

PLANNING AND PUBLIC RIGHTS OF WAY

I. Introduction

1. Every year, hundreds of public ways are affected by development. New housing, factories, warehouses, golf courses, quarries - any development can affect a public right of way. Some developments succeed in preserving the route and character of ways or provide attractive replacements. The increasing recognition of public ways, both as part of the transport infra-structure and as vital recreational and health assets, means that every effort should be made to incorporate ways into new developments and, if possible, to enhance them.
2. The Rights of Way Review Committee has prepared this note to assist local authority officers, particularly rights of way officers and those who work in development control, to incorporate public ways into sites proposed for development. It is hoped that the note will also be of use to developers and individuals making planning applications. Rights of way officers are urged to make sure that their colleagues in development control (including those in district councils) have copies of this note. It is also recommended that authorities consider publishing a simple guide to these procedures for developers—some authorities have done this eg Mid Bedfordshire District Council, Suffolk County Council and Wigan Metropolitan Borough Council.

II. Planning applications

3. The effect of a development on a public right of way is a material consideration in the determination of applications for planning permission. Planning authorities are therefore asked to ensure that the effect on rights of way is taken into account when such applications are considered. To achieve this end:
 - a. **Planning officers** should ensure that there is a question on planning application forms about the existence of public rights of way within the site proposed for development, immediately adjacent to the application site, or along which access to the site is proposed either for the period of carrying out the development or permanently. Forms should also advise where applicants can get precise information about the status, line and width of the public right of way to enable them to answer the question accurately, and ask for the depiction of definitive routes on the plans being submitted.
 - b. **Planning officers** should check this information with the local authority officers responsible for highways and public rights of way.
 - c. **Rights of way officers** should ensure that all rights of way affected by the development have been identified, by reference to the definitive map and any other information on ways acknowledged as public rights of way but which are not yet recorded on the definitive map.
 - d. **Planning officers** should take into account applications to modify the definitive map or proposals the authority may have to do so, and the possible existence of higher rights on the ways shown on the definitive map (eg bridleway rights over ways shown as footpaths). Officers should look on the ground for ways apparent on site and in use by the public which are not recorded on the definitive map — the planning application may spark a claim.
 - e. Where public rights of way cross a site proposed for development, **planning officers** should involve rights of way officers in any pre-application meetings

with the developer.

- f. **Planning officers** should involve public rights of way user groups in the procedure. This can be done by making the weekly planning list available to them free of charge or at a reduced fee, and by consulting them about planning applications that affect public rights of way. **Planning officers** should invite them to site meetings where appropriate.
 - g. **Planning officers** should ensure that local plans include policies to incorporate public rights of way in new developments.
 - h. **Planning officers** should give special consideration to developments which might endanger rights of way users. For example, horses might be startled by sudden, unexpected noise from vehicles or machinery near to rights of way. In the light of this, there should be a safety margin between proposed wind turbines and public rights of way for horse-riders or horse-drawn vehicles.
 - i. **Planning officers** should beware of the use of existing rights of way as vehicular access routes, either as part of the development or during development works. There may be important health and safety implications.
 - j. **Planning officers** should consider whether to use a planning obligation arrangement under s.106 of the Town and Country Planning Act 1990 (TCPA 1990) (as amended by the Planning and Compensation Act 1991) to provide for new or improved public rights of way within the site.
 - k. **Highway officers** should ensure that transport assessments for new developments take account of public rights of way in, near or affecting the site of a proposed development.
 - l. **Planning officers** should ensure that training in planning and development control for elected members includes the key considerations that must be taken into account where the site of the development is crossed by a public right of way. Training courses should include examples of those elements of any development which would necessarily obstruct a public right of way and those which would not and provide guidance on the procedures to accommodate a public right of way within any new development where the development would necessarily result in the obstruction of an existing way.
4. Article 8 of the Town and Country Planning (General Development Procedure) Order 1995 provides that development affecting a public right of way must be advertised in a local newspaper and by posting a notice on the site. It is recommended that, where such advertisement is necessary, those organisations prescribed to receive copies of public path orders should be consulted about the planning application as soon as possible after the application has been received. This will help to ensure that adequate consideration to public rights of way is given *before* planning permission is decided. It would also help to ensure that elected members give proper consideration to public rights of way before the planning application is decided.

III. Planning guidance

5. Other planning guidance should also be taken into account before planning permission is granted:
 - a. Defra advice on planning permission and public rights of way

“Provision of a new line for the way should be considered at the detailed planning stage. Wherever possible ways should be provided which pass through landscaped or open space areas away from vehicular traffic. They should be generally acceptable to the public. Estate roads should not be used to provide a new line for an existing right of way unless there is no other option.”

b. DOE Circular 5/94 (Welsh Office 16/94): Planning Out Crime

“Care should be taken that well-intentioned segregation schemes for pedestrians and cyclists do not lead to over-isolation, especially at night. Attractive pedestrian links and cycleways can be formed through amenity open space ... Wherever possible, footpaths and alleyways should be wide, clear of hiding places, well lit and should follow a direct route... sensitive and skilled design should be capable of reconciling the need for acceptable landscaping and the need to produce safe environments. Generally speaking, however, landscaping schemes should avoid creating hidden areas, near footpaths for example, where crime is easier to commit.”

c. PPG13 paras 75-77: Transport on walking, especially:

“In preparing their development plans and in determining planning applications, local authorities should identify the network of routes and locations (including the links between key uses such as schools, town centres and transport interchanges) where the needs and safety of pedestrians will be given priority — create more direct, safe and secure walking routes, particularly in and around town centres and local neighbourhoods, and to schools and stations, to reduce the actual walking distance between land uses, and to public transport.

Local authorities, as part of their walking strategy, should also promote walking through such measures as encouraging more use of public rights of way for local journeys and helping to promote missing links in rights of way networks.

d. PPG 17 paras 17 and 32: Sport and Recreation

“Local authorities should protect and enhance those parts of the rights of way network which might benefit open space.”

“Rights of way are an important recreational facility which local authorities should protect and enhance. Local authorities should seek opportunities to provide better facilities for walkers, cyclists and horse-riders, for example by adding links to existing rights of way networks.”

e. Encouraging walking: advice to local authorities (DfT advice, March 2000)

“Carefully planned new developments within existing urban areas can help to reduce the need to travel by car by increasing the number of people who can easily walk to jobs, shops leisure and other facilities, including public transport interchanges”.

f. Policies set out in structure, local and unitary development plans, and in local transport plans and walking and cycling strategy documents.

IV Layout and design on site

6. **Planning officers** should advise developers that wherever possible ways through developments should run through open, landscaped areas away from roads and should complement the existing network. Narrow ways running between houses and enclosed by fencing should be avoided. Natural surveillance is important - ways should be over-looked and free from sharp bends (which can provide blind spots and hiding places). Well-overlooked ways on which activity is encouraged during the day and evening benefit from being regularly under surveillance from the general public. There should be appropriate lighting, having regard to the DOE/Countryside Commission publication, *Lighting in the Countryside: Towards good practice*.

7. New routes should have formal status by adoption as highways or recorded as public rights of way, including those that run through public open space. This will avoid problems over appropriate use and responsibility for maintenance. However, if the local authority may want to amend the routes of ways running through new public open space, they should make a declaration under section 31(6) of the Highways Act 1980 and/or place notices on site.

8. Where ways are not enclosed, footpaths should be of a minimum width of 2 metres and bridleways and byways 3.5 metres. If the way is to be enclosed by fencing, hedging or buildings then footpaths should be of a minimum width of 4 metres and bridleways and byways 6 metres. If an existing path or way is to be retained on its existing line then **planning officers** should remind developers that widths recorded in the definitive statement apply. (If no width is recorded in the definitive map and statement, **rights of way officers** should carry out research to establish the width and make a definitive map modification order to record the width.)

9. The needs of all members of the community need to be taken into account when surfacing and street furniture are being considered. **Planning officers** should assess how use of the route might alter as a result of the development and discuss with **highway officers** (because the highway authority which will be responsible for maintenance) what kind of surface and safety barriers, etc should be provided.

10. **Planning officers and rights of way officers** should consider the boundaries of the application site and how ways can help to integrate the development into the surrounding landscape. It is important that new routes which go to the edge of the site join the public rights of way or highway network to avoid access and maintenance problems arising later.

V. Before planning permission has been granted—public path order applications

11. **Planning officers** should make clear to a developer as early as possible after a planning application is received that the granting of planning permission will not give the developer the power to divert, extinguish or alter the status of any public right of way which may be affected by the development. Nor it is certain that the local authority will allow ways to be diverted or extinguished.

12. If the application is for outline permission it may only be possible to make sure the applicant knows he must set out his plans for public rights of way when he applies for detailed permission. In view of the uncertainty of the outcome of a public path order application, wherever possible ways should be kept on their existing routes and consideration should always be given to amending site layout plans to accommodate the routes on their existing lines. However, if after discussion between the developer and development control, landscape and rights of way officers, it is

concluded that the development does necessitate the closure or diversion of a public right of way then the developer (with the landowner's agreement if not the same person or company) must apply for an order under section 257 of the Town and Country Planning Act 1990.

12. Section 257 empowers a local authority to make an order to stop-up or close a public right of way affected by development for which planning permission has been granted (or where express permission is not needed). For the power to be exercisable, the authority must be satisfied that it is necessary to stop up or divert the way *in order to allow the development to be carried out*. If discussions conclude that it would be *desirable* to divert or extinguish a route, rather than *necessary* to avoid its physical obstruction, the landowner/developer should be advised to submit an application under the Highways Act 1980.

13. **Planning officers** should make clear to the applicant that a public path order application will not automatically succeed. At this stage the applicant should be made aware in writing that if a way is disturbed or obstructed before the public path order procedure has been completed the developer may be prosecuted. Local authorities have the power to reinstate ways in that circumstance, even if this means pulling buildings down.

14. There is no power for the local planning authority to make an order under section 257 of the 1990 Act until planning permission has been granted. However Rights of Way Review Committee Practice Guidance Note No. 1 recommends that, before embarking on the formal order-making procedure, the authority should consult the prescribed organisations and other interested parties with a view to forestalling representations and objections after the order is made. Consultations on the proposed change should be carried out when layout details are being discussed, *before* the grant of planning permission. This allows time for negotiation on the responses received to the consultation, and gives the opportunity for changes to be made to proposed routes, or to the layout, before planning permission is granted.

15. Ways which are shown on the list of streets but not on the definitive map should be treated as if they were shown on the definitive map.

16. **Planning officers and rights of way officers** should decide the standard of new routes before planning permission is granted, so that the applicant is aware of the works he will need to carry out he is successful. **Planning officers and rights of way officers** should also discuss with the applicant the timetable for making new ways available; and draft the order accordingly. The options for the order taking place on the ground and the certification procedure should be explained to the applicant—see IX below. Additionally the need for any temporary closure or diversions of existing routes should be discussed.

17. Good communication between the applicant and development control, landscape and rights of way officers should mean that the content of the proposed public path order and public notice can be agreed and drafted in anticipation of planning permission being granted. RWRC Practice Guidance Note 4: Securing agreement to public path orders encourages authorities to use an explanatory statement to accompany Highways Act orders. It is recommended that a similar statement be prepared for orders made under TCPA 1990.

VI After planning permission has been granted—public path order making

18. Once planning permission has been granted, the local authority can

determine the application for a public path order. **Rights of way officers** need to be satisfied that it is necessary to divert or extinguish a footpath, bridleway or restricted byway in order to enable development to be carried out in accordance with the planning permission.

19. Developers should not assume that because planning permission has been granted the local authority will invariably make or confirm a public path order. This view is backed by case law, in particular *K C Holdings (Rhyl) Ltd -v- Secretary of State for Wales* (1989) where it was held that there is a discretion to consider the merits and demerits of the proposed closure of a footpath in relation to the particular facts that obtain. The judge, Sir Graham Eyre QC, rejected the contention that once the Secretary of State was satisfied that the development could be carried out only if the footpath was stopped-up he was obliged to confirm the order. And *Vasilou -v- Secretary of State for Transport* (1990) where the Court of Appeal held that the Secretary of State had to take into account the effect that an order would have on those entitled to the rights which would be extinguished by the order, especially as the section contained no provision for compensating those so affected.

20. The order has to be made in accordance with the procedures in Schedule 14 of the 1990 Act and substantially in the form set out in the Town and Country Planning (Public Path Orders) Regulations 1993.

21. **Planning officers and rights of way officers** should ensure that s.257 of the 1990 Act is used only in legitimate circumstances. The word 'necessary' as it is used in s.257 must be understood as meaning precisely that: it must be shown that the closure is *necessary* to enable the development to take place, not merely that it is (for example), desirable or expedient. For example, residents, usually in urban or suburban areas rather than in rural locations, may complain about an adjacent way being an intrusion on their privacy. Aware that legitimate frequent use of the way will make it difficult to show that the way is not needed for public use, some councils have granted planning permission for 'development' which is no more than the conversion of the way into garden land, and then made an order under s.257 on the basis that it is necessary to stop-up the way in order to enable this development to be carried out in accordance with the planning permission. In most cases this is no more than a contrivance to get a way closed and objectors have successfully opposed several such orders. In most cases it will be perfectly possible for a way to go through a garden, even if it is enclosed or cultivated. Many fields are enclosed and cultivated, yet they are crossed by ways. Inspectors acting on behalf of the Secretary of State have rejected attempts to extinguish ways by this means, and the Local Government Ombudsman found one council guilty of maladministration when it sought to use planning permission and then the s.257 procedure to convert a right of way into an area of garden. Where it would be expedient, for the purposes of preventing or reducing crime which would otherwise disrupt the life of the community, and where the way in question is situated in an area designated by the Secretary of State, special extinguishment and diversion orders can be made under ss.118B and 119B of the Countryside and Rights of Way Act 2000.

22. Notice has to be given stating the general effect of the order, where it can be inspected free of charge and that copies of it may be purchased. The notice will also specify a period (not fewer than 28 days from the publication of the notice) during which representations and objections may be made. The notice must be published in a local paper, displayed at the ends of the way to be affected, and served on other local authorities, those organisations prescribed in the Regulations, and others who have advised the authority of their wish to receive orders.

23. Representations and objections have to be sent to the authority by the date appointed in the notice. An authority cannot confirm an order to which representations or objections have been made and not withdrawn. At the end of the objection period, the authority should contact those who have made representations or objections to see if there are grounds for withdrawing them. Otherwise, the order, together with the representations and objections, must be referred to the Planning Inspectorate which acts for the Secretary of State for Environment, Food and Rural Affairs (Defra) in England and the National Assembly for Wales. The Inspectorate will appoint an inspector who will either hold a hearing or an inquiry, or arrange an exchange of written representations.

24. It should be noted that the Secretary of State has no power to amend a planning permission so as to facilitate what objectors to an order claim to be a preferable diversion, and inspectors are advised not to allow objectors to seek to re-argue the merits of the development for which planning permission has been granted.

25. Once the order is confirmed, whether by the Secretary of State or the local authority, the authority must give notice in the same way that it advertised the making of the order. It must also give notice of a decision not to confirm. The Secretary of State also has power to modify an order, for example to substitute an alternative route for a way, but he may have to advertise his proposed modification. If the Secretary of State decides not to confirm an order, the way remains on its existing line until a further order is made and confirmed. If the order is modified or is not confirmed the applicant may need to apply for an amended planning permission to accommodate the definitive line of the way on the site.

VII. Secretary of State orders

26. The Secretary of State is empowered by s.247 of the 1990 Act to make orders affecting rights of way for reasons similar to those available to local authorities under s.257. The Secretary of State's powers extend to the extinguishment or diversion of highways carrying vehicular rights of way (restricted byways, byways open to all traffic, and "ordinary" roads). In practice he rarely exercises his powers in relation to footpaths, bridleways or restricted byways. In Greater London the Secretary of State's order-making powers have been transferred to the London borough councils, with the Mayor of London being involved with orders to which there are representations or objections. The Secretary of State retains jurisdiction on opposed orders made by the London borough councils under s.257.

VIII What if the way has already been built over?

27. From time-to-time authorised development starts, and may be completed, before an order to close or divert a way affected by that development has been made. Is an order under s.247 or s.257 then precluded? This question was considered by the Court of Appeal in *Ashby & Dolby -v- the Secretary of State for the Environment* (1980). The court held that orders (under the Town and Country Planning Act) could be made so long as some of the authorised development remained to be carried out. If it had been completed those powers could not be used. Further to this, in *Hall -v- Secretary of State for the Environment* (1998), the developer had built a wall over a footpath and then demolished it in the hope of still being able to make use of s.257. At inquiry, the inspector had taken the view that rebuilding the wall would constitute authorised development remaining to be carried out and had confirmed the order, but his decision was quashed in the High Court where the judge held that once development had taken place the planning

permission relating to that part of the development had been spent—the rebuilding of the wall would therefore need new planning permission.

IX Coming into force of orders

28. An order which extinguishes a right of way under the 1990 Act is normally so drafted as to come into effect immediately on the order's confirmation, regardless of whether or not the development ever takes place. Orders which divert or otherwise bring into existence new rights of way, should be drafted so as to come into operation not immediately upon confirmation (unless the new route is already available at a standard which is acceptable to the local planning and highway authorities) but upon the subsequent certification by the order-making authority that the new route has been satisfactorily created. This provides an incentive for the developer to get the new routes made up, and prevents the order from taking effect if for any reason the development fails to be carried out as planned. It also avoids a contested order being confirmed by an inspector and coming into operation on a date over which the order-making authority has no control, which could lead to the old way being closed before the new one has been created, thus depriving the public of the use of the way.

29. If an order comes into operation other than on the date on which it was confirmed, the authority has to certify the order to bring it into operation. This certification acts as confirmation that the terms of the order have been complied with in respect of the creation of the new route to the reasonable satisfaction of the order making authority. In consequence, order-making authorities are recommended to inspect the new routes of ways before certifying an order, even if the highway authority has already confirmed that it is content with the standard of the new route. There is no prescribed means of certifying an order; this can be done by adding the words 'the Foregoing Order is hereby Certified', signed and dated by the Chief Executive of the order-making authority to the order.

30. The coming into force of an order by certification must be advertised in a local paper. Again there is no prescribed form of words but the following could be used:

[Name of order-making authority]

Town and Country Planning Act 1990 s257

[Name of Order]

In accordance with s.257 and paragraph 8 of Schedule 14 to the above Act notice is hereby given that on [date] [name of order making authority] certified that the alternative right[s] of way required under the terms of the above order have been created to it reasonable satisfaction. The order has now taken effect. [Date]

It is recommended that those on whom the making and confirmation of the order was served are also notified by letter of the certification.

30. Authorities must send copies of confirmed orders (when certified, if certification is involved), to Ordnance Survey. OS reflect the effect on the ground on the next revision of the relevant maps.

31. The surveying authority (the county council or unitary authority, metropolitan district or outer London borough council) is under a duty to make, in due course, a definitive map modification order under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement of public rights of way so as to reflect the change made by the order. There is no right of objection to such legal event orders.

X Further reading

Access/rights of way pages on : www.defra.gov.uk; www.wales.gov.uk; www.planning-inspectorate.gov.uk; www.naturalengland.org.uk; www.ccw.gov.uk.

www.dft.gov.uk *Transport Assessment: good practice guidance for development proposals; National Cycling Strategy; Local Transport Note 1/87 Getting the right balance (advice for local authorities on pedestrianisation and vehicle restricted areas); By Design — Urban design in the planning system: Towards better practice; Better Places to Live, By Design; Encouraging walking: advice to local authorities*

www.communities.gov.uk *Places, Streets and Movement; Lighting in the Countryside: Towards good practice; Publicity for Planning Applications; Planning Out Crime; The Town and Country Planning (General Development Procedure) Order 1995 (Statutory Instrument 1995 No 419) Article 8; Planning policy guidance 13 : Transport.*

Institute of Public Rights of Way Management: www.iprow.co.uk *Rights of way good practice guide*, section 4.7.7

The Town and Country Planning (Public Path Orders) Regulations 1993 (Statutory Instrument 1993 No 10)

Department of the Environment Circular 7/95 *Amendment Regulations and Advice on Public Path Orders* Stationery Office, 1995, £1.50

Practice Guidance Notes 1 and 4 in this series

Rights of Way: A Guide to Law and Practice, John Riddall and John Trevelyan, Open Spaces Society and Ramblers' Association, fourth edition, 2007. £29.95 + postage and packing from 0116 254 3579

www.dspace.dial.pipex.com/rwlr/ *Rights of Way Law Review Section 12 (Annex - issued September 1998) Practice & Precedent - Section 257 Town and Country Planning Act 1990: stopping up and diversion orders*

British Horse Society Policy Statement No. 20 Wind Farms (www.bhs.org.uk; tel. 01926 707700)