

Public Guidance Note 8

Public Path Orders Applications Made Under the Highways Act 1980

Introduction

Public Path Orders are used to make changes to public rights of way based on preference. Most Public Path Orders are made under Sections 118 (extinguishments) and 119 (diversions) of the Highways Act 1980. Anyone can apply for an order under these parts of the Act although the Council will require written agreement of all affected landowners before agreeing to proceed.

More recently special powers have been created which are limited to particular applicants:

- Any owner, lessee or occupier of any land used for agriculture, forestry or the breeding or keeping of horses crossed by a Right of Way (section 118ZA and 119ZA of the Highways Act 1980)
- The proprietor of any school to allow special diversion and extinguishments to be made on Public Rights of Way where they cross school grounds (section 118C and 119C of the Highways Act 1980) *For more information see Public Guidance Note 23: Special Diversion & Extinguishment Orders for Schools*
- Natural England where public rights of way run over Sites of Special Scientific Interest (SSSI) (Diversion applications only under section 119D of the Highways Act 1980)

What type of order do I need?

It is important that applicants are aware of the relevant criteria for the type of order they are applying for prior to the submission of an application.

Diversion Orders (Section 119 Highways Act 1980)

Diversion Orders are used to move a route or part of a route, onto another line.

These orders can be made either in the interests of the owner, lessee or person using the land crossed by the right of way or in the interests of the public. Before making an order, the authority must be satisfied that this test will be met.

The authority must also be satisfied that the diversion order either does not alter any point of termination of the path where that is not on a highway, or that where the path terminates on a highway, it only moves the point of termination to another point on the same highway, or a highway connected to it. The diverted route must also be substantially as convenient to the public.

The council should also make sure that the route shown in the order as the alternative route is not an existing public right of way.

The authority has the power to require the applicant to cover the costs of the order and the cost of making up the new path, as well as any compensation that may be payable.

When making a diversion order the Council must also consider:

- How it will affect the public use of the path as a whole
- How it will affect land served by the existing path
- How it will affect land it is diverted through
- Whether the diverted path is less convenient to the public
- If the order is in the best interests of the person or persons named in it.

Extinguishment Orders (Section 118 Highways Act 1980)

Extinguishment orders are used to remove public rights from all or part of a right of way.

These are more likely to attract objections than diversions and the Council will only agree to make such orders where the legal tests can clearly be met.

The law states that it must appear to the authority, before making an order, that it is necessary to stop up the path or way on the grounds that it is not needed for public use ; these are the only grounds under which such an order can be made. Any temporary circumstances preventing or diminishing the use of the path by the public must be ignored.

Before confirming an order, the authority or the Secretary of State must be satisfied that it is necessary to confirm the order having regard to the likely use that would be made of the path and to the effect which closure of the route would have on land served by it. It must also have regard to any material provisions set out in the authority's Rights of Way Improvement Plan. The authority or the Secretary of State must ignore any temporary circumstances preventing the use of the path by the public. These tests must be applied even where the order has attracted no objections.

Government Presumption Guidance

In August 2023, the government introduced guidance³ that effectively acts as a presumption to divert or extinguish rights of way that pass through the gardens of family homes, working farmyards or commercial premises where privacy, safety or security are a problem. The guidance gives local authorities more scope to confirm orders in the interests of the landowner where a right of way causes concern in these circumstances.

In determining an application to which this guidance applies, the Council must consider the case on all its merits, considering all the statutory requirements and available guidance. In making its decision as to whether the existing path should be diverted or extinguished, the Council should consider the impact of the existing path on the property owner and/or occupier against the benefit that having the right of way through the land brings to the public, taking account of this guidance.



Making the Application

In the first instance you should contact the Rights of Way Team to outline your proposals. You will be sent the relevant application form to complete along with the cost schedule. When applying for a diversion the applicant will need to supply a **plan of the proposal** when the application form is submitted. This plan should be at a scale of either 1:1250 or 1:2500 and it must be as accurate as possible. Please note that this can be amended following advice from the Rights of Way Officer or comments at the informal consultation stage.

Once an application has been received a site visit will usually be arranged with the Rights of Way Officer. The site meeting is an ideal opportunity to view the current definitive line of the right of way and the proposal. The officer will usually give advice about the suitability of the proposal, the statutory requirements and brief details of the procedures and costs involved. The applicant will also be advised if they would be required to do any works on the ground to bring the route of the proposed diversion up to a suitable standard.

The Council's Countryside Maintenance Team are able to carry out any necessary works should they be required (fees apply) or applicants can undertake the works themselves or with private contractors. The specification and cost of any furniture (e.g. gates) can also be outlined at this time.

The Rights of Way Officer cannot make the decision whether to make a diversion or extinguishment order, but they can advise on the likelihood of its success.

What costs are involved?

Applicants will normally be expected to pay both the administrative costs and the cost of the advertising required by law. Details of fees are outlined in a cost schedule and the Rights of Way Officer will provide you with this document.

The applicant will usually be required to pay in three instalments:-

1. The first instalment will be paid for work done up to when a report is dealt with under Delegated Powers procedures or (in rare circumstances) is taken to the appropriate Planning Committee. **This will not be refunded if the application does not get approved and a legal order is not made.**
2. A second payment will be required when an order is made and advertised.
3. A final payment will be due on confirmation of the order. The cost of any furniture supplied/work undertaken by the Council to open up the diverted route will be included at this stage.

Costs will be less if objections can be avoided, and this is why it is particularly important to carry out thorough informal consultation prior to making an order.

Who needs to be consulted?

Officers follow the Department of the Environment, Food and Rural Affairs (DEFRA) Code of Practice on consultation.

The Rights of Way Officer will informally consult with the various consultees at an early stage. They will provide the reasons for the application and a plan. Any other interested parties will also be consulted at this stage.

The informal consultation will also specify any work that would need to be carried out on the new route and any limitations or conditions on the new route.

The informal consultation is beneficial as it provides an opportunity to judge the likely support/opposition that your application might receive and whether it is possible to accommodate the views expressed by the consultees within the final proposal. Informal consultation at this stage should speed up the process of the application during the more formal stages by identifying any problems or conflicts of interest whilst allaying any concerns of those likely to be affected. As a result of informal objections applicants may decide to modify their proposals or even to abandon them where agreement is unlikely.

An illustrative flow chart is included as Appendix 1 showing the process which is followed when an application is received by the Council.

Making the Order

If Shropshire Council as the Order Making Authority (OMA) decide to publish a legal order to propose the changes detailed in the application then we will inform the applicant, affected landholders and any other interested parties.

In all cases the proposals need to fulfil the necessary legal order tests in order to obtain a decision to publish.

When an order is published, the Council is required to:

- Erect notices at either end of the route with details of the proposed changes and an accompanying map.
- Advertise the making of the order in at least one local newspaper.
- Notify statutory consultees, the local member and any landowners/interested parties regarding the publication and send copies of the legal order together with guidance notes on how to object to the proposals.

What Happens Next?

If there are no objections to the order within the 28 day period, or if the objections are withdrawn in writing, the order can be confirmed by the Council.

Due to the initial informal consultation process it is hoped that any potential objections have already been dealt with, but there is always the possibility of unexpected representations from objectors. A formal objection has to be made in writing to the Council within the 28 day period following the advertisement of the order.



If objections are received, the Council will mediate in any negotiations where appropriate. If objections are maintained, the Council will not be able to confirm the order and will need to send it to the Planning Inspectorate (PINS) for determination. There are three different procedures for dealing with objected orders:

- a) An exchange of written representations
- b) A hearing
- c) A local public inquiry.

The Planning Inspectorate has clear guidelines on how they deal with objections relating to the Definitive Map. Depending upon the procedures being employed the Inspectorate provide the local authority, the applicant, and other relevant people with notification of how they intend to deal with the matter. They will also provide a specific timetable of when the required information has to be submitted by. The timetables vary depending on the process being employed.

The applicants will be expected to present their own case at the Hearing/Inquiry in defending the opposed order. Council officers will attend the Hearing/Inquiry to assist all parties if deemed necessary. If the written representation procedure is exercised, again the Council will act as a facilitator for this.

If an Inquiry is necessary and the order is made in the public interest, the Council will prepare a case for confirmation of the order at a Public Inquiry. However, if the order is made in the landowner's interest, the Council will only act as a facilitator for this.

An independent inspector appointed by the Secretary of State will give the decision to confirm, not confirm or modify the order after the case has been considered.

For the full details of the Planning Inspectorate procedures please visit <https://www.gov.uk/guidance/object-to-a-public-right-of-way-order>

Can costs be awarded?

The parties at hearings and inquiries relating to public rights of way orders made by local authorities are normally expected to meet their own expenses irrespective of the outcome. However, the Secretary of State or Planning Inspectors are empowered to award costs by virtue of Section 250 (5) of the Local Government Act 1972. Costs are only awarded when what is termed 'unreasonable' behaviour is held to have occurred.

The right of objection to an order under the Highways Act 1980 is a statutory right but it should be exercised in a reasonable manner. Objectors who have been given the opportunity to modify grounds of objection which are not legally relevant but have declined to do so, will be at risk of an award of the authority's costs against them if they pursue the unmodified objection to a hearing or inquiry. It must have been obvious that the objection, so pursued, had no reasonable prospect of success.

Other actions that can constitute 'unreasonable behaviour' which can be the cause of an application for costs against objectors include:

- Failing to comply with normal procedural requirements for inquiries and hearings, for example failing to provide a pre-inquiry statement when asked to do so. If the proceedings have to be adjourned or are unnecessarily prolonged due to this or if the objectors are deliberately or wilfully un-cooperative, for example refuse to discuss the matter or provide the requested, necessary information.
- Failing to attend an inquiry or hearing.
- Pursuing an objection which has no reasonable prospect of success.

Further information is available at: <https://www.gov.uk/government/publications/rights-of-way-guidance-booklet>

Planning Inspectorate Decisions

Following either the written representation, Hearing or Public Inquiry process the Inspector will make a decision on the order and detail the reasons and interpretation of the evidence in a written decision letter.

The decision letter is sent to the local authority, the objectors and all those that request a copy at the Hearing or Public Inquiry.

The Inspector may decide: -

- to confirm the order
- not confirm the order
- modify the order proposals

If the order is confirmed the council will publish final notices of confirmation and serve notice on all those who were served notice when the order was made.

If the order is not confirmed the council will forward a copy of the Inspector's decision letter to all those served notice of the making of the order.

If the order is confirmed with modifications the Planning Inspectorate will normally re-advertise the modified proposals. There is an opportunity at this stage to make objections to the proposed modifications which may lead to a second Public Inquiry to determine the outcome of the modified order.

Making up the New Route

The new route will be required to be opened to a suitable standard prior to confirmation of the legal order. The route will be inspected and certified as operational after this period by a Rights of Way Officer. If the work has not been undertaken, then the order will not be confirmed, and the definitive line will remain. The Rights of Way Officer can arrange to have the works done if preferred, although the applicant/landowner will be required to pay the costs involved.



Confirmation of the Order

Once the order had been confirmed whether by the Council or by an Inspector appointed by the Planning Inspectorate, public notice of the confirmation must be given.

Public notice is given in the same way as for the publication of the order, but the notices must remain on site for six weeks rather than 28 days.

During this six week period aggrieved persons can challenge the order in the High Court on the grounds that the legal procedures have not been followed properly in some way, but it is unusual for this to happen.

Once the order has been confirmed the Council will amend its records accordingly. Copies of the confirmed order are sent to Ordnance Survey who will update their publications in due course, although this may not happen for some time.

If the order is not confirmed, the definitive line will remain unaltered.

What if I am unhappy about how my application was dealt with?

Where an application has been made under sections 118ZA and 119ZA and sections 118C and 119C the applicant may appeal to the Secretary of State if the Council:

- refuse to make an order on the application
- refuse to confirm as an unopposed order an order made on the application, or
- refuse to submit to the Secretary of State an order which is made on the application and against which any representation or objection has been made and not withdrawn.

There is no right of appeal for applications made under sections 118 or 119

The Council cannot give assurances that an application will be successful in the event of objections. Applicants must be aware that they may incur cost without the order eventually succeeding. The Council will endeavour to resolve objections if at all possible and applicants will be able to withdraw their applications prior to objected orders being sent to the Planning Inspectorate for determination. In these circumstances the Council will only recover costs up to the point that this event occurs.

An illustrative flow chart is included as Appendix 2 showing the process which is followed when a legal order is made by the Council.

