the Order under section 257 which had already been made by EDC. The developer proposed that (a) the restriction to 32 houses should be increased to 64 houses and (b) that restriction would be lifted if either of two exceptions were satisfied. The first exception continued to repeat the requirement that the stopping up order should be made and confirmed. But in the alternative, the second exception would allow the prohibition on the construction of more than 64 homes to be lifted in the event of the Defendant deciding that the order should not be confirmed. On 9 March 2016 EDC approved the section 73 application and granted planning permission for the development of 142 homes subject to the revised condition proposed by the developer (Ref. 15/1097). The Council's decision resulted in the grant of a freestanding planning permission. It was open to SHL to decide which of these permissions to carry out and hence which version of the negative Grampian condition should be satisfied.

5. Shortly before the public inquiry opened, on 16 November 2016 Mr Alan Kind, an objector to the Order, wrote to the Planning Inspectorate, contending that in view of the terms in which planning permission 15/1097 had been granted, it could no longer be said that the stopping up was "necessary" in order to enable the development to go ahead and therefore the Order should be treated as outwith the powers of the Defendant. Another objector, Mr Geoff Wilson, wrote to the Planning Inspectorate to similar effect on 18 November.

6. The public inquiry had been set down for a hearing lasting some three days. However, when the inquiry opened the Inspector announced that because objectors had submitted to him that the Order was legally incapable of being confirmed, that issue should be dealt with at the outset. The Inspector then went on to hear submissions on this point from EDC and NR in support of the Order, and from objectors.

7. Towards the end of the morning of the first day of the inquiry, the Inspector repeated his provisional view expressed earlier on during the hearing that, for the reasons advanced by the objectors, it was not legally possible for the Order to be confirmed. Counsel for NR submitted to the Inspector that he should nevertheless proceed to hear all of the evidence which had been prepared for the three-day public inquiry dealing with the merits of the Order and the objections to it. It was suggested that the Inspector could revisit the issue which he had raised that morning once he had heard and considered all of the evidence. However, the Inspector rejected that suggestion and closed the inquiry. The hearing therefore lasted only a half day. His decision letter then followed just over a month later on 4 January 2017.

8. I regret the need to have to make some observations on the inappropriate manner in which the claim was put before the court. I do so in order to make it plain to litigants that the practices that were followed in this case, and regrettably sometimes in others, are not acceptable. Notwithstanding the clear statement by Sullivan J (as he then was) in *R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC (Admin) 74* at paragraphs 6-10, this claim was accompanied by six volumes comprising over 2,000 pages of largely irrelevant material. The Claimant's skeleton argument was long, diffuse and often confused. It also lacked proper cross-referencing to those pages in the bundles which were being relied upon by the Claimant. The skeleton gave little help to the court.

9. Shortly before the hearing the court ordered the production of a core bundle for the hearing not exceeding 250 pages. During the hearing, it was necessary to refer to only 5 or 6 pages outside that core bundle. Ultimately, as will be seen below, the claim succeeds on one rather obvious point concerned with the effect of the Grampian condition in the 2016 permission. But this had merely been alluded to in paragraph 76 and the first two lines of paragraph 77 of the skeleton. Indeed, the point was buried within the discussion of Ground 3 of the claim, a part of the Claimant's argument to which it does not belong. Nevertheless, Mr Tim Buley, who appeared on behalf of the Defendant, acknowledged that he had appreciated that this point could be raised. He was ready to respond to it.

10. Certainly, for applications for statutory review or judicial review of decisions by Planning Inspectors or by the Secretary of State, including many of those cases designated as "significant" under CPR PD 54E , a core bundle of up to about 250 pages is generally sufficient to enable the parties' legal arguments to be made. In many cases the bundle might well be smaller. Even where the challenge relates to a decision by a local planning authority, the size of the bundle need not be substantially greater in most cases.

11. Prolix or diffuse "grounds" and skeletons, along with excessively long bundles, impede the efficient handling of business in the Planning Court and are therefore contrary to the rationale for its establishment. Where the fault lies at the door of a claimant, other parties may incur increased costs in having to deal with such a welter of material before they can respond to the Court in a hopefully more incisive manner. Whichever party is at fault, such practices are likely to result in more time needing to be spent by the judge in pre-reading material so as to penetrate or decode the arguments being presented, the hearing may take longer, and the

time needed to prepare a judgment may become extended. Consequently, a disproportionate amount of the Court's finite resources may have to be given to a case prepared in this way and diverted from other litigants waiting for their matters to be dealt with. Such practices do not comply with the overriding objective and the duties of the parties (CPR 1.1 to 1.3). They are unacceptable.

12. The Court has wide case management powers to deal with such problems (see for example CPR 3.1). For example, it may consider refusing to accept excessively long skeletons or bundles, or skeletons without proper cross-referencing. It may direct the production of a core bundle or limit the length of a skeleton, so that the arguments are set out incisively and without "forensic chaff". It is the responsibility of the parties to help the Court to understand in an efficient manner those issues which truly need to be decided and the precise points upon which each such issue turns. The principles in the CPR for dealing with the costs of litigation provide further tools by which the Court may deal with the inappropriate conduct of litigation, so that a party who incurs costs in that manner has to bear them.

13. This judgment is set out under the following headings:
(i) planning history;
(ii) a summary of the Inspector's decision;
(iii) the identification and determination of a preliminary issue;
(iv) relevant legal principles;
(v) the flaws in the decision letter; and
(vi) other grounds of challenge.

Planning History

14. The first relevant planning permission (11/0989) was granted on 30 July 2013. It granted detailed planning approval for the proposed housing development. Because NR had raised safety concerns regarding potential additional usage of the pedestrian crossing of the railway lines, condition 14 of the permission provided:

> "No development hereby approved shall take place beyond plots 1-22 and 133-142 until a footpath diversion order has been made and confirmed. The order shall incorporate the diversion of the exiting [sic] footpath adjacent to the cemetery, the stopping up of it to prevent any access to the

> Carlisle-Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane. The footpath shall be fully completed, including lighting, and made available prior to the occupancy of plots 23-132."

15. On 13 March 2014 EDC granted planning permission 13/0969 pursuant to an application made under section 73 by varying condition 2 of the 2013 permission so as to substitute a new layout altering the route of the proposed footpath diversion through the estate (Drawing SL054.90.9.SL.CPL.Rev P). The permission replicated condition 14 of the 2013 consent.

16. SHL then applied for a further variation of the consent they had obtained so as to delete altogether the negative Grampian condition. EDC did not accept that proposal. The further section 73 consent granted by the Council on 13 May 2015 (14/0594) retained the same Grampian condition (now referred to as condition 13). Condition 1 also required the development to be carried out in accordance with a revised site layout, referred to as "Rev V", which showed the new, diverted footpath to be provided within the development site. The path was to run parallel to the north-eastern boundary of the site.

17. In November 2015 SHL made a further application under section 73 to vary condition 13 of the consent 14/0594. An accompanying Planning Statement explained that there had been a delay in the resolution of the issue whether the existing footpath should be diverted in accordance with the Order (which by this time had been made by EDC) and so, in order to maintain the rate of development on the site and the involvement of the workforce employed on the project, the developer asked that the cap on the amount of housing that could be built before satisfying the Grampian condition be raised from 32 to 64 units. SHL also asked for the terms of the condition to be varied so that the cap would be lifted, and the residue of the development (the remaining 78 units) could be carried out not only if the Order was confirmed and the footpath diverted, but also if the Secretary of State should refuse to confirm it. SHL envisaged that the Secretary of State might take the view that the Order was not justified on its merits; for example, following an inquiry he might consider that NR's safety concerns were insufficient to justify the stopping up and diversion of the existing footpath. In

that event, it was suggested that the basis for the imposition of the cap in the Grampian condition would have been overcome. SHL expressly put forward the revised condition providing for these two alternative outcomes to a decision on whether the Order should be confirmed, so that if the Secretary of State should decide against confirmation on the merits, it would be unnecessary for SHL to make a further section 73 application for a fresh planning permission for the same 142 house scheme but omitting the Grampian condition. They were seeking to avoid any further unnecessary delay to the carrying out of the remainder of the whole development (see also Mr McNally's witness statement referred to in paragraph 62 below).

18. EDC agreed with the developer's proposal and issued a fresh planning permission 15/1097 on 9 March 2016 with condition 13 expressed in the following terms:

> "No development hereby approved shall take place beyond plots 1-22, 49-53, 87-95, 73-74, 98-113 and 133-142 (64 units total) unless any of the following exceptions occur:
>
> i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing fromt eh [sic] site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north-east of the site that can in principle afford connectivity to Drawbriggs Lane, as [sic] been made and confirmed by the LPA or the Secretary of State, or
>
> ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point (i) does not confirm the order;
>
> Upon any confirmed diversion and stopping up order coming into force, the new footpath route shall be fully completed including lighting and made available prior to the occupation of units 39-48 and 126-132."

19. From the documentation before the Court it does not appear that SHL asked for any other

variation of the consent 14/0594. However, condition 1 of permission 15/1097 required the development to be carried out in accordance with a different layout to Rev V, referred to as "Rev U". It is common ground that this version differed from Rev V in only one respect, namely it omitted a section of the route of the alternative footpath running towards the north-western corner of the site. It is also common ground that by the time of the public inquiry on 29 November 2016, the developer had only constructed that section of the alternative footpath corresponding to the length shown on Rev U.

A Summary of the Inspector's Decision

20. In paragraph 2 of his decision the Inspector stated:

> "At the inquiry, the objectors submitted that the Order was incapable of confirmation as the wording of the relevant condition attached to the planning permission was such that the statutory test found in section 257 of the 1990 Act could not be said to be satisfied."

This argument was based upon exception (ii) in condition 13 of permission 15/1097 (see paragraph 24 below).

21. Paragraphs 3 to 8 of the decision letter summarised the planning history. In paragraph 4 the Inspector recorded that the negative Grampian condition had been imposed by EDC "in the light of an objection to the development made by NR which contended that the housing estate would generate increased pedestrian traffic over the level crossing with a consequential increase in the risk of an accident occurring."

22. In paragraph 6 the Inspector noted that EDC had rejected SHL's application in July 2014 (14/0594) to delete the Grampian condition altogether, on the basis of a study commissioned by the developer which concluded that the increased risk in the use of the crossing through the completion of the housing development was marginal. EDC decided to retain the Grampian condition in its original form.

23. In paragraph 7 of his decision the Inspector noted that there had been no objection, not even from NR, to SHL's planning application which resulted in the permission 15/1097, with its revised Grampian condition.

24. In paragraphs 9, 10 and 15 of the decision letter the Inspector summarised the objectors' case as to why the Order no longer fell within the scope of section 257 by virtue of condition 13 of the permission 15/1097:

> "9. The objectors submit that the wording of the condition attached to the revised planning permission 15/1079 [sic] and the development which has already taken place on the site make the order incapable of confirmation. The effect of the "exception" described in (ii) of condition 13 of 15/1097 being that the closure of the path across the railway is not necessary to enable the development to be carried out; consequently, the order does not meet the statutory criteria of section 257 of the 1990 Act and could not be confirmed.
>
> 10. In addition, it was submitted that it was not necessary to divert the path to allow development to take place as the houses were not being built on the footpath subject to the Order, the majority of which lay outside the development boundary. It was only because of the condition imposed by the Council could the diversion be considered necessary. Whereas that would have been true of condition 13 attached to 14/0594, condition 13 of 15/1079 [sic] provided that development could take place without the footpath being diverted. Furthermore, the objectors submitted that the planning permission which was being implemented was 15/1079 [sic] which was not cited in the order and that the order was therefore no longer valid.
>
> …
>
> 15. The objectors' view was that permission 15/1097 and the terms of condition 13 attached to that permission could not be overlooked, either as a matter of course but particularly in the light of what had been built on the site. The condition attached to the planning permission which was being implemented demonstrated that the LPA did not consider that the closure of the path was necessary."

25. In paragraph 16 of his decision the Inspector explained why he did not agree with the submissions made by objectors that the grant of the consent 15/1097 had "invalidated" the Order made under section 257 . He said that it was not unusual for section 73 applications to be made to vary some aspect of a permission and it is unnecessary for a fresh section 257 order to be made each time a section 73 permission is granted. An order previously made:-

> "remains valid so long as the development to which it relates remains the same. The planning permissions in 11/0989. 14/0594 or 15/1097 all relate to the construction of 142 houses on the site and the order is relevant to that development. Condition 13 attached to 15/1097 varies the phasing of the construction of those houses and the terms on which the full completion of the site can be achieved. I conclude that the order is validly made."

26. In paragraphs 11 to 12 and 18 to 19 the Inspector explained why he considered that, by the time of the inquiry, SHL was implementing permission 15/1097 rather than permission 14/0594. It is common ground that by that stage permission 11/0989 had lapsed. It is also common ground that when the developer began to build homes on the site it must then have been relying upon 14/0594. But by the time of the inquiry SHL had built at least 46 homes and its representative, Mr McNally, told the inquiry that the sale of 43 of these properties had been completed.

27. In paragraph 14 of his decision the Inspector recorded the submissions for NR, which was represented by Mr Juan Lopez, as in this Court. He suggested that the Inspector should consider whether to confirm the Order solely by reference to whether it was necessary to stop up the footpath to enable the development under 14/0945 to be carried out. He added that the consent 15/1097 was "by the by."

28. The Inspector did not agree. Not surprisingly, he considered that (paragraph 18):

> ”To consider the order against the merits of 11/0989 and 14/0594 to the exclusion of 15/1097 would be a wholly artificial approach to be taken to what is being built on the site which is in accordance with 15/1097.”

29. The Inspector took the view that, rather than treating all of the 46 homes built as being referable to permission 14/0594 and therefore in breach of planning control, the developer had been relying upon permission 15/1097, which allowed up to 64 homes to be built before condition 13 had to be discharged.

30. In paragraphs 20 to 21 of the decision letter the Inspector referred to the statutory test to be satisfied under section 257 , and pointed out that this was not a case in which the development permitted would physically be constructed on the route of the existing footpath. He then went on to state that the question for him to determine was whether it was necessary to divert the footpath in order to satisfy condition 13 of permission 15/1097, focusing on the second exception of that condition. That was the sole issue which the Inspector addressed when he decided that the Order was incapable of confirmation.

31. On this issue the Inspector accepted the argument advanced by objectors:

> ”21. If it is not necessary to allow physical construction to take place on site, the question arises therefore as to whether it is necessary to divert the path in order to satisfy condition 13 of 15/1097? Reading the condition, it would appear not; the second part of the condition would permit the full development of the site if the order was not confirmed.
>
> 22. In contrast to condition 13 attached to 14/0594 which would have prevented the development of more than 32 houses if the Order was not confirmed, condition 13 of 15/1097 permits the whole development of 142 houses to be carried out irrespective of whether the Order is or is not confirmed. If the full development of the site can be carried out without the Order being confirmed, it cannot be necessary to divert the footpath in order for the development to be carried out.

> 23. I concur with the objectors that, in the light of the terms of the condition attached to the planning permission being implemented the Order fails the statutory test for confirmation.
>
> 24. I conclude that as the diversion of the footpath is not necessary to allow development to take place, the Order should not be confirmed."

(emphasis added)

32. Thus, the Inspector concluded that condition 13 of 15/1097 allowed the whole development of 142 homes to be carried out irrespective of whether the Order was or was not confirmed. However, it is to be noted that he did not address in his reasoning the range of considerations which are to be considered in order to be able to reach a conclusion on whether a section 257 order should or should not be confirmed. Furthermore, his construction of condition 13 in 15/1097 means that although the condition was expressed to be a Grampian condition limiting the development to 64 houses, that restriction was effectively a dead letter. True enough, it required that a section 257 order be made. But in the event of there being any objection (and in this case objections had been made to the Order before the grant of 15/1097), the effect of the Inspector's decision, as he recognised, was to render the restriction to 64 houses ineffective.

33. Although the developer's Planning Statement produced in November 2015 may not be used as an aid to the construction of condition 13 (see, for example: *R v Ashford Borough Council ex parte Shepway District Council [1999] PLCR 12* ; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions [2003] JPL 1048*)), it is plain that the Inspector's interpretation arrives at an outcome which is wholly at odds with the declared purpose of SHL's application. No evidence was shown to the court to suggest that EDC took any other view when granting 15/1097. Accordingly, the correctness of the Inspector's conclusion should be examined further. It does raise the questions whether he has properly construed condition 13 of 15/1097 taken as a whole (which is an objective question of law for the Court to determine) and the relationship between that condition properly construed and the decision on whether to make and confirm the order under section 257 .

The identification and determination of a preliminary issue

34. In granting permission to apply for judicial review Dove J observed that the case raises potentially significant issues about the correct procedure to be adopted in relation to preliminary issues. I agree. Counsel had not come across an ordinary planning appeal where an Inspector or the Secretary of State has been willing to dispose of the entire process by reference to a preliminary issue. I am not referring here to the practice in some planning procedures where the evidence on separate issues is heard sequentially, but a decision on the whole matter is only made once all the evidence is received and considered in a decision letter. But a preliminary issue may arise, for example, where one party raises a *proper* argument that the Secretary of State has no jurisdiction to determine the subject matter of the proceedings at all. If the Secretary of State were to agree with that contention, then he would refuse to consider the merits of the matter. It would be outwith his power or *ultra vires* for him to do so.

35. For example, where a notice of appeal against an enforcement notice is served outside the absolute time limit in section 174(3) of the TCPA 1990 , the Secretary of State is entitled to decide that he has no jurisdiction to entertain the appeal and will refuse to consider any grounds of appeal which have been put forward (see eg *Lenlyn Ltd. v Secretary of State for the Environment (1985) 50 P&CR 129*). Similarly, where an appellant in an appeal against an enforcement notice successfully contends that the notice is a nullity, the Secretary of State will quash the notice, with the result that he has no further jurisdiction in the matter and will not address the statutory grounds of appeal relied upon in the alternative (see eg *Rhymney Valley District Council v Secretary of State for Wales [1985] J.P.L. 270*). Issues of this kind may be suitable for consideration as a preliminary issue in an appropriate case.

36. On the other hand, there are many situations in which the issue whether the making or confirmation of an order lies within the relevant statutory power is inseparable from the merits of that order and therefore cannot in practice be determined until the decision-maker reaches conclusions on those merits. For example, under section 226(1)(b) of the TCPA 1990 a local planning authority may be authorised by the Secretary of State to acquire compulsorily any land in their area which "is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated". In *Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332* the Court of Appeal held that "required" meant "necessary in the circumstances of the case," and not merely "desirable" on the one hand or "indispensable" or "essential" on the other. In *Chesterfield Properties Plc v Secretary of State for the Environment (1998) 76 P. & C.R. 117* Laws J applied the same approach to the alternative power of compulsory acquisition in section 226(1)(a) where the

local planning authority considers "that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land." He also held that it is necessary to read the language of section 226(1)(a) as a whole, in order to appreciate that it expresses the purpose for which the discretionary power to make the order may be exercised (the principle in *Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997*), rather than setting a condition precedent to the exercise of that power. Accordingly, the consideration of whether an order made under section 226 satisfies the statutory tests and is in *intra vires* , is generally dependent upon the Secretary of State's findings on such matters as the merits of the promoter's scheme. Issues of this kind are generally unsuited to the identification and determination of a preliminary issue.

37. In the Courts the determination of a preliminary issue without receiving all the evidence and submissions in the case is handled with particular care (see, for example, the Queen's Bench Guide paragraph 7.3.1). It is necessary to consider precisely what the preliminary issue should be and to draft the terms of that issue in advance of the hearing. The written arguments of the parties may then be focused on that issue and exchanged beforehand. The decision on whether a preliminary issue should be heard will also address the need for an agreed statement of facts sufficient to enable the point to be determined. It is worth recalling the comment by Lord Scarman in *Tilling v Whiteman [1980] AC 1* at page 25C: "preliminary points of law are too often treacherous short cuts."

38. It does not appear that anything resembling that approach occurred in the present case. Instead the point on which the Inspector decided that the Order was incapable of confirmation was not raised until letters from two objectors were sent on 16 and 18 November 2016, less than two weeks before the start of the inquiry. They did not develop the point in any detail and it was not clarified before the inquiry. Nonetheless the objectors suggested that the matter be dealt with at the beginning of the inquiry. Unfortunately, the Inspector did not respond to their letters by notifying all parties in advance of the hearing on 29 November 2016 that he would deal with a preliminary issue at the outset. Nor indeed did he take any steps to invite written submissions to define and deal with the issue in advance of the hearing, or attempt to set down in writing what he considered the preliminary issue to be.

39. Plainly it would have been of assistance to the parties and, most importantly to the Inspector, if he had taken such steps. To put the matter at its lowest, good practice was not followed in this case. It would be advisable for the Inspectorate to consider giving, or if it already exists reviewing, guidance to Inspectors on (a) the circumstances in which it is truly appropriate for a preliminary issue to be determined and (b) where it may be, the procedure to

be followed, including inviting submissions on whether a preliminary issue should in fact be decided, and if so how the issue(s) should be defined and what directions should be made. Of course, the determination of a preliminary issue must be compatible with the statutory framework within which the subject matter before the Secretary of State is to be decided. This procedure is only likely to be appropriate in a limited range of cases.

Relevant Legal Principles

The legislation

40. Section 257 provides (inter alia):

> ”(1) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out –
>
> a) in accordance with planning permission granted under Part 3 or section 293A ; or
>
> b) by a government department.
>
> (1A) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that –
>
> a) an application for planning permission in respect of development has been made under Part 3 , and
>
> b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.
>
> (2) An order under this section may, if the competent authority are satisfied that it should do so, provide –

a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;

b) for authorising or requiring works to be carried out in relation to any footpath, bridleway or restricted byway for whose stopping up or diversion, creation or improvement provision is made by the order;

c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the order is under, in, on, over, along or across any such footpath, bridleway or restricted byway;

d) for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works."

The "competent authority" includes the local planning authority who granted the planning permission authorising the development upon which the order is based, or who would have had the power to grant a permission if an application had fallen to be made to them.

41. Section 259 provides:-

"(1) An order made under section 257 or 258 shall not take effect unless confirmed by the appropriate national authority or unless confirmed, as an unopposed order, by the authority who made it. "

(1A) An order under section 257(1A) may not be confirmed unless the appropriate national authority or (as the case may be) the authority is satisfied—

(a) that planning permission in respect of the development has been granted, and

(b) it is necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission.

> (2) The appropriate national authority shall not confirm any order under section 257(1) or 258 unless satisfied as to every matter as to which the authority making the order are required under section 257 or, as the case may be, section 258 to be satisfied.

The "appropriate national authority" is the Secretary of State in England and the Welsh ministers in Wales (section 259(5)). Section 259(4) and schedule 14 set out the procedure for the confirmation of such orders, including the holding of public inquiries in certain cases, such as the present one.

42. Section 247 confers a parallel power on the Secretary of State (and within Greater London upon London borough councils) to make a stopping up order in similar terms to the power conferred by section 257 on local planning authorities, save that it covers highways generally, including those open to vehicular traffic. Here, the legislation does not provide for a confirmation stage. Instead it allows for the making of objections to a draft order and the holding of a public inquiry before that order is formally "made" (section 252).

Vasiliou v Secretary for State for Transport

43. The leading case on the ambit of sections 247 and 257 is the decision of the Court of Appeal in *Vasiliou v Secretary of State for Transport (1991) 61 P&CR 507* . In order to uphold the Inspector's decision that the order in this case fell outwith section 257 , Mr Buley placed great reliance upon a close reading of certain parts of *Vasiliou* and the legislation. He submitted that the Inspector's conclusion was entirely in line with, and indeed required by, these sources. But with respect his analysis was selective and incorrect. It is important to identify carefully what *Vasioliou* was about and what it did and did not decide, before revisiting the case law on Grampian conditions and section 257(1) itself.

44. Mr Vasiliou carried on a restaurant business 60-70% of which depended on passing trade. The local authority granted planning permission for a retail development across the whole width of the street on which the restaurant was located, subject to a condition that the development could not be commenced until the relevant section of the street had been stopped up. Because a vehicular highway was involved the developer asked the Secretary of State to make a stopping up order under what has since become section 247 of TCPA 1990 . The order would have made that part of the street where the restaurant was situated a cul de sac, with the consequence that the business was very likely to fail. The Inspector found that there were no highway reasons against the confirmation of the order, but he recommended against

confirmation because of the likely effect on the restaurant, for which there was no right to compensation. However, the Secretary of State disagreed with the Inspector's recommendation and confirmed the order. He did so on the basis that his decision was solely concerned with highway matters, and therefore the effect of the proposed stopping up on the restaurant was an irrelevant consideration.

45. The High Court rejected the legal challenge brought by Mr Vasiliou, holding that the Secretary of State had not erred in law. The correctness of that decision was the issue for the Court of Appeal to determine. It reversed the High Court, holding that the effect of the stopping up on the restaurant business had been a relevant consideration in deciding whether to confirm the order under section 247 . The principles laid down by the Court generally apply to orders made under both sections 247 and 257 .

46. The leading judgment was given by Nicholls LJ (as he then was), with whom the other members of the Court agreed. He pointed out (at page 511) that, but for the stopping up order, Mr Vasiliou would have been entitled as against the developer to enforce rights of access to the highway without being obstructed by the development, on the grounds of both unlawful interference with his right to gain access to the highway as a frontager and also the damage he would sustain through the commission of a public nuisance (*Benjamin v Storr (1874) LR 9 CP 400*). It was in that context that Nicholls LJ went on to deal with stopping up under planning legislation and held at page 512 that:-

> "These sections confer a discretionary power on the Minister. *He cannot make the order unless he is satisfied that this is necessary in order to enable the development in question to proceed. But even when he is satisfied that the order is necessary for this purpose he retains a discretion; he may still refuse to make an order.* As a matter of first impression I would expect that when considering how to exercise this discretion the Minister could take into account, and, *indeed, that he ought to take into account, the adverse effect his order would have on those entitled to the rights which would be extinguished by his order.* The more especially is this so because the statute makes no provision for the payment of any compensation to those whose rights are being extinguished. I would not expect to find that such extinguishment, or expropriation, is to take place in the exercise of a discretionary power without the Minister in question so much as considering and taking into account the effect that such expropriation would have directly on those concerned.

> Having read and re-read the sections I can see nothing in their language, or in the subject-matter, to displace my expectation. I can see nothing, on a fair reading of the sections, to suggest that, when considering the loss and inconvenience which will be suffered by members of the public as a direct consequence of closure of part of the highway, the Minister is not to be at liberty to take into account all such loss, including the loss, if any, which some members of the public such as occupiers of property adjoining the highway will sustain over and above that which will be sustained generally. The latter is as much a direct consequence of the closure order as the former. The loss flows directly from the extinguishment, by the order, of those occupiers' existing legal rights."

(emphasis added)

The "expropriation" referred to there was the extinguishment by a stopping up order of the rights of a land owner in the position of Mr Vasiliou to bring a common law action to prevent interference with his access over the public highway.

47. The remaining parts of the judgment then went on to reject two arguments advanced by the Secretary of State against the construction of the legislation set out in paragraph 46 above; namely, the effect on the trade of the restaurant business was irrelevant because (1) that was a matter to be dealt with in the application of planning control and there was no overlap between that regime and the stopping up code, and (2) it would involve re-opening the merits of the decision to grant planning permission for the development across the street. It was in the context of dealing with that second contention that Nicholl LJ stated at pages 515-516:-

> "If the consequence of what seems to me to be the natural construction of section 209 were to enable an aggrieved objector to re-open the merits of a planning decision in this way, I would see much force in this argument. Parliament cannot have intended such a result. But in my view these fears are ill-founded. *A pre-requisite to an order being made under the limb of* section 209 *relevant for present purposes is the existence of a planning permission for the development in question. Thus the Secretary of State for Transport's power to make a closure order arises only where the local planning authority, or the Secretary of State for the Environment, has determined that there is no sound planning objection to the proposed development. I do not think that there can be any question of the*

Secretary of State for Transport going behind that determination. He must approach the exercise of his discretion under section 209 *on the footing that that issue has been resolved, in favour of the development being allowed to proceed. It is on that basis that he must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order.* In some instances there will be no significant disadvantages or losses, either *(a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up or are sufficiently near to it that, in the absence of a closure order, they could bring proceedings in respect of the proposed obstruction* . In such instances the task of the Secretary of State for Transport will be comparatively straightforward. In other cases there will be significant disadvantages or losses under head (a) or under head (b) or under both heads. In those cases, the Secretary of State for Transport *must decide whether, having regard to the nature of the proposed development, the disadvantages and losses are sufficiently serious for him to refuse to make the closure order sought* . That is a matter for his judgment. In reaching his decision he will, of course, *also take into account any advantages under heads (a) or (b) flowing directly from a closure order* : for example, the new road layout may have highway safety advantages.

Of course, some proposed developments are of greater importance, from the planning point of view, than others. When making his road closure decision the Secretary of State for Transport will also need to take this factor into account. But here again, I do not think that this presents an insuperable difficulty. In the same way as it is not for the Secretary of State for Transport to question the merits, from the planning point of view, of the proposed development, so also it is not for him to question the degree of importance attached to the proposed development by those who granted the planning permission. The planning objective of the proposed development and the degree of importance attached to that objective by the local planning authority will normally be clear. If necessary, the planning authority can state its views on these points quite shortly. Likewise, if the permission was granted by the Secretary of State for the Environment on appeal, his decision letter will normally give adequate guidance on both those points. Either way, the Secretary of State for Transport can be apprised of the views on these points of the planning authority or of the Minister who granted the planning permission. The Secretary of State for Transport will then make his decision on the road closure application on that footing. *In this way there will be no question of objectors being able to go behind the views and*

> *decision of the local planning authority, or of the Secretary of State for the Environment, on matters which were entrusted to them alone for decision,* viz*., the planning merits of the development* ."

(emphasis added)

48. Finally, it is helpful to set out the conclusion of Nicholls LJ at page 516:-

> "My overall conclusion on section 209 is that I can see nothing in the scheme of the Act which requires, as a matter of implication, that the Secretary of State for Transport shall not be entitled, when making a road closure order, to have regard to and take into account the directly adverse effect his order would have on all those presently entitled to the rights being extinguished by the order. In my view, he is entitled to, and *should, take into account those matters when exercising his discretion on a road closure application under* section 209 ."

(emphasis added)

49. In summary, it was decided in *Vasiliou* that:-

(i) The Secretary of State cannot make an order under section 247 or confirm an order under section 257 unless satisfied that a planning permission exists (or under sections 253 or 257(1A) will be granted) for development and that it is necessary to authorise the stopping up (or diversion) of the public right of way by the order so as to enable that development to take place in accordance with that permission (see also language to the same effect in section 259(1A)(b));

(ii) But even if the Secretary of State is so satisfied, he is not obliged to confirm the order; he has a discretion as to whether to confirm the order and therefore may refuse to do so;

(iii) In the exercise of that discretion the Secretary of State is obliged to take into account any significant disadvantages or losses flowing directly from the stopping up order which have been raised, either for the public generally or for those individuals whose actionable rights of access would be extinguished by the order. In such a case the Secretary of State must also take into account any countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such

disadvantages or losses are of such significance or seriousness that he should refuse to make the order.

(iv) The confirmation procedure for the stopping up order does not provide an opportunity to re-open the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision.

As a form of shorthand it is convenient to refer to the test in (i) above as a "necessity" test and the test in (iii) above as a "merits" test.

50. *Vasiliou* decided that, although the satisfaction of the necessity test is a pre-requisite to the exercise of the power under to make (under section 257) and to confirm (under section 259) an order, where there are relevant objections engaging the merits test, the satisfaction of that further test is also a pre-requisite for the order to be made and confirmed (or for an order to be made under sections 247 and 252). However, *Vasiliou* did not decide, as Mr Buley suggested, that where both of those tests are engaged, the decision-maker must treat the necessity test as an initial hurdle to be satisfied once and for all before the merits test may lawfully be considered, or that there is no overlap in the application of these two tests. Likewise, the language of TCPA 1990 does not lend any support to his suggestion.

51. There are a number of other matters which were not decided in *Vasiliou* . In that case, unlike the present one, there was no issue as to whether the necessity test was satisfied and so the Court of Appeal did not have to consider how that test may, or may not, be satisfied. In *Vasiliou* the stopping up order was necessary to enable the development to be carried out physically. Although *Grampian* and *K C Holdings* had already been decided (see further paragraph 55 below), the Court of Appeal did not need to consider, and made no observations upon, the relationship between a Grampian condition and the necessity test in sections 247 or 257 or indeed the merits test where that arises. It does not appear that these issues have been considered in any subsequent authority. *Vasiliou* does not provide any support for the contention that, as a matter of law, the necessity test cannot be satisfied where a Grampian condition provides for the restriction on development to be lifted in the event of a decision not to confirm the order.

52. Returning to the language of section 257(1) , a local planning authority has a discretionary power to authorise by order the stopping up of a public right of way where it is necessary *to do so* to enable development to be carried out *in accordance with a planning permission* . Thus, the necessity test is concerned with whether such an order is necessary for that purpose. Furthermore, the terms of the planning permission, including its conditions and the drawings determining how the development authorised is allowed to be carried out are relevant to the application of the necessity test. Mr Buley's submissions effectively disregarded the words "in accordance with a planning permission" and treated the question

posed by the necessity test as simply being whether the order is necessary to enable the "relevant development" (as he put it) to go ahead. But effect must be given to the words I have emphasised in section 257(1) . They are not surplusage and cannot be ignored.

53. The language used by Parliament in section 257(1) for the purpose of enabling, or facilitating, the carrying out of development, strongly suggests that the word "necessary" does not mean "essential" or "indispensable", but instead means "required in the circumstances of the case." Those circumstances must include the relevant terms of the planning permission (see by analogy the power of compulsory purchase in section 226 and the case law referred to in paragraph 36 above).

54. During the course of argument Mr Buley and Mr Jonathan Easton (who appeared for the Interested Party) both submitted that the stopping up and diversion of the footpath across the railway line could have been achieved under sections 118A and 119A of the Highways Act 1980 . I understand that to be disputed by NR. However, this is not a matter which the Court needs to resolve, because both Mr Buley and Mr Easton accepted that this would not result in the Order failing the necessity test in *Vasiliou* . I agree. Their stance tacitly and rightly accepts the principle set out in paragraph 54 above. The necessity test does not require an order under section 257 (or section 247) to be indispensable or essential.

Grampian conditions and the use of sections 247 and 257

55. It is well-established that an order under sections 247 or 257 may be made, not only where a planning permission allows development to be physically carried out on the route of an existing footpath, but also where the *only* necessity for a stopping-up order arises from a condition in a planning permission which restricts the whole or some part of the development authorised unless and until that stopping up is first authorised by order and is then carried out (see, for example, *Grampian (1984) 47 P&CR 633* ; *K C Holdings (Rhyl) v Secretary of State for Wales [1990] JPL 353*). In such cases it is the language by which the Grampian restriction is expressed that satisfies the necessity test under sections 247 or 257 . The order is necessary so that the development may be carried out "in accordance with [the] planning permission," or, in other words, so as to overcome that negative restriction. As Lord Keith held in *Grampian* at page 637 (substituting references for the corresponding provisions in TCPA 1990):-

> "In the circumstances, it would have been not only not unreasonable but highly appropriate to grant planning permission subject to the condition that the development was not to proceed unless and until the closure had been brought about. In any event, it is impossible to view a condition of

> that nature as unreasonable and not within the scope of section [70(1)] of the Act if regard is had to the provisions of section [247] . *Subsection (1) provides: "The Secretary of State may by order authorise the stopping up or diversion of any highway if he is satisfied that it is necessary to do so in order to enable development to be carried out in accordance with planning permission granted under* Part III *of this Act, or to be carried out by a government department.*
>
> *A situation where planning permission has been granted subject to a condition that the development is not to proceed until a particular highway has been closed is plainly one situation within the contemplation of this enactment* , though no doubt there are others. *The stopping up of the highway would very obviously be necessary in order to enable the development to be carried out.* So it is reasonable to infer that precisely the type of condition which is in issue in this appeal was envisaged by the legislature when enacting section [70(1)] . As it happens, the first respondents have themselves power, under section 12 of the Roads (Scotland) Act 1970 , to promote an order for the closure of Wellington Road. But that is an accident, though it may perhaps make the case an a fortiori one. Section [247] *is entirely general and is apt to favour strongly the reasonableness of negative conditions relating to the closure of highways in all appropriate cases.* "

(emphasis added)

56. Mr Buley stated on behalf of the Defendant that he accepts that this passage remains a correct statement of the law. This is important because it recognises that where the need for a stopping up order is based upon a Grampian condition, this is because of the *terms* of the permission and not merely the *existence* of the permission. The phrase "existence of a planning permission" used by Nicholls LJ in *Vasiliou* (see paragraph 47 above) was understandable in the context of that case, where self-evidently the development could not physically proceed unless the stopping up of the highway was authorised by the order. But that phrase cannot be taken to be an exhaustive description of the circumstances in which the necessity test, as expressed in the language of sections 247(1) and 257(1) , is satisfied. In the case of a Grampian condition relating to the stopping up of a highway it is not the mere existence of the permission which satisfies the necessity test, but the terms of that particular condition. Hence, the correct construction of the condition, an objective question of law, is necessary for the necessity test to be applied correctly.

57. It is also important because the following passage in paragraph 7.11 of DEFRA Circular 1/09 (”Rights of Way”) has given the contrary impression to some readers:-

> ”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.”

Indeed, this passage was relied upon by objectors in the present case as indicating that an authority is unable to found a section 257 order upon a Grampian condition. That, of course, would fly in the face of the decision of the House of Lords in the *Grampian* case itself. In a separate note Mr Buley explains that this was not how the circular was intended to be read or should be read. He says that the only purpose of the passage was to discourage, as a matter of policy, the imposition of Grampian conditions in circumstances where an alternative power to section 257 of TCPA 1990 is available. Given that the imposition of such conditions is a planning function, it is relevant to ask whether the appropriate Minister for these purposes, the Secretary of State for Communities and Local Government, has published any policy to the same effect. It does not appear that he has done so (see the National Planning Policy Framework and the Planning Practice Guidance).

58. In any event, paragraph 7.11 is confused in that it suggests that a Grampian condition is unnecessary because:-

(i) it duplicates the separate statutory procedure for diverting or stopping up a right of way; and

(ii) would require the developer to do something outside his control.

Point (ii) is incorrect; it ignores the rationale for the imposition of negative Grampian conditions. Such conditions restrict the carrying out of development authorised by a planning permission *unless* a specified act takes place, but *without imposing a positive obligation* on the developer to carry out that act. As for point (i), I do not see how it can be said that a Grampian condition duplicates the procedures in sections 247 and 257 , or for that matter under sections 118A and 119A of the Highways Act 1980 or other stopping up powers. A restriction upon the timing or phasing of the carrying out of development (for example, to address highway safety issues) plainly does not involve any duplication of a stopping up procedure. It simply involves a prohibition on the carrying out of certain development unless and until a defined right of way is stopped up. It is plain from the principles stated in *Vasiliou* that the imposition of a Grampian condition does not predetermine whether a section 257 order (or a stopping up order under any other power) should be made or confirmed.

Fortunately, Mr Buley has been instructed that the circular is under review, which will provide an opportunity for paragraph 7.11 to be reconsidered and any confusion which it currently causes to be removed.

Principles upon which a quashing order may be granted

59. The principles upon which the Court may be asked to intervene in a challenge under section 288 of TCPA 1990 have been summarised by Lindblom J (as he then was) in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin)* . It is common ground that essentially the same principles apply in this application for judicial review of the Inspector's decision not to confirm the Order (see eg. *(E) v Secretary of State for the Home Department [2004] QB 1044* at paras. 41-42).

The Flaws in the Decision Letter

60. This was a case where the Defendant decided to hold a public inquiry because objections had been made to the Order regarding disadvantages to the public flowing from the proposed stopping up and diversion of the footpath. During the hearing the Court was shown a selection of the objections the clear effect of which was to require the merits test in *Vasiliou* to be applied, as well as the necessity test.

61. Mr Buley and Mr Easton accepted, rightly in my view, that condition 13 of the permission 14/0594 was sufficient to satisfy the necessity test in *Vasiliou* for a stopping up order made under section 257 . The condition prevented part of the development authorised by the permission, namely that part of the 142 houses which exceeded the "Grampian limit" or cap of 32 houses (i.e. 110 houses), from being built unless that order was made and confirmed. Accordingly, the decision on whether the order should be confirmed, and hence the cap lifted, would also depend upon the application of the merits test in *Vasiliou* . If the order was not confirmed the cap would remain. Condition 13 in the 2015 permission did not provide for any alternative outcome. The developer would only be able to overcome the restriction to 32 houses by making a fresh section 73 application to delete or amend the Grampian restriction in condition 13.

62. As Mr McNally explained in his witness statement on behalf of SHL, the objects of the application which resulted in the amended version of condition 13 in permission 15/1097 were firstly, to increase the Grampian restriction from 32 to 64 houses and secondly, to set out

what would happen if the Order should not be confirmed, so as to obviate the need to make a fresh application under section 73 in that event. That second purpose was the rationale for the addition of exception (ii). It is common ground that condition 13 in permission 15/1097 down to the end of exception (i) has the same legal effect for the purposes of section 257 as condition 13 of permission 14/0594, and therefore it satisfies the necessity test in *Vasiliou* . The Defendant (and latterly SHL as well) says that it is merely because exception (ii) has been added to condition 13 in permission 15/1097, so as to deal with the alternative scenario where the Secretary of State refuses to confirm the stopping up order, that the necessity test was not satisfied and so the Order before the Secretary of State fell outside the power conferred by section 257 and was incapable of being confirmed.

63. This outcome would render the amended condition 13 in permission 15/1097 effectively defunct. No matter what number the draftsman inserted into that condition, whether 64 houses or any number between 1 and 141, the Grampian restraint would have no real teeth at all. EDC might just as well have deleted condition 13, although plainly that was not a position which it was prepared to accept. In my judgment, the correct approach is to seek to give effect to condition 13, rather than no effect, in so far as its language permits and subject to any construction being compatible with section 257 and the decision in *Vasiliou* .

64. Mr Buley suggested that the Inspector's conclusion did not render condition 13 defunct because it may be satisfied by the use of alternative powers, such as sections 118A and 119A of the Highways Act 1980 , which do not require the necessity test in *Vasiliou* to be met. But, with respect, that argument is misconceived because condition 13 in permission 15/1097 is only satisfied if a stopping up order is first made *"by the LPA"* and then confirmed or not confirmed. This reference to the local planning authority restricts this Grampian condition (unlike the one imposed in permission 14/0594) to orders made by a local planning authority under planning legislation, that is section 257 . EDC is the relevant local planning authority but it is not a highway authority, and so would have been unable to exercise the powers conferred by sections 118A and 119A . Those powers are conferred on the County Council as highway authority, but that council is not a local planning authority for the purposes of the development to which condition 13 relates. There is nothing surprising about this reading of the condition, given that (i) permission 15/1097 was applied for and granted after the Order under section 257 had already been made by EDC and (ii) the object was to provide a mechanism for determining whether the development of the residual 78 houses should continue to be inhibited if that order should not be confirmed because of the objections which it had previously attracted.

65. Furthermore, Mr Buley's argument overlooks the basis upon which the Inspector refused to confirm the Order. In paragraph 22 of his decision letter (which follows on from the second sentence of paragraph 21) he concluded that condition 13 of 15/1097 "permits the whole development of 142 houses to be built, irrespective of whether *the Order* is or is not confirmed" (my emphasis). Therefore, the Inspector reached his decision on the basis that (a) condition 13 of 15/1097 refers to a stopping up order under section 257 of TCPA 1990 and not under any other power and (b) the Grampian restraint was ineffective. The construction advanced by Mr Buley would necessarily involve re-writing this dispositive part of the decision letter, which is impermissible.

66. In any event, the Inspector's conclusion about the effect of condition 13 involved a clear misinterpretation of permission 15/1097 and its relationship with the power in section 257 . The language used in the condition simply provides for what is authorised, and in one scenario required, according to the outcome of the decision on whether the Order should be confirmed. But it does not purport to render the Order incapable of confirmation. So much is plain from exception (i). The Inspector erred in law by concluding that the necessity test was not, or could not, be satisfied. Given that this was the sole basis for his refusal to confirm the Order, this error of law is sufficient to require the decision to be quashed and reconsidered.

67. Condition 13 begins by imposing a restriction on building more than 64 houses. Accordingly, the 2016 permission upon which the Inspector found that SHL was relying prohibits it from building the residual 78 houses unless either exception (i) or exception (ii) is satisfied. Exception (i) essentially replicates the Grampian mechanism in condition 13 of permission 14/0594 for overcoming the restriction (save that in the 2016 permission only a stopping up order under section 257 of TCPA 1990 may qualify for this purpose). Consequently, the same analysis applies to exception (i) as to condition 13 of 14/0594. First, exception (i) satisfies the necessity test in *Vasiliou* . Second, exception (i) cannot be satisfied, and the restriction to 64 houses lifted, unless the merits test is also satisfied.

68. One of the flaws in the Inspector's interpretation, and the Defendant's argument, is that it involves reading exception (ii) in isolation from exception (i), in effect as a freestanding provision. It is not. Exception (ii) refers to the consideration by the Secretary of State of "a lawfully made stopping up order as aforementioned *in point (i)* " (my emphasis). That language makes it perfectly plain that exception (ii) is coupled together with exception (i) and is to be read consistently with it. Both exceptions envisage that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping up order under section 257 to divert the footpath in the manner described. The prohibition on

the carrying out of the residual part of the development makes the stopping up order necessary. Thus, the necessity test in *Vasiliou* is satisfied in both cases. Both exceptions (i) and (ii) then go on to deal with the effect of the decision as to whether the section 257 order should be confirmed. This involves the application of the merits test in *Vasiliou* . The two exceptions differ in that exception (i) deals with the situation where the merits test is satisfied and the order is confirmed, whereas exception (ii) deals with the situation where the merits test is not satisfied and the section 257 order is not confirmed. Consistent with that straightforward and natural meaning of condition 13 in the 2016 permission, exception (ii) refers to the Secretary of State's "consideration" of the order. Thus, an essential difference between the two exceptions is that they address opposite sides of the same coin, the outcome of applying the merits test in *Vasiliou* , in accordance with the clear objective of the developer in making, and EDC in granting, the section 73 application. The other key difference is that where the order is confirmed, exception (i) in condition 13 *also prohibits* the occupation of the residual 78 houses *until the order comes into force and the diverted footpath route is made available for use* .

69. It therefore follows that there were three fatal flaws in paragraphs 22 to 24 of the decision letter:-

(i) The Inspector's interpretation fails to give any effect to exception (i) at all. He failed to recognise that it is a Grampian restriction which not only satisfies the necessity test under section 257 , but in this case also engages the merits test, and imposes the further protection that the diversion must be brought into effect before the residual 78 homes may be occupied. Of course, if the stopping up order *passes* the merits test it follows that the confirmation of the order is still necessary (and its subsequent implementation) to enable the entire development to proceed. Both the necessity test and the merits test are considered alongside each other.

(ii) Reading condition 13 in 15/1097 as a whole, the Grampian restraint on carrying out the residual development continues to make the stopping up order necessary until at least the outcome of the merits test is known, and either exception (i) or exception (ii) can be applied. If the merits test is not satisfied, the order cannot be confirmed for that reason and at that point, but not before, the order ceases to be necessary to enable the residual development to be carried out *in accordance with the permission* . Thus, under both exceptions (i) and (ii) the necessity test and the merits test are considered alongside each other.

(iii) Condition 13 does *not* allow the whole scheme to be carried out on the basis that there is no need for the decision-maker to consider the merits test at all, because the stopping up order under section 257 fails the necessity test in *Vasiliou* in any event. The draftsman did not manage to create a legally effective exception (i) which satisfies the necessity test in *Vasiliou* only to negate his efforts by the mere addition of exception (ii). The Inspector's construction of condition 13 begs the very question which it was designed to test, namely whether the stopping up order would be

> confirmed after applying the merits test as well as the necessity test. Condition 13 cannot sensibly be interpreted as meaning that the stopping up order was not necessary at all or under any circumstances, or that the whole development could be carried out irrespective of whether the Order was confirmed or not.

Because of this misinterpretation of the condition and its legal relationship with the use of the power in section 257 , the Inspector brought the inquiry abruptly to a halt and, as is common ground, did not embark upon any hearing or determination of the merits test in *Vasiliou* as, in my judgment, he ought to have done.

70. Mr Buley submitted that reliance cannot be placed upon a planning condition so as to override the language used in section 257 or the proper application of that provision in accordance with the decision in *Vasiliou* . I agree, but I reject his submission that the correct construction of condition 13 in 15/1097 set out above conflicts with that principle and is therefore defective. It does not follow from the mere *possibility* that the stopping up order may not be confirmed when the merits test comes to be applied under exception (ii), that the order fails the necessity test from the outset. That simply begs the question on what basis the order may or may not be confirmed. As with exception (i) that decision effectively hinges on the application of the merits test. To read exception (ii) properly in this way does not involve any rewriting of section 257(1) or departure from *Vasiliou* , any more than in the case of exception (i), or indeed condition 13 in the 2015 permission. Under exception (ii) the prohibition on carrying out the residual part of the development remains in force, and the stopping up order is necessary to overcome that prohibition and enable that development to proceed, unless and until it is decided that the arguments against the proposed stopping up and diversion outweigh those in favour (including the importance of that development). This analysis is entirely consistent with sections 257 and 259 , which empower the making and confirmation of an order which is necessary to enable development to be carried out *in accordance with the relevant permission* , whether the conditions of that permission include a simple form of Grampian restriction as in the case of exception (i), or go on to lift that restriction in the event of the order not being confirmed, as in exception (ii).

71. This issue may also be tested in the following way. Suppose that a planning permission is granted for a development, subject to a condition in the same form as condition 13 in 15/1097, and a section 257 order is then made which did not attract any objections at all. As *Vasiliou* makes plain, there would be no need for the merits test to be applied. In that instance the necessity test would be satisfied and the inclusion of exception (ii) in condition 13 would not take the order outside the ambit of section 257 . It could be confirmed by the local planning authority under section 259 . If on the other hand the section 257 order did attract objections and it became necessary to apply the merits test to see whether the order should or should not be confirmed, there is nothing in the legislation or *Vasiliou* which alters that analysis or

renders the condition defective.

72. For completeness, I would add that the quashing of the Inspector's decision is not dependent upon construing condition 13 of 15/1097 as referring solely to an order under section 257 (see paragraphs 64-65 above). Even if, contrary to my view, that condition also embraces stopping up orders made under other powers and so the Inspector's decision did not render the condition nugatory, his decision must still be quashed. First, it is common ground that the availability of those other powers would not cause the Order to fail the necessity test in *Vasiliou* (see paragraphs 53-54 above). Second, irrespective of whether an order was made under section 257 or under alternative powers, condition 13 required a decision to be taken on whether or not that order should be confirmed before the Grampian restraint could be lifted. That would involve a decision being made on the merits of the order (eg. the effects of the stopping up and diversion). Third, for the reasons already given above, where the order is made under section 257 , it would still be wrong in law to say that the possibility of that order failing to pass the merits test made the order unnecessary to enable the development to proceed in accordance with the planning permission, applying the language used in section 257(1) of TCPA 1990 .

73. For these reasons, the decision dated 4 January 2017 must be quashed, and the issue of whether the Order should be confirmed must be re-determined by a different Inspector.

Other Grounds of Challenge

74. In Ground 4 the Claimant complains that the Inspector acted unfairly or in breach of the rules of natural justice, by not allowing the parties at the inquiry to deal with the merits of the Order. Mr Lopez accepted that this is not in fact a free-standing ground of challenge. Given the conclusions I have already reached that the Inspector misinterpreted condition 13 in the 2016 permission and erred in law by concluding that the Order fell outwith section 257 and was therefore incapable of being confirmed, it follows that he ought to have allowed the cases of the various parties on the merits of the Order to be heard and then proceeded to apply both tests in *Vasiliou* . It is not so much a matter of the Inspector having acted unfairly. Instead, because of the errors already identified he failed to take into account considerations which he was obliged to take into account applying *Vasiliou* .

75. I do not see any merit in the other grounds. The arguments advanced in support are confused and ultimately misconceived. They need only be dealt with shortly.

76. Under Ground 1 the Claimant sought to argue that where a stopping up order is made on the basis of permission A, the necessity test in *Vasiliou* can only be applied by reference to that permission, and the subsequent grant of permission B is irrelevant to the application of that test. The contention is utterly hopeless. Mr Lopez accepted that there is nothing in the language of the 1990 Act which could support the restriction which he sought to place on the consideration of orders made under section 257 . To take one practical example, a planning permission might be granted subject to a Grampian condition which, taken in isolation, would justify the making of a stopping up order under section 257 . But if a second permission were to be granted without any Grampian condition and the landowner entered into a section 106 obligation running with the land not to carry out any development under the first permission, the basis for satisfying the necessity test would have been wholly removed. Mr Lopez accepted that he could not advance any legal justification for treating the second permission in such a case as irrelevant to the lawful operation of section 257 . Indeed, during the first day of the hearing he expressly abandoned Ground 1. At the beginning of the second day he sought to resurrect the point, not because he had any legal argument to advance which could justify this *volte face* , but simply because his client wished that course to be followed. Given that it had become clear that the point was not properly arguable, that was inappropriate and not a proper use of the Court's resources.

77. Ground 2 sought to challenge the factual findings and inferences drawn by the Inspector when he concluded that by the time of the inquiry SHL was relying upon and implementing the 2016 permission (15/1097) rather than the 2015 permission (14/0594). Mr Lopez accepted that he had to show that the Inspector had acted irrationally in this regard. As Sullivan J pointed out in *Newsmith* , that is a particularly difficult hurdle for a claimant to meet. The lengthy submissions on this aspect failed to come anywhere near demonstrating irrationality. I have a good deal of sympathy for Mr Buley's submission that, on the material shown to the Court, it could have been irrational for the Inspector to have come to the opposite conclusion. In my judgment, it would certainly have been surprising, to say the least.

78. The second aspect of Ground 2 was set out in paragraph 67(iii) of the Claimant's skeleton. The Claimant criticises paragraph 19 of the decision letter in which the Inspector said that "the developer cannot mix and match between permissions as one of the purposes of granting permission is to provide certainty as to what will be built and where it will be built."

79. It is submitted that this amounted to a self mis-direction to the effect that, as a matter of law, the 2015 planning permission could not have been relied upon by the developer, or had effectively been abandoned. The argument is hopeless. The context in which the Inspector wrote this passage was his discussion as to what the developer needed to do in order to build out the whole length of the alternative footpath in accordance with the drawing Rev V. He would need to make a further application under section 73 to substitute Rev V for the drawing Rev U approved by the 2016 permission 15/1097. He went no further than that.

80. Under Ground 3 the Claimant seeks to argue that the Inspector failed to consider, as a freestanding issue, the need for the footpath to be stopped up and diverted because of the *consequences* of carrying out the development of 142 houses on the application site. That argument flies in the face of the language used in section 257 and the decision of the Court of Appeal in *Vasiliou* .

Conclusion

81. The decision must be quashed, but solely for the reasons set out in paragraphs 60 - 73 above (drawing upon the preceding analysis of the legislation and case law). To that extent only, the claim for judicial review succeeds. I reject the other grounds of challenge raised by NR.

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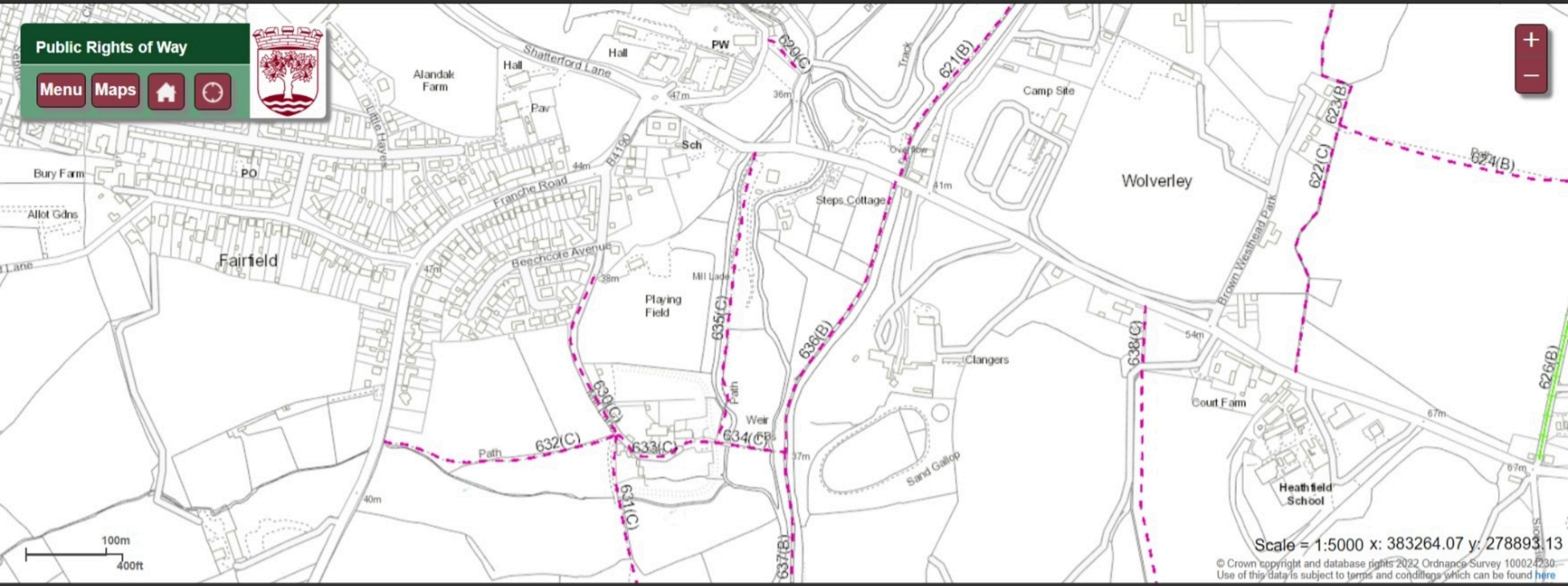

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