

Strategic land

Welcome

Strategic Land Development and
Public Rights of Way:
Issues and options from a legal perspective

This webinar will begin at 10:30

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STRATEGIC LAND DEVELOPMENT AND PUBLIC RIGHTS OF WAY

MATTHEW STIMSON, SOLICITOR

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OVERVIEW

- Public Rights of Way – what they are and why they are important
- Relevance to Planning
- Options and Procedures for Stopping Up and Diversion
- Managing Objections and the Consultation Process
- Conclusions (a Case of Reform?)
- Questions

PUBLIC RIGHTS OF WAY

- A type of Highway
- Distinguishable from:
 - Private Rights of Way/Easements
 - Permissive Rights of Way
- Footpaths
- Bridleways
- Bridleways Open to all Traffic (BOATs)
- Cycleways

PUBLIC RIGHTS OF WAY

- Definitive Map and Statement
- Maintained by the local authority
- Conclusive evidence of the existence of a path
- Not conclusive evidence that no other paths exist
- Duty to be kept under review
- New rights can be established
- Routes can change over time

PUBLIC RIGHTS OF WAY

- Implications
- Offence to obstruct
- Offence to build over

CONSTRAINT OR OPPORTUNITY?

- Constraint
 - Limits where development can go – factor into housing yield
 - May be a cause for public opposition
 - Stopping up or diversion might weigh against the scheme
- Opportunity
 - Means of access
 - Makes a site more sustainable
 - Opportunity for enhancement

MANAGING RISK

- Consider implications when buying a site
- Existing Paths
 - Provision for stopping up or diversion
 - conditionality
 - Implications for long-stop dates
- Potential Paths
 - S31A of Highways Act
 - Provision for dealing with third party applications
 - Who should be responsible?

THE PLANNING APPLICATION

- The need for any stopping up or diversion should be made clear
- Can paths be maintained or kept open during development?
- Consider temporary closure or diversion
- Permissive path agreements for alternative routes
- S106 and s278 Agreements as means to deliver improvements
- Dedication Agreements to create new paths

STOPPING UP AND DIVERSION; THE OPTIONS AND PROCEDURES

GRACE MITCHELL, SOLICITOR

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STOPPING UP AND DIVERSION; THE OPTIONS AND PROCEDURES

A stopping up order extinguishes the right of the public to pass and repass over a highway.

A diversion order covers both the stopping up of a highway and the creation of a new right of way.

Powers exist under the Town & Country Planning Act 1990 and the Highways Act 1980

TOWN AND COUNTRY PLANNING ACT 1990

Section 257 of the TCPA enables an authority by order to authorise the stopping up or diversion of a PROW if the authority is satisfied it is necessary to do so in order to enable development to be carried out:

- a) in accordance with a planning permission; or
- b) by a government department.

A planning permission does not mean a stopping up or diversion order will automatically be made.

S257 cannot be used where the development is “substantially complete”

HIGHWAYS ACT 1980

S118 – stopping up of a public right of way

“it is expedient that the path or way should be stopped up on the ground that it is not needed for public use”

S119 – diversion of a public right of way

“in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted”

PROCESS – MAKING THE ORDER

Slight differences in process for the different powers, however the following are very similar:

- Publish a notice in a local newspaper. The notice must:
 - state the general effect of the order
 - specify a place where the order documents can be inspected
 - give details of how to object
- Display a notice at each end of the footpath section to be diverted
- Serve a copy of the notice and order on all relevant interests
- Objections can be received 28 days from the date of publication
- The applicant will usually pay all costs

PROCESS – CONFIRMING THE ORDER

The order can be confirmed if there are no objections or if all have been withdrawn

If there are objections –

- S257 - the order must be submitted to the SoS to resolve
- S119 - the order can be submitted to the SoS for confirmation (this is a discretionary power)

If the order is not confirmed, the LPA or Secretary of State must inform the previously notified parties.

Once the order is confirmed:

- carry out publicity and notice requirements
- the definitive map must be modified to reflect the changes

JUDICIAL REVIEW AND STATUTORY CHALLENGE

A party can apply to the High Court to quash the order within 6 weeks following the date the order was published if the decision maker has acted *ultra vires* or not carried out the correct procedure.

If the SoS or authority decides not to make or confirm the order this can only be challenged by judicial review.

COMPENSATION

Compensation is not payable in respect of orders made pursuant to S118 of the Highways Act or S257 of the Town and Country Planning Act 1990

Compensation may be payable in respect of an order made pursuant to S119 of the Highways Act, if the diversion order adversely effects either:

- the value of an interest in the land; or
- the enjoyment of land

An application must be made in writing 6 months following the date the order came into operation.

The applicant will be required to pay the compensation.

PROWS – FPs/BWs/RBs & BOATs AND REFORM

KAREN HOWARD, PARTNER,
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PUBLIC PATH DIVERSIONS – CONSULTATION PRINCIPLES

Key Documents

Defra's Rights of Way Circular 1/09

Natural England's publication "A guide to definitive maps and changes to public rights of way" 2008 also provides information about the process (p24 - 25)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414670/definitive-map-guide.pdf

Rights of Way Advice Note 9

Also recommended that you read the

DEFP's guidance on procedures for considering objections - September 2020

IMPORTANT TESTS

S.119 Highways Act (1) empowers a council to make such an order (which must be submitted to the Secretary of State for confirmation unless the order is unopposed) *firstly where it appears to a council ... that, "in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier)."*

Any diversion of a footpath or right of way :

- must be in the interests of the applicant or the public;
- the diversion route must not be substantially less convenient; and
- the diversion must be "expedient" taking factors into account including the impact on public enjoyment.

CASE ARGUMENT

Recent High Court decision (Lieven J) in *the Open Spaces Society v Secretary of State for Env, Food and Rural Affairs [2020] EWHC 1085 (Admin)* “OSS Case” considered relevant factors to be taken into account when determining whether to make an Order under S119 HA 1980.

Argued that the Inspector had misinterpreted s119 HA 1980 and made a mistake by taking the benefit of the landowner into account under the expediency test.

High Court clarified that a wide range of factors can be taken into account when considering such orders including the landowners interests when deciding to confirm the order.

So for now the “balance test” recommended for Inspectors has gone to be replaced with a broader consideration of all relevant matters.

No more balancing competing interests when assessing diversions, the pendulum seems to have swung towards landowners who may want to secure diversions to protect their health, privacy etc.

S257 TCPA 1990

Enables diversion or stopping up of public footpaths and bridleways where it is necessary to enable a development to take place in accordance with planning permission.

This legislation can only be used before or in the early stages of a development. Always important to consider the best legislation to use appropriate to your circumstances.

Consultation in both instances above i.e. whether you proceed under the Planning or Highways Act is very important.

MANAGING CONSULTATION

When deciding to make an order:

Consider timing and when diversion is needed

Make sure the definitive line of the existing path is currently open and is at all times kept open and available for public use. If a path is inaccessible it is likely to lead to the application being rejected.

Proposals to change rights of way are a matter of trust.

People get emotional and the public can be cynical if they cannot use the existing route or are not properly consulted.

Remember there is no guarantee that an order will be made or, if made, will be confirmed.

WHO TO CONSULT

Draft order and plan, these should be used to consult on the proposed diversion/extinguishment to ensure scheme receives broad support.

When an application is made under the Town and Country Planning Act there is no requirement for any pre-consultation over the Order.

Statutory requirement in the Highways Act 1980 to consult the District/Borough council for the area.

Consult Statutory Undertakers! Ramblers, BHS, Byways and Bridleways Trust

County Council expects you to carry out a much broader consultation even at the initial stage to try to avoid objections once any formal order is made.

Includes putting up non-statutory notices on site and publicising on County Council website NB: if any parties object at first stage and objections are not resolved, they will almost certainly object to any order when it is formally advertised.

IMPORTANT POINTS

Give consultees at least 28 days to respond and be clear about timescales – invite detailed comments.

Send a letter to the consultees – set out :

the reasons and benefits of the proposals – be clear

how the proposals meet the legislative tests and County Council's policies

how the new route will be made up to suitable standard (and if works are considered necessary)

details of the width of the new route and any other physical features that have been agreed such as fencing and signs

a copy of the draft order and plan

an extract of the Definitive Map – be transparent

Site visit ?

CONT....

- Consultation Report needs to be complete and accurate - County Council will base its decisions to proceed on this
- ONCE ORDER MADE - Any objections or representations made are sent to the County Council.
- Keep close contact with the PROW team to see what has been said. Check details of any objections or representations to the order that were received. Examine possibility of putting forward proposals to objections and this may lead to them being withdrawn. Obviously on a case-by-case basis.
- Any order can only be confirmed by the County Council if no objections to it are received or, if those that are received are withdrawn.
- The order can only be confirmed if necessary legal tests have been met.
- Provided there are no objections, and the tests are met, the County Council can confirm the order.

CASE FOR REFORM

Often problems with timing and point at which footpath/bridleway is needed. Proposals often become stuck because of conflict introduced by separate regimes.

Land allocated for employment in 2002 – recent diversion PROW applications became problematic – may be a need for reform specially to support Strategic Sites and Local Plan allocations

Improvements to the policy and legal framework for public rights of way – public consultation May 2012 and report 2013 – long read but contains options for improving way that changes can be made to support planning applications and diversions.

OUTCOME: Nothing further ..yet but ..some useful ideas for streamlining the process:

CASE FOR REFORM – IDEAS

- 1. Better collaboration between highways and planning authorities, and raising awareness of processes earlier.
- 2. Make it a requirement for any planning application involving rights of way to have early consultation with prescribed bodies.
- 3. When allocating large areas for redevelopment (which may be a long term proposal) make sure all footpaths and bridleways are considered at that stage – are these in the right place and could improvements be made? Consider timing of proposals to divert at that stage so everyone is clear.
- 4. Planning application forms could ask whether there is a public right of way which is within or adjacent to the site proposed for development,
- 5. Introduce closer working between planning and rights of way officers, for example public rights of way officers making themselves available to advise planning officers and applicants.
- 6. Planning authority websites should contain relevant information on public rights of way, of the procedures that need to be carried out and details of contacts within highway authorities
- 7. Planning and rights of way work should be undertaken by the same authority. Advertising the planning application should include the public rights of way element rather than being done separately
- 8. The local planning authority should be empowered to consider and make decisions on rights of way without referral to the Secretary of State.

The key is to ensure that rights of way are treated as material to planning. - The public interest aspect of any right of way should be considered as early in the process as possible. - The major delay in a number of scenarios is not the system but the failure to note, consider or adequately deal with rights of way issues at an early stage, including engagement with the local highway authority and rights of way team.

Public rights of way can be complex and involve conflicting interests and sometimes can be difficult to resolve. It may be difficult to introduce change that would meet all concerns.



AT A GLANCE

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Strategic land

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