

Section 2: Guidelines for Assessors and Area Officers on dealing with Pre-order Consultations and Made Public Path Orders on behalf of the Society

Introduction

These guidelines explain the process and steps to be taken when dealing with proposals, on behalf of the Society, to alter the rights of way network by making Public Path Orders.

1 POLICY CONSIDERATIONS

The objective is to protect walkers' rights and improve the network for walkers as far as is possible under current legislation.

Two constraints must be borne in mind:

- Developments and changes in land use continually alter the public rights of way environment.
- Legal rules tightly control how changes in the network may be made.

2 WHY ARE WE CONSULTED ON CHANGES TO THE NETWORK?

By law the Society is a "prescribed organization"¹ and Highway Authorities (HAs) have a statutory obligation to send us copies of Public Path Orders that propose to, if confirmed, divert, stop up, extinguish, or create a public right of way², or part thereof.

It is considered best practice for HAs to consult user groups³ like the Society in advance of deciding whether to publish a Public Path Order. That code of best practice is set out in "Practice Guidance Note No.1", published by the Rights of Way Review Committee⁴.

Once an order has been made, we can raise a formal objection. An objection will prevent an order being confirmed by the Order Making Authority and the matter will be referred to the Planning Inspectorate unless the objection is withdrawn or the order itself is withdrawn.

In addition, Highway Authorities, landowners, or developers may initiate Pre-Order Consultations with the Society before making an order. At this stage we may be able to influence the proposals.

NB *If you receive a proposal to stop up a path under s116/s118 Highways Act 1980) or s247/s257 Town and Country Planning Act 1990, you must refer it to the relevant Courts & Inquiries Officer (C&IO) immediately. Only a C&IO can respond to a consultation about a stopping up order.*

3 ADDRESS FOR SERVICE

The Society's address for service is not specified in the Public Path Order Regulations 1993⁵. The

¹ Rights of way circular (1/09) (<https://www.gov.uk/government/publications/rights-of-way-circular-1-09>)

² By "public right of way" we mean any definitive public right of way shown on the relevant Definitive Map & Statement, or any other non-vehicular highway maintainable at public expense shown on the "List of Streets" kept under section 36 of the Highways Act 1980 or any path which is believed to be a public path although it is not yet shown on the Definitive Map and Statement. Any highway that carries public vehicular rights, such as a Byway Open to All Traffic (BOAT), can only be diverted or stopped up by a magistrates' court order unless there is development involved e.g. new roads and/or buildings.

³ An exception to this is a proposal to divert or stop up a public right of way or part of it, using section 116 of the 1980 Highways Act. There is no legal obligation to consult a user group prior to applying to a magistrates' court for an Order. The only legal obligation is to publish a notice in a local paper giving details of the changes applied for, and a date, time and location of the court hearing. Several of the Highway Authorities PNFS deals with use this method, which the Society deprecates and has lobbied against without success.

⁴ <https://www.bhsaccess.org.uk/wiki/uploads/RWRCpgn1.pdf>

⁵ The Public Path Orders Regulations 1993 (<https://www.legislation.gov.uk/uksi/1993/11/contents/made>) see schedule 3. See also the Town and Country Planning (Public Path Orders) Regulations 1993 (<https://www.legislation.gov.uk/uksi/1993/10/contents/made>) and the Town and Country Planning (Public Path Orders)

address for service may be electronic – assessors@pnfs.org.uk or mail@pnfs.org.uk or by post to Taylor House (TH). Alternatively, the appointed AO may receive direct communications from their Highways Authority (or from another OMA such as a district/borough council, Secretary of State, or National Park), or via the Assessors.

In the context of this document the Consultation & Orders Manager (COM) and the Assessors act as the Area Officer (AO) for all Order Making Authorities (OMAs) where a dedicated AO has not been appointed. Assessors/AO may find it helpful to have a copy of the “Rights of Way: a guide to law and practice” 4th edition (Blue Book).

4 RECORD KEEPING

A permanent record of each pre-order consultation and statutory order must be kept, preferably an electronic record that may easily be shared for filing or statistical purposes.

The record should contain, as a minimum, the date of receipt, the addressor, the subject matter (i.e. s116, s118 or s119 Highways Act 1980 or s257 or s247 Town and Country Planning Act (TCPA) 1990 and if a diversion/stopping up or extinguishment), the name of the person to whom it has been referred for action and the date it was sent for filing.

Care is needed in recording the subject matter as one letter may cover two or more orders. Each order should be separately recorded.

Correspondence largely falls into two groups – Pre-Order Consultations/proposals (POCs) and orders. Occasionally an order making authority (OMA) may send us a creation agreement, but these are rare and there is no statutory right to object to them. The essential difference between POCs and orders is that POCs have no statutory force. A failure to meet a time limit, for example, is fatal to an order but not to a POC.

5 FILING

All electronic correspondence relevant to a pre-order consultation or statutory order is to be filed in the Society’s digital filing system. This should take place as soon as possible (file as you go).

Please email any items for filing to pnfs.filing@gmail.com

6 PRE-ORDER CONSULTATIONS BY OMAs

OMAs are under no obligation to consult the Society but it is considered best practice to do so by the Rights of Way Review Committee⁶. Invariably we are asked to respond by a stated date. Whilst we are not bound by that date it is helpful and courteous to meet the OMA’s request. If you feel further time is needed for whatever reason (e.g. holidays, travel restrictions, illness), then ask the author of the POC for this extra time.

The guiding principle is that the Society should make its point as early in the process as possible, on the basis that representations are more likely to be effective whilst proposals are still fluid.

The extreme case is that we do not respond to a POC, the order is subsequently made, and we then lodge an objection on grounds we should have mentioned at consultation. In that situation the Society would be likely to attract criticism.

(Amendment) (England) Regulations 2013 (<https://www.legislation.gov.uk/uksi/2013/2201/introduction>).

⁶ Rights of Way Review Committee Consultation on changes to public rights of way para1 see also DEFRA Rights of Way Circular 1/09 Guidance to Local Authorities.

7 CONSULTATIONS BY OTHER PERSONS AND BODIES

It is not uncommon for applicants for an order to consult the Society before the OMA formulates any proposals.

It is advantageous to establish a good working relationship with an applicant and the Society is much more likely to achieve its objective if it participates in the process at the earliest possible stage.

However, when responding to a consultation and you do not object to the principle of the proposals, you may state this, but you must not state expressly or by implication that the Society would not object to the order if it were made as proposed. You must always expressly retain the right to object if the order is defective in some way, is inconsistent with the proposals or relevant new information has come to light.

8 GENERAL PRINCIPLES

In responding to a proposal or order the Society should strive to achieve a route that provides greater convenience and enjoyment for walkers. If the proposed route is not as convenient or enjoyable as the existing route, we may maintain an objection. However, if it meets all the legal tests, the new route does not have to be better for walkers and may be detrimental.

Note that Defra guidance issued in August 2023⁷ applies to the proposed diversion of routes that pass through private gardens, farmyards and commercial or industrial premises. This guidance requires OMAs to weigh the interests of the owner and/or occupier against the overall impact of the proposal on the public as a whole and states that reducing or eliminating the impact of such routes in terms of privacy, security and safety are important considerations to which due weight should be given. However, the proposed diversion to the route must nevertheless meet the applicable legal tests before this guidance can be effective as a de facto “presumption” in favour of making the diversion.

Diversions onto estate roads should be avoided in accordance with Government advice in Rights of Way Circular 1/09⁸. Preference will be given to made-up estate paths through landscaped or open space away from vehicular traffic.

If a way is to be diverted from an open route to a route alongside a wall or other physical boundary, we would usually request-

- In the case of a hedge, the path is 1 metre away from the root of the hedge and at least 2 metres wide (or at least 3 metres wide and up to 5 metres wide depending on circumstances if a bridleway).
- If against a wall, the path is 0.5 metres away from the wall and at least 2 metres wide (or at least 3 metres wide and up to 5 metres wide depending on circumstances if a bridleway).
- If a way which is to be diverted is to be enclosed on both sides, the width requested will be the greater of the existing width or at least 2.5 metres (for a footpath) or at least 3 metres and up to 5 metres wide depending on circumstances (for a bridleway).

It should be noted that different legal criteria apply for s257 TCPA1990 orders made to enable development to take place. However, the principle of seeking greater convenience and enjoyment still applies.

⁷ “Government guidance on diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises” issued by Defra in August 2023

⁸See footnote 1.

9 Extinguishment and Stopping Up Orders

The starting position for all extinguishments is that we will oppose them. An objection will be maintained unless the way is no longer needed by the public because:

- a suitable alternative way is available (or to be provided by means of a creation order), or
- the way no longer has any public value.

10 ASSESSMENT OF THE PRE-ORDER CONSULTATION

A site visit must be undertaken where changes to the network are proposed.

All POCs should be forwarded to the local Inspector as they have local knowledge of the area that will be useful for our response. If there is no local Inspector or alternative i.e., an agent appointed by the Society, then the AO must carry out the site visit.

The Inspector should be sent a copy of the proposal and a link to the relevant checklists on the Society's website (i.e. Section 3 of the Volunteers' Handbook). See the Consultation Checklists in Section 3 for Highways Act 1980 and Town & Country Planning Act 1990.

11 LIAISING WITH OTHER INTERESTED GROUPS.

The Society encourages liaison with other interested groups who may also be consulted e.g. The Ramblers, Open Spaces Society, British Horse Society, or local user groups who operate specifically in that locality. Some of them may be affiliated to PNFS, so check the list of current affiliates on the Society website.

12 DIFFERENCES OF OPINION OR INTERPRETATION.

There will be occasions where there is a difference of opinion or interpretation of the relevant legislation between user groups or even within the Society.

When such a difference arises, it should be brought to the attention of the relevant C&IO. In the case of disagreement between Society members, the matter will be discussed at the next C&I Committee meeting. The decision of the C&I Committee will be final and binding.

13 THE ROLE OF THE INSPECTOR

When the proposal is referred to an Inspector, their attention should be drawn to the date by which the OMA has asked for a response, with a request that this be complied with if possible. If the Inspector sees any difficulty in meeting the time limit, an extension should be asked for.

The Inspector will be asked to assess the proposal using the relevant checklist. They may also be asked to respond on the following:

- whether or not to raise an objection, stating the grounds of objection in line with the appropriate factors as set out in the checklist
- any suggested improvements to the proposals
- any proposed conditions to be attached to not objecting to the order e.g. waymarking, surface and width of path, form of furniture.

A record should be made of the date a response from the Inspector is due and/or the expiry of the OMA's time limit, to ensure it is not overlooked. It is important to ensure that Inspectors are kept fully informed of the progress of proposals that affect their patch.

14 RESPONSE TO PRE-ORDER CONSULTATIONS BY OMAs

The Assessor/AO will respond to the OMA's consultation letter, basing that response either on the findings in the Inspector's checklist/report or on their own findings or on material from any other source e.g. members of the public.

15 ASSESSMENT OF STATUTORY ORDERS

A record must be kept of the receipt of 'Notice of the making of an order'. It must then be examined to ensure the OMA has sent everything to which we are entitled i.e. a copy of the order and plan and the 'Notice of the making of the order'.

It is not unknown for an OMA to fail to include a copy of the 'Notice of the making of the order' or the plan attached to the order. If that happens an objection should be lodged immediately on procedural grounds. Sometimes an OMA sends a statement of reasons for making the order. A full and closely reasoned statement makes our job much easier.

***NB** check the order to ensure it accords with the form of notices as set out in Public Path Order Regulations 1993.⁹ See relevant checklist for full details.*

The second task is to examine the records to ascertain if the Society has been consulted and if so, what the response was. In the absence of good reason, the response to the making of the order should be the same as it was to the POC, with the addition of technical objections if relevant. The local Inspector should be sent copies of the documents, even though they raised no objection at POC stage. They are thus kept informed of what is happening on their patch and if the situation has changed, they may now wish to change their stance. If a further site inspection is thought necessary, this should be requested.

If a report is needed from the Inspector, they should be made aware of the time limit for lodging objections and of the date their report must reach the Assessor/AO. This is to give sufficient time for the Assessor/AO to make representations to the OMA within that time limit.

A failure to lodge an objection within the time limit is fatal – we can assume there will be no extension. If there has been an objection at POC stage the Assessor/AO can immediately lodge an objection based on what was said at POC. This will stop time running against us. Should further grounds of objection need to be added this could be done later, even after the time limit has expired.

The crucial point is to stop time running against the Society. If the Assessor/AO considers, on examining the documents, that it looks suspiciously like a case where the Society might object, then they must lodge a holding objection immediately i.e. before the documents are sent to the Inspector. When an objection is lodged, the grounds must be stated. Without a report from the Inspector, it will not be possible to state the grounds in full. The Assessor/AO should therefore use their judgment in formulating grounds at the outset, reserving the right to add to those grounds later.

Again, a note should be made of the date the Inspector's report is required.

16 RESPONSE TO STATUTORY ORDERS

The OMA must be informed of the Society's stance on each order and whether that stance has changed since the POC.

Where there is an objection, the relevant Courts and Inquiries Officer **MUST** be consulted and agree the grounds for the objection. This must occur within four weeks of receipt of the Order. In the

⁹ See footnote 5.

absence of a C&IO, the response must come from the Consultations and Orders manager or another delegated officer.

17 PUBLIC INQUIRIES, HEARINGS AND WRITTEN REPRESENTATIONS

When this stage is reached, the assessment process is at an end.

18 DATA COLLECTION

The Society collects data on its activities on an annual basis (1st January to 31st December).

Please submit the following data to the Consultation and Orders manager by 5th January:

Total numbers of: Consultations, orders, confirmed orders, objections and public space protection orders.

This data will be included in the PNFS annual report.

PUBLIC PATH ORDERS CHECKLISTS

INTRODUCTION

The purpose of this guidance is to alert assessors, and others as relevant, to the matters which need consideration when public path orders are sent to the Society as a statutory consultee. Such orders may be made by authorities under:

s26 Highways Act 1980 (creation)

s118 Highways Act 1980 (stopping-up of public rights of way, not including BOATs)

s118A Highways Act 1980 (stopping-up of paths crossing railway lines)

s118B Highways Act 1980 (stopping up for crime-prevention and school protection)

s119 Highways Act 1980 (diversion of public rights of way, not including BOATs)

s119A Highways Act 1980 (diversion of paths crossing railway lines)

s119B Highways Act 1980 (diversion for crime-prevention and school protection)

s247 Town and Country Planning Act 1990 (order made by the Secretary of State for stopping up or diversion to enable authorised development to take place)

s257 Town and Country Planning Act 1990 (stopping up or diversion of public rights of way, not including BOATs, to enable authorised development to take place)

If an order made under any other legislation is received e.g. a cycle tracks order, a temporary order for mineral extraction, a SSSI diversion order, etc, this should be sent to a Courts & Inquiries Officer (C&IO) for a response.

Combined Orders (both a public path order and a definitive map modification order) should be sent to a C&IO for a response.

GENERAL

There is a legal deadline of 28 days, after the date of the notice of the making of the order, for objections to the order to be made. If it seems unlikely that this deadline can be met, a holding objection must be made. This should state why the objection is only holding and what needs to happen before the objection would be withdrawn.

The merits of the stopping up/diversion will have been assessed at the pre-order making consultation stage. The order must be checked to ensure that any comments made at this pre-order making stage have been considered; if they have not, and the result is that the order is detrimental to the interests of walkers as assessed against the legal criteria, then an objection to the order must be made.

SPECIFICS – ALL ORDERS

Check that:

- the order is written in the form set out in the relevant Regulations (see below) – there is a small amount of latitude here: the order must be in “substantially” the form set out in the Regulations; if in doubt, consult a C&IO
- the width of any new path stated in the appropriate Parts (see the relevant Regulations for

what is appropriate) of the Schedule is described precisely, preferably to one decimal place, and words such as “approximately, minimum, maximum” are not used; if necessary, the exact width of the path should be shown by shading on the order plan and referred to as such in the appropriate Parts; the path width should not change as it runs over a bridge, culvert or steps, unless there are special circumstances; if in doubt, consult a C&IO

- the correct notation has been used for the lines on the order map representing the path to be diverted/stopped up (bold, black continuous line), the new path (bold black broken line) and any unaffected paths (footpath = continuous line with short bars at intervals or dotted line); this notation is specified in the Public Path Orders Regulations and (for unaffected paths) in the Definitive Map Modification Orders Regulations, and guidance is given in Advice Note 22 (see References below)
- the map key should clearly identify the different notation types used and should preferably also describe the points of the routes e.g. A – B – C etc, against the relevant notation style; it is a matter of judgment as to whether failure to do this should result in an objection to be made – the test is if any interested party would have been disadvantaged by the mistake.
- the surface of any new path is described accurately (if it is described at all, it does not have to be)
- lengths and grid references are given in the appropriate Parts, and these are accurate (scale from the order plan if necessary)

If the order does not fulfil these requirements, an objection should be made.

SPECIFICS – HIGHWAYS ACT 1980 ORDERS

Check the above requirements applicable to all orders and:

- the location and description of any barriers included in the description of a new path are also included in the “Limitations and Conditions” section of the order.
- any such barriers are described as being compliant with the current British Standard 5709, or the local standard specified by the order making authority; if the latter, then you should be satisfied that the prescribed standard meets the requirements of walkers.
- that if barriers are described as stiles rather than gates, there is a very good reason for this e.g. the landowner will be keeping lambs in the field, the remainder of the path is totally unsuitable for access by the less-able – if a comment was made at the pre-order making stage that stiles would not be acceptable, but they have nevertheless been included in the order, and the OMA has not shown that it has considered the matter in the light of the provisions of the Equality Act 2010, this could be a reason to object to the order; consult a C&IO if in doubt
- bridges, culverts, and steps are not included in the “Limitations and Conditions” section of the order (Part 3); they should be described in Part 2 of the Schedule, and, if, in special circumstances, they are narrower than the path, their width should be included in Part 2 as described above (“Specifics – All Orders”).
- the length of time given for works to be carried out on a new path is appropriate and reasonable; the order may state that the old path will be stopped up on the date that it is certified that the works on the new path have been carried out to the OMA’s satisfaction – this is fine.

If the order does not fulfil these requirements, an objection should be made.

SPECIFICS – TOWN AND COUNTRY PLANNING ACT 1990 ORDERS

Check the above requirements applicable to all orders and:

- the planning permission for the development which makes the order necessary must be described and its number given in the introduction to the order (as stated in the Regulations)
- if the order is made in anticipation of planning permission being granted, the correct wording as per the amendment regulations is used (see below)
- there should be NO Limitations and Conditions section in the order - any barriers must be separately authorised by the highway authority – though the installation of barriers may be described in the works to be carried out in paragraph 4 of the order.

If the order does not fulfil these requirements, an objection should be made.

By section 257(1)(a) of the 1990 Act competent authorities are permitted to make orders authorising the stopping up or diversion of a 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 in accordance with planning permission granted under either Part 3 or section 293A of the 1990 Act.

Section 257(1A) now permits competent authorities to stop up or divert a footpath, bridleway, or restricted byway where they are satisfied that it would be necessary do so in order to enable development to be carried out in accordance with planning permission for which an application has been made under Part 3 of the 1990 Act, were that application to be granted.

AMENDMENT OF THE TOWN AND COUNTRY PLANNING (PUBLIC PATH ORDERS) REGULATIONS 1993

The following extract from these Regulations sets out the required form for Town and Country Planning Act 1990 Orders:

2.—(1) The Town and Country Planning (Public Path Orders) Regulations 1993(2) are amended as follows.

(2) In Schedule 1 (forms of public path order), in Form 1, for the preamble, substitute—

“[This order is made by [name of authority] under section 257 of the Town and Country Planning Act 1990 because it is satisfied that it is necessary to [stop up][divert] the [footpath][bridleway][restricted byway] to which this order relates in order to enable development to be carried out [in accordance with planning permission granted under [Part 3][section 293A] of the Town and Country Planning Act 1990][by a government department], namely: [insert description of development and, if appropriate, name of department].]

[This order is made by [name of authority] under section 257 of the Town and Country Planning Act 1990 because it is satisfied that—

(a) an application for planning permission has been made under Part 3 of that Act, namely: [insert description of development], and

(b) if the application were granted it would be necessary to authorise the [stopping up] [diversion] of the [footpath][bridleway] [restricted byway] to which this order relates in order to enable the development to be carried out.”.

REFERENCES: RELEVANT REGULATIONS ETC (Legislation available on the Gov.uk website)

Rail Crossing Extinguishment and Diversion Orders Regulations 1993

Town and Country Planning (Public Path Orders) Regulations 1993

Public Path Orders Regulations 1993

Highways, Crime Prevention etc (Special Extinguishment and Special Diversion Orders) Regulations 2003

Highways (SSSI Diversion Orders) (England) Regulations 2007 (and Defra advice 2007)

The Public Rights of Way (Combined Orders) (England) Regulations 2008 and the Public Rights of Way (Combined Orders) (England) (Amendment) Regulations 2010 (and Defra advice October 2010)

2013 No. 2201 RIGHTS OF WAY, ENGLAND the Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations 2013

PLANNING INSPECTORATE ADVICE NOTES

Rights of way advice notes - GOV.UK (www.gov.uk)

Advice Note No 9 'General guidance on Public rights of way matters.'

Advice Note No 16 'Widths on orders.'

Advice Note No 22 'Use of Correct Notation on Definitive Map Modification orders and Public Path Orders.'