



GUIDE TO SOME ASPECTS OF THE LAW RELATING TO RIGHTS OF WAY

Status of this document

This document is a work in progress. It is an attempt to pull together all the information that needs to be considered when having a role in the alteration of the rights of way network to accommodate development or redevelopment and specialist information about practical problems relating to the maintenance of rights of way.. It will need revision and updating from time to time and to incorporate errors, omissions and improvements. This is Version 5 dated 3 September 2018. Any suggestions for alterations to the text should be sent to Richard Kenchington, Footpath Secretary, the Eastleigh Ramblers a Group of the Ramblers' Association by email to eastleighrambler@aol.com The latest version can be found at www.eastleighramblers.org.uk – make sure you have the latest version.

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1. Introduction

England is a beautiful country with a wide variety of scenery and landscapes which has been passed down to us all by previous generations. It reflects not only the pattern of human history but the means by which people have travelled around the country for work and pleasure. We have been left a network of rights of way which is the envy of the world and one which attracts people to come to live and visit. The rights of way network is continually changing to accommodate development associated with changes in human activity and the need to accommodate a growing population. All who partake in that process from whatever angle they are associated with it benefit from the rights of way network that we have inherited and it is up to us all to ensure that future generations inherit from us a network no less attractive. The object of the process of managing change should be approached with that objective in mind.

Plans to build on land which is crossed by public rights of way often cause concern because of fears that the paths will be lost or changed beyond recognition. But there are legal procedures which apply when rights of way are affected by development and this document is intended to inform all those involved of that process. This document relates to the procedures contained in Section 257 of the Town and Country Planning Act 1990 which relate only to footpaths, bridleways, Restricted Byways and Byways open to all Traffic.

This document also covers topics that are relevant to the use and maintenance of rights of way. In such a short document it is only scratching the surface of the law relating to rights of way but in time it is hoped to expand it to cover those matters that are most likely to affect users and landowners.

2. Definitions

FOOTPATH – This is defined in Section 336 of the Town and Country 1990 by cross referencing to the definition in the Highways Act 1980 Section 329(1) - *a highway over which the public have a right of way on foot only, not being a footway; A footway is a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only;*

BRIDLEWAY - This is defined in Section 336 of the Town and Country 1990 by cross referencing to the definition in the Highways Act 1980 Section 329(1) - *bridleway” means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway.*

By Section 30 of the Countryside Act 1968 (as amended by the Countryside and Rights of Way Act 2000) Cyclists got the following rights to use bridleways

Riding of pedal bicycles on bridleways.

(1)Any member of the public shall have, as a right of way, the right to ride a bicycle, [F]not being a mechanically propelled vehicle], on any bridleway, but in exercising that right cyclists shall give way to pedestrians and persons on horseback.

(2)Subsection (1) above has effect subject to any orders made by a local authority, and to any byelaws.

(3)The rights conferred by this section shall not affect the obligations of the highway authority, or of any other person, as respects the maintenance of the bridleway, and this section shall not create any obligation to do anything to facilitate the use of the bridleway by cyclists.

(4)Subsection (1) above shall not affect any definition of “bridleway” in this or any other Act.

(5)In this section “mechanically propelled vehicle” does not include a vehicle falling within paragraph (c) of section 189(1) of the Road Traffic Act 1988.

That provision includes an electrically assisted pedal cycle of such a class as may be prescribed by regulations so made.

RESTRICTED BYWAY By virtue of Section 47 of the Countryside and Rights of Way Act 2000 (2) *Every way which, immediately before the commencement of this section, is shown in any definitive map and statement as a road used as a public path shall be treated instead as shown as a restricted byway; and the expression “road used as a public path” shall not be used in any definitive map and statement to describe any way.* By virtue of Section 48(4)

“restricted byway rights” means—

- (a) a right of way on foot,*
- (b) a right of way on horseback or leading a horse, and (c) a right of way for vehicles other than mechanically propelled vehicles; and*

“restricted byway” means a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way.

BYWAY OPEN TO ALL TRAFFIC – This is defined in Section 66(1) of the Wildlife and Countryside Act 1981 as *a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used;*

3. Prescribed Organisations

By virtue of Annex A of Defra’s Rights of way Circular 1/09 – Version 2 October 2009 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 organisations head office.*

*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

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.

4. Planning permission

Development is defined in Section 55(1) of the Town and Country Planning Act 1990 - *Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land"*.

The Act says at Section 57(1) *Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.*

Most applications for planning permission are made to the district council if there is one, or otherwise to the unitary authority. The main exceptions are applications for mineral extraction and waste management which are decided by the county council where counties still exist, or by the park authority within national parks.

After an application for planning permission has been made it is listed on the local authority's planning register, which is open to the general public, often on the authority's website.

The authority sends the application to other relevant councils for their comments, for example to county and parish councils, and sometimes also consults local groups who carry out regular activities in the area, such as Ramblers groups. Members of the public are only given a short period (up to 21 days) to comment because the Government expects planning authorities to decide applications within eight weeks.

The Department for Communities and Local Government (DCLG) has guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7727/1505220.pdf (refer to section 48.d – extract below in italics) for local authorities on the validation of planning applications. The guidance states that applications for full planning permission should be accompanied by a plan of the proposed development showing all rights of way crossing or adjoining the site.

Site plan

48. A site plan should be submitted. The legislation requires three copies plus the original (unless submitted electronically). The site plan should be drawn at an identified standard metric scale. It should accurately show

a. the direction of North

b. the proposed development in relation to the site boundaries and other existing buildings on the site, with written dimensions including those to the boundaries

and the following, unless these would NOT influence or be affected by the proposed development:

c. all the buildings, roads and footpaths on land adjoining the site including access arrangements

d. all public rights of way crossing or adjoining the site

e. the position of all trees on the site, and those on adjacent land

f. the extent and type of any hard surfacing; and

g. boundary treatment including walls or fencing where this is proposed

Note that “public rights of way” in the context of 48(d) includes a footpath, bridleway, a restricted byway and a byway open to all traffic.

If an application for planning permission affects a right of way then a special rule applies and the application must be advertised at the proposed site and in a local paper (Article 15 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. SI 2015 No 595 or Article 12 of The Town and Country Planning (Development Management Procedure) (Wales) Order 2012. SI 2012 No 801). Again, a notice has to be displayed for 21 days. This is an important way path users can find out about possible threats to the path network and make comments about them.

5. Protecting rights of way when development is proposed

To protect a public right of way over a site proposed for development it’s important that the paths at risk are given proper consideration before the decision on the planning application is taken, and that the paths are kept open and unobstructed until the legal procedures which authorise the closure or diversion of a path (if planning permission is granted) have been carried out.

There is important Government advice on this subject in section 7 of Defra’s Rights of way Circular 1/09 – Version 2 October 2009 <https://www.gov.uk/government/publications/rights-of-way-circular-1-09> (In Wales, the same information is provided in Annex D to DoE Circular 2/93 (Welsh Office 5/93). This says that the effect that a proposed development will have on a right of

way must be considered by planning authorities when deciding whether or not to approve an application for planning permission. See Section 7.1 and 7.2 in italics below.

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.

This means that, while the existence of a right of way across the site of a proposed development won't automatically mean an application is rejected, the fact that it is there must be taken into account by the officer or committee which decides the application.

This is why it's very important that any concerns about paths, alongside any concerns about the development as a whole, are made, in writing, to the planning authority when the application is advertised.

Planning applications are approved or rejected by a local authority with reference to its Local Plan (which sets planning policies in a local authority area) which will have been prepared following extensive local consultation. Those interested in preserving rights of way and those seeking to affect them need to ensure that the provisions of the Local Plan meet their expectations and should play an active part in their drafting and adoption.

In most cases rights of way can be incorporated into new developments as safe and convenient features. It's often possible to keep a distinct path separate from the pavements alongside roads, whether on its existing route or through or around open spaces or woodland or by water features.

Paragraph 7.8 of Defra circular 1/09 firmly supports this view by saying

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.

There is further helpful advice about providing 'green infrastructure' – a term which includes public rights of way and other paths – in guidance produced by the Town and County Planning Association and the Wildlife Trusts – "Planning for a healthy environment – good practice for green infrastructure and biodiversity" (July 2012) .

http://www.tcpa.org.uk/data/files/TCPA_TWT_GI-Biodiversity-Guide.pdf

6. National Planning Policy Framework 2018

Local Plans also have to be developed within the National Planning Policy Framework (the NPPF) This sets out the government's economic, environmental and social planning policies for England. There are a number of useful references to pedestrian access and paths in the NPPF

There was a 2012 Version of this document which would have been relevant until 27 July 2018 when it was replaced.

In Paragraph 20 there is a requirement that Strategic Policies in a Development Plan (a term which encompasses Local Plans and Neighbourhood Plans) should have an overall strategy for the conservation and enhancement of green infrastructure.

Below are some extracts from relevant paragraphs some elements have been highlighted in this document in bold as being particularly relevant

91. Planning policies and decisions should aim to achieve healthy, inclusive and safe places which:

a) promote social interaction, including opportunities for meetings between people who might not otherwise come into contact with each other – for example through mixed-use developments, strong neighbourhood centres, **street layouts that allow for easy pedestrian and cycle connections within and between neighbourhoods**, and active street frontages;

b) **are safe and accessible**, so that crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion – for example **through the use of clear and legible pedestrian routes**, and high quality public space, which encourage the active and continual use of public areas; and

c) **enable and support healthy lifestyles**, especially where this would address identified local health and well-being needs – for example **through the provision of safe and accessible green infrastructure**, sports facilities, local shops, access to healthier food, allotments **and layouts that encourage walking and cycling**.

98. Planning policies and decisions should protect and enhance public rights of way and access, including taking opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails.

102. Transport issues should be considered from the earliest stages of plan-making and development proposals, so that:

a) the potential impacts of development on transport networks can be addressed;

b) opportunities from existing or proposed transport infrastructure, and changing transport technology and usage, are realised – for example in relation to the scale, location or density of development that can be accommodated;

c) opportunities to promote walking, cycling and public transport use are identified and pursued;

d) the environmental impacts of traffic and transport infrastructure can be identified, assessed and taken into account – including appropriate opportunities for avoiding and mitigating any adverse effects, and for net environmental gains; and

e) patterns of movement, streets, parking and other transport considerations are integral to the design of schemes, and contribute to making high quality places

104. Planning policies should:

c) **identify and protect, where there is robust evidence, sites and routes which could be critical in developing infrastructure to widen transport choice** and realise opportunities for large scale development;

d) **provide for high quality walking and cycling networks and supporting facilities such as cycle parking (drawing on Local Cycling and Walking Infrastructure Plans);**

110. Within this context, applications for development should:

a) **give priority first to pedestrian and cycle movements, both within the scheme and with neighbouring areas;** and second – so far as possible – to facilitating access to high quality public transport, with layouts that maximise the catchment area for bus or other public transport services, and appropriate facilities that encourage public transport use;

c) **create places that are safe, secure and attractive – which minimise the scope for conflicts between pedestrians, cyclists and vehicles,** avoid unnecessary street clutter, and respond to

118. Planning policies and decisions should:

a) **encourage multiple benefits from both urban and rural land, including** through mixed use schemes and **taking opportunities to achieve net environmental gains – such as developments that would enable** new habitat creation or improve public access to the countryside;

b) **recognise that some undeveloped land can perform many functions, such as** for wildlife, recreation, flood risk mitigation, cooling/shading, carbon storage or food production;

141. Once Green Belts have been defined, local planning authorities should plan positively to enhance their beneficial use, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land.

168. Development in a Coastal Change Management Area will be appropriate only where it is demonstrated that:

a) it will be safe over its planned lifetime and not have an unacceptable impact on coastal change;

b) the character of the coast including designations is not compromised;

c) the development provides wider sustainability benefits; and

d) **the development does not hinder the creation and maintenance of a continuous signed and managed route around the coast.**

170. Planning policies and decisions should contribute to and enhance the natural and local environment by:

a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);

b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland;

c) maintaining the character of the undeveloped coast, while improving public access to it where appropriate;

The NPPF includes at the end a list of the terms used and their definition including the following definition of Green Infrastructure, National Trails and Sustainable Transport Modes.

Green infrastructure: A network of multi-functional green space, urban and rural, which is capable of delivering a wide range of environmental and quality of life benefits for local communities.

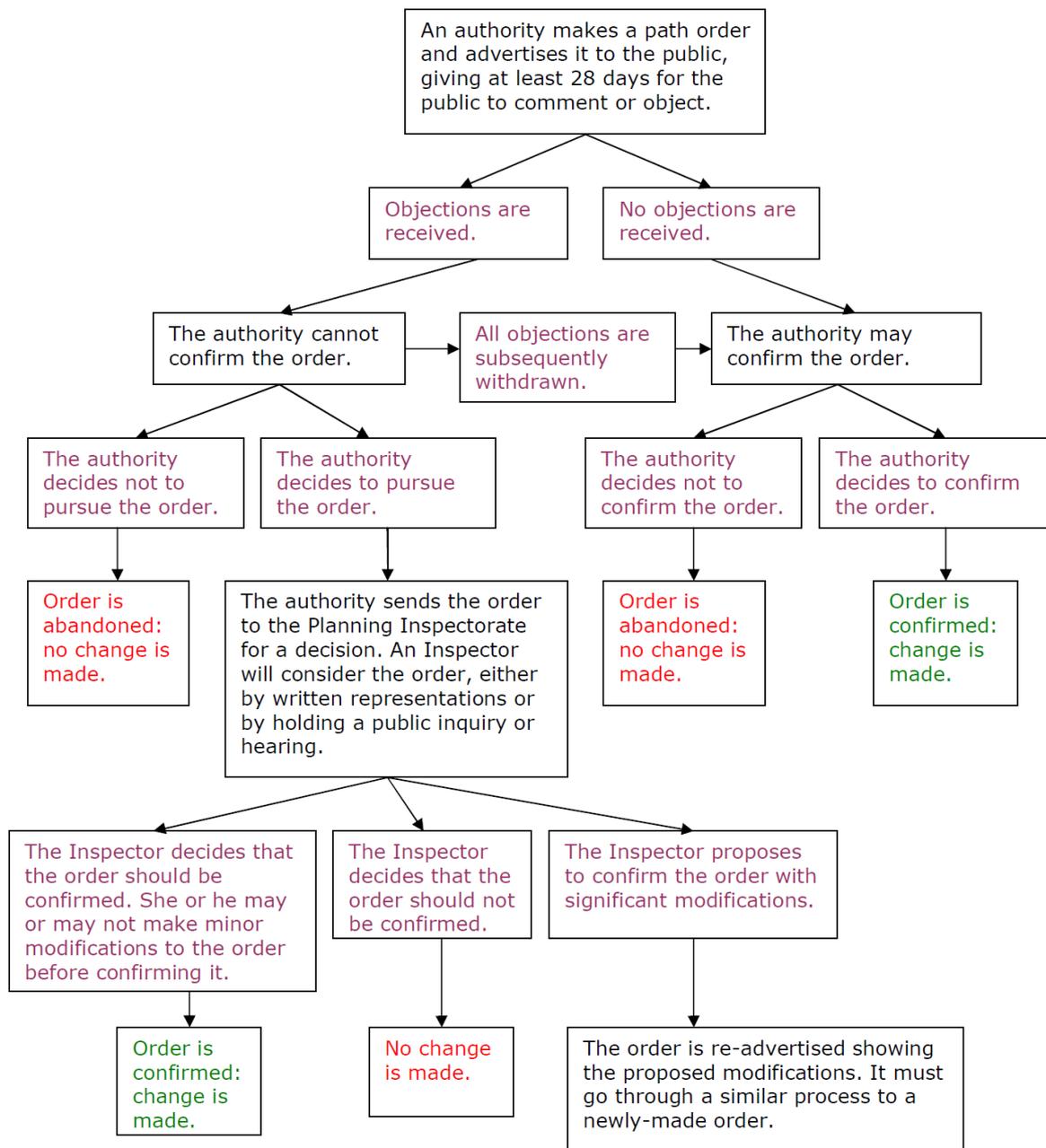
National trails: Long distance routes for walking, cycling and horse riding.

Sustainable transport modes: Any efficient, safe and accessible means of transport with overall low impact on the environment, including walking and cycling, low and ultra low emission vehicles, car sharing and public transport.

7. The closure and diversion of rights of way affected by development

Planning permission is a right to carry out development, not to interfere with, move or block a right of way. If the planning authority is satisfied that it wouldn't be possible for a development to go ahead as described in the planning application unless any paths on the site (footpaths, bridleways or restricted byways) are closed or moved, the authority can make an order to bring about the change.

The public has the right to object to any order which proposes to close or move a right of way to allow a development to go ahead. These orders are made under section 257 of the Town and Country Planning Act 1990. The path order procedure is set out in our path order flow chart – below.



Section 257 Town and Country Planning Act 1990

257 Footpaths bridleways and restricted byways 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 and 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 III 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 and restricted bridleway 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 and 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.

(3) An order may be made under this section authorising the stopping up or diversion of a footpath bridleway and restricted byway 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, who would have had power to grant it;

(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.

(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, the local planning authority to whom the application would otherwise have been made.”

Source <http://www.legislation.gov.uk/ukpga/1990/8/section/257>

Changes applied

s. 257 side note words substituted by S.I. 2006/1177 Sch. Pt. 1s. 257(1) words substituted by S.I. 2006/1177 Sch. Pt. 1s. 257(1A) inserted by 2013 c. 27 s. 12(2)s. 257(1A) words omitted by 2015 anaw 4 s. 38(2)s. 257(2)(b)(c) words substituted by S.I. 2006/1177 Sch. Pt. 1s. 257(4) word omitted by 2013 c. 27 s. 12(3)(a)s. 257(4)(a) words inserted by 2015 anaw 4 Sch. 4 para. 14(a)s. 257(4)(c) inserted by 2013 c. 27 s. 12(3)(b)s. 257(4)(c) words inserted by 2015 anaw 4 Sch. 4 para. 14(b)271-274 applied (with modifications) by S.I. 2012/2679 Sch. 13 para. 1

Objections to such orders have to be on the grounds that the diversion or closure of a right of way isn't necessary for development to take place. Even though a proposed development may affect the line of a right of way, the order will not necessarily be confirmed.

It might, for example, be possible to divert a path instead of closing it, and there are court judgments which allow wider considerations to be taken into account, for example, the effect that the order would have on those entitled to use the path which would be lost if it were to close.

Prior to 25 June 2013 orders couldn't be made until planning permission had been granted, but a change in the law in made by Section 12 of the Growth and Infrastructure Act 2013 (which came into force by virtue of Section 35(3) of that Act) added Section 257(1a) to the Town and Country Planning Act 1990 means that an order can now be made and considered at the same time as the relevant planning application and before the planning permission is granted. An order cannot be confirmed however before planning permission is granted because of the addition of Section 1(A) into Section 259 (confirmation of orders made by other authorities). This provision reads

“(1A) An order under section 257(1A) may not be confirmed unless the Secretary of State 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.”

It's hoped that this change will mean that rights of way are given more thorough consideration during the decision making process for the planning application. It's still possible for orders to close or divert a path to be made after planning permission has been granted, in which case any objection to the path order is not an excuse to object again to the development itself.

Orders made by the Secretary of State

The Secretary of State for Transport also has the power to make orders affecting rights of way for reasons similar to those available to local authorities. The Secretary of State's powers extend to the closure or diversion of byways open to all traffic (BOATs) and ordinary roads. The Secretary of State rarely exercises these powers in relation to footpaths, bridleways and restricted byways.

8. How orders to close or divert rights of way come into effect

An order which closes a right of way under the Town and Country Planning Act 1990 is normally written in such a way that the change comes into effect as soon as the order is confirmed, regardless of whether or not the development ever takes place.

Orders which divert or create new rights of way should be drafted to come into operation not on confirmation of the order, but when the planning authority certifies that the new route has been properly created.

This gives the developer an incentive to get any new routes ready for use, and prevents the order from taking effect if for any reason the development doesn't go ahead as planned. It's the job of the developer to get the new path ready for the public to use, not the planning authority.

If an order comes into operation other than on the date on which it was confirmed, or after a certain period of time specified in the order, the authority has to advertise that the order has come into operation in a local paper.

Development, in so far as it impacts any rights of way on a site, mustn't be started (and the paths must be kept open for public use) until any orders to close or divert the paths have come into effect.

A developer who interferes with a right of way before it has been formally closed or moved could be prosecuted. Any such interference with a public right of way should be reported to both the planning authority and the highway authority (where they're separate bodies).

Occasionally a local authority will agree to facilitate development work from taking place by making a temporary traffic regulation to stop the public from using a path across a development site before any permanent orders to close or divert the path have been made and confirmed.

This may be done for safety reasons but should not pre-empt the confirmation of an order by allowing the path to be destroyed as a local authority can't guarantee that an order will be confirmed.

9. Procedure for diversion or extinguishment of rights of way

The procedure for diversion or extinguishment of rights of way made under The Town and Country Planning Act 1990 is contained in the **Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10)**.

These Regulations re-enact the Town and Country Planning (Public Path Orders) Regulations 1983 ("the 1983 Regulations") with minor and drafting amendments. They prescribe requirements for orders made by local planning authorities under section 257(1) or 258 of the Town and Country Planning Act 1990.

Orders under section 257 authorise the stopping up or diversion of footpaths or bridleways to enable development to be carried out in accordance with planning permission or by a government department. Orders made by local planning authorities under section 258(1) of the Act extinguish public rights of way over footpaths or bridleways over land held by such local authorities for planning purposes.

Regulation 2 and Schedule 1 states

(1) A public path order shall be in the relevant form set out in Schedule 1 to these Regulations or in a form substantially to the like effect, with such modifications as may be required, and shall at the end be sealed and dated.

(2) A public path order shall contain a map which shall be on a scale of not less than 1:2500 or, if such a map is not available, on the largest scale readily available.

Regulation 3 with Schedule 2 prescribe forms of notice of orders and with Schedule 3 prescribe additional persons on whom notice of the making and confirmation of orders must be served.

Regulation 4 contains provisions governing the procedure for orders.

Regulation 5 revokes the 1983 Regulations.

The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 No. 407

These Regulations make provision for county councils, district councils, London borough councils, the Common Council of the City of London, the Council of the Isles of Scilly, joint or special planning boards and the Broads Authority to impose charges for dealing with requests to make orders for—

- (a) the creation of a footpath or bridleway under section 26 of the Highways Act 1980, where the proceedings are taken concurrently with proceedings for the stopping up of a footpath or bridleway under section 118;
- (b) the stopping up and diversion of footpaths or bridleways under sections 118, 118A (railway crossings) 119 and 119A (railway crossings) of the Highways Act 1980; and
- (c) the stopping up and diversion of footpaths or bridleways under sections 257 (footpaths and bridleways affected by development) and 261 (temporary stopping up of highways for mineral workings) of the Town and Country Planning Act 1990..

The regulations imposed a limit on the maximum fee that could be charged to applicants but this was removed by amending regulations in 1996 see below.

The Rail Crossing Extinguishment and Diversion Orders, the Public Path Orders and the Definitive Maps and Statements (Amendment) Regulations 1995 No 451

These Regulations make minor amendments to the Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (S.I. 1993/9), The Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10), the Public Path Orders Regulations 1993 (S.I. 1993/11) and the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (S.I. 1993/12).

Regulation 2 amends regulation 2 of S.I. 1993/9 so that it refers to Forms 1 and 2 in Schedule 1 rather than Parts 1 and 2 of Schedule 1.

Regulation 3 amends Form 2 in Schedule 2 to S.I. 1993/10 to omit the references to paragraph 8 of Schedule 14 to the Town and Country Planning Act 1990.

Regulation 4 substitutes a new regulation 2(1), (2) and Schedule 1 to S.I. 1993/11. References to the form of an acquisition extinguishment order are omitted and minor drafting changes are made.

Regulations 2 to 5 also amend the areas in relation to which persons are to be served with notice of orders.

The Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 No 1978

Regulation 2 of these Regulations enables local authorities in England, Wales and Scotland to make charges for providing advice or assistance in accordance with the Local Authorities (Overseas Assistance) Act 1993. The amount of the charges is to be at the discretion of the charging authority, which is required in setting charges to have regard to the costs of providing the advice or assistance in question.

Regulation 3, which extends to England and Wales only, amends the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 so that the ceiling on charges for the making of a public path order is removed. It also amends those Regulations in consequence of the establishment of National Park authorities pursuant to Part III of the Environment Act 1995.

Advice was issued by The Department of the Environment by Circular 11/96

Town and Country Planning (Public Path Orders) (Amendment) (England) Regulations 2013 SI 2013 No 2201

These Regulations amend the Town and Country Planning (Public Path Orders) Regulations 1993 (S.I. 1993/10) (“the 1993 Regulations”) in relation to England, following the enactment of section 257(1A) of the Town and Country Planning Act 1990 (c. 8) (“the 1990 Act”) by section 12 of the Growth and Infrastructure Act 2013 (c. 27).

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.

These Regulations provide for an alternative preamble to the draft form of stopping up or diversion Order set out in Form 1 in Schedule 1 to the 1993 Regulations which refers to this new ground for a competent authority to make such an Order.

10. Further Procedure for dealing with objections to path orders

The Planning Inspectorate has issued “Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England” May 2015

http://www.planningportal.gov.uk/uploads/pins/row/row_booklet2.pdf

11. Rights of Way and Human Rights

The Human Rights Act 1998 incorporates into UK law the provisions of the EU Convention on Human Rights https://www.echr.coe.int/Documents/Convention_ENG.pdf Article 6(1) of which relates to the Right of a Fair Trial/ This provides:-

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This means that everyone has

- i) the right of effective access to appeal proceedings e.g. the venue must not be so distant from the parties’ homes that they are unable to attend proceedings;

- ii) ‘equality of arms’ between the parties i.e. each party must have a reasonable chance to put their case and must not be put at a substantial disadvantage in relation to another party;
- iii) the right to a hearing within a reasonable time, including the right to a decision within a reasonable time; and
- iv) the right to an independent and impartial tribunal.

It has been suggested that Article 6(1) (iii) could be used by those claiming rights of way have not had their claim dealt with within a year and the Secretary of State has the power to direct a local authority to deal with a path claim.

There is useful guidance from the Planning Inspectorate on this topic at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/434591/rights_of_way_19.pdf

One particular aspect is the right to fair hearing which is incorporated into

12. Publicly Maintainable Streets

Section 36(6) of the Highways Act 1980 states

The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.

Note that this does not include privately maintainable streets or military ones.

“Street” is defined in Section 329 of the Highways Act 1980 as amended by the New Roads and Street Works Act 1991 - “street” has the same meaning as in Part III of the New Roads and Street Works Act 1991

Section 48(1) of the New Roads and Street Works Act 1991 states –

In this Part a “street” means the whole or any part of any of the following, irrespective of whether it is a thoroughfare—

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court, and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

Where a street passes over a bridge or through a tunnel, references in this Part to the street include that bridge or tunnel.

This information may be available on line, if it is to be relied upon the date and time the information was accessed should be recorded. Example

<http://www3.hants.gov.uk/roads/maintained-roads.htm>

13. The Highway Authority's interest in the land

There is an important distinction between land over which the highway authority control the surface of the highway and lands where the Highway Authority or its predecessors in title have acquired in order to construct a new highway, or enlarge, modify or divert an existing highway. Here the subsoil below the highway and the surface of the highway belong to the highway authority. If public highway rights over the surface are extinguished then like all subsoil owners the highway authority will retain the land but without it being encumbered by a public highway and without the adjoining owners having any rights over it. So extinguishing highway rights in such circumstances can be bad news for the adjoining owners particularly if these unencumbered parcels are within a development site which results in the highway authority's land having special value. To guard against creating this situation all available maps for the area should be investigated to see if the ancient highway or the enclosure award highways have been altered in which case there is a good chance the highway authority or its predecessors have acquired the land and their title deeds may be in their vaults gathering dust with their title unregistered. If the highway is not an ancient highway or a highway referred to in Enclosure Awards then it will be necessary to investigate who built it and whether they have the title deeds and can claim the land after the extinguishment of the highway. One particular problem is where a housing estate was constructed and the developer never conveyed the highway with the properties it constructed and retained it. Lots of roads were built as toll roads by private companies and title passed to the highway authority.

Now to deal with the situation where the interest of the highway authority is in the surface only.

The land that forms the public highway is vested in the relevant highway authority by virtue of Section 263(1) of the Highways Act 1980 which provides:-

- (1) Subject to the provisions of this section, every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway.*
- (2) Subsection (1) above does not apply—*
 - (a) to a highway with respect to the vesting of which, on its becoming or ceasing to be a trunk road, provision is made by section 265 below, or*
 - (b) to a part of a trunk road with respect to the vesting of which provision is made by section 266 below, or*
 - (c) to a part of a special road with respect to the vesting of which provision is made by section 267 below.*
- (3) Where a scheme submitted to the Minister jointly by two or more ~~local~~ *2 highway authorities under section 16 above determines which of those authorities are to be the special road authority for the special road or any part of it ("the designated authority") and the designated authority are not the highway authority for the road or that part of it, the road or that part of it vests in the designated authority.*
- (4) Where—*
 - (a) the responsibility for the maintenance of a bridge or other part of a highway is transferred to a highway authority by means of an order under section 93 above, but the property in it is not so transferred, or*

(b) the responsibility for the maintenance of a part of a highway is transferred to a highway authority in pursuance of an agreement made under section 94 above, but the property in that part is not so transferred,

the part of the highway in question does not by virtue of subsection (1) above vest in that highway authority.

*(5) Notwithstanding anything in subsection (1) above, any such material as is referred to in that subsection which is removed from a highway by a [non-metropolitan*1] district council in exercise of their powers under section 42, 50 or 230(7) above vests in the district council and not in the highway authority.*

*1 Word inserted by Local Government Act 1985 (c. 51, SIF 81:1), s. 8, Sch. 4 para. 37

*2 Words omitted by virtue of the Infrastructure Act 2015 Schedule 1 Part 1 Section 51

Note however that there are exceptions to this general rule contained in Section 263 (2) to (5) which may take some time to resolve as the history of the highway needs to be investigated.

The relevant body has a determinable fee simple in the surface of the land and an appropriate part thereunder. Below that the land is capable of separate ownership so who owns it?.

Another point to bear in mind is that by statute the surface and the subsoil may have been together vested in the highway authority or a predecessor body.

There is an added complication in that the courts decide what forms part of the public highway if it is in dispute and reliance should not be placed upon anything that the highway authority may say without double checking it is correct by reference to the historical evidence that the authority is relying upon.

The highway authority's interest in the surface does come to an end when the highway is legally extinguished. *Tithe Redemption Commissioners v Runcorn Urban District Council* 1954 Ch 383

14. When is the highway authority's interest extinguished?

A highway is extinguished when one of the many statutory provisions enacted by Parliament is used to extinguish or divert a highway. The surface of the land then can be claimed by the subsoil owner whose interest is no longer encumbered by the Section 263 rights.

It does not terminate when:-

- (a) It is not used or becomes disused – *Harvey v Truro Rural District Council* (1903) 2 Ch 638 the public can resume their right to use the route whenever they choose. See also *Dawes v Hawkins* (1860) 8 CB(NS) 848 where Byles J used a now often quoted maxim "Once a highway always a highway". See also *Suffolk County Council v Mason* (1979) AC 705. The fact that the public does not need all the width of the highway does not reduce its extent, it all of it is not needed statutory procedures are available to extinguish part of the highway – see *Seekings v Clarke* (1961) 59 LGR 268.

- (b) When there has been all the normal grounds for assuming adverse possession – R (on the application of Smith) v Land Registry (2010) EWCA Civ 200; (2010) 21 EG 92.
- (c) Because it is a “public right” it is an overriding interest in the context of a registered title – See Paragraph 5 of Schedule 1 and Section 29 of the Land Registration Act 2002.
- (d) Nor can the highway authorities rights to the land be displaced by first registration at the Land Registry
- (e) When it is covered by water – the highway may be over tidal waters, over a river ford or via a bridge and there may be a ford that is not in regular use next to the bridge so the history of a river crossing needs investigating.
- (f) When the adjoining owners keep the highway verge cut rendering it unnecessary for the highway authority to do so. Putting stones or other impediments to vehicles driving or parking on verges does not result in highway rights being extinguished.

It is therefore essential to thoroughly investigate historical mapping to identify if there are any highways on the land that may not be obvious from visual inspection and not to be misled into assuming from the Land Registration entries that the highway authority does not have a legal interest in the land.

If a highway is extinguished it is important to keep records of the process used as it may be necessary to prove that it has been extinguished a long way into the future.

15. Ransom Strips

If you making enquiries of the highway authority to establish whether there are any ransom strips that separate your land from the public highway it is essential to state the purpose of your enquiry. In *Gooden v Northamptonshire County Council* [2001] EWCA Civ 1744; [2002] 1 EGLR 137 the local authority was held not liable for giving incorrect information on the grounds that the local authority had not been told it intended to develop the property that was ransomed and hence was not liable for the developers loss of profits.

16. Inaccurate Local Searches

Chesterton (Oxon) Ltd v Oxfordshire County Council [2015] EWHC 2020 (Ch) [2015] PLSCS 228 concerned an inaccurate response by the Local Authority to a Local Search. Valuable parking spaces that the developer was told were not part of the highway were still part of the ancient highway and the local authority’s records were not correct and up to date. The developer successfully sued for diminution in the existing use value, damages for funding the money they had overpaid for the site as well as their unsuccessful attempt to get a stopping up order.

Gooden v Northamptonshire County Council [2002] P.N.L.R. 18; [2002] 1 E.G.L.R. 137, CA was decided otherwise however, there the response to the Local Search was based on the List of Publicly Maintainable Streets which turned out to be incorrect and the footway turned out to be not part of the highway and privately owned. The enquirer had not made it clear that they were developers of the land to the rear and they wanted a definitive answer on the status of the footway to be sure they had access to their land from the highway. It was held that the Council could not have known that Mr. Gooden was acquiring the land for development and could not be taken to

have assumed a duty in relation to it. The costs of the abortive development were irrecoverable because they were not a foreseeable consequence of the Council's incorrect reply. Enquiries to a local authority should therefore make it clear the reason for the enquiry so that they cannot use this case as a defense.

Any response by a highway authority to an enquiry about the position of the highway boundary needs to be the subject of a reasonable disclaimer of liability for the highway authority and the officer making the statement. The highway authority should ensure that their legal advice as to the form of the disclaimer is applied in all such circumstances.

Purchasers should before relying on the Local Authority Search Form CON29 (2016) should attempt to verify the answers given by following up on the information that is being referred to by the Local Authority by getting copies of the documents they are using.

17. Negligence by advisors

When acquiring any land but especially land that is to be redeveloped it is important to establish what public rights of way have become established across the site. It is important for the client to make it clear to his advisors that this matter is to be thoroughly investigated and for the advisors to clarify precisely the steps that the client wishes them to take in this regard. *Walker v Giffen Couch & Archer* (a firm of solicitors) (1988) EGCS 64 was a case where the solicitors admitted negligence and compensation was fixed on the basis of the difference in the value of the property with and without the rights of way, a reduction in the conveyancing fee to reflect that lower price plus interest on the awarded sums.

18. Cycle Tracks

Where development is adjacent to an existing highway the Developer can be asked to construct a Cycle Track along that road within the limits of the highway. This can be treated as a separate matter from the development itself.

A Cycle Track is defined in Section 329 (1) of the Highways Act 1980 (as amended by Section 1(1)(2) of Cycle Tracks Act 1984 and Section 3 and Schedule 3 Paragraph 21(2) of the Road Traffic (Consequential Provisions) Act 1988) as *a way constituting or comprised in a highway, being a way over which the public have the following, but no other, rights of way, that is to say, a right of way on pedal cycles (other than pedal cycles which are motor vehicles within the meaning of the Road Traffic Act 1988 with or without a right of way on foot.*

Section 65 of the Highways Act 1980 provides

- 1) *Without prejudice to section 24 above, a highway authority may, in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway, construct a cycle track as part of the highway; and they may light any cycle track constructed by them under this section.*
- 2) *A highway authority may alter or remove a cycle track constructed by them under this section.*

Section 55 (2) of the Town and Country Planning Act 1990 provides that some operations or uses of land shall not be taken for the purposes of this Act to involve development of the land and in Section 55(2)(b) (as amended by the Planning and Compulsory Purchase Act 2004 (c. 5), ss. 118, 120, 121, Sch. 6 para. 1, Sch. 9{with s. 111}; S.I. 2006/1281, art. 2 and S.I. 1999/293, reg. 35(17) one such provision is

The carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment.

As the works would not be exclusively for the maintenance of the road it is necessary to consider whether the works may have significant adverse effects on the environment. If it is decided that the answer is no, it should be borne in mind that an aggrieved person could seek a declaration that planning permission is required. Each scheme has to be judged on its own facts and circumstances and any decision would have to be irrational for the courts to intervene. See *R (on the application of The Licensed Taxi Drivers Association) v Transport for London* (2016) EWHC 233 (Admin) (2016) PLSCS 46.

19. Implications for third parties

Before making a stopping up or diversion order the order making authority needs to consider the implications for persons other than the applicant. Because you do not need to be the owner of the land when applying for planning permission but need to have an interest in the land when you implement it there may be people who rely on the highway for access to their premises who have not supported the planning application or failed to recognise the implications for them if the highway is stopped up. The stopping up may be some way from their premises but effectively block a third party having access from their premises to the rest of the highway network. In *Bothwell v County & District Properties (South West) Ltd and others* 1990 EGCS 108 the applicant failed to get an injunction or damages through the lawful stopping up of the access to the rear of the premises because highway rights had been extinguished.

20. Charges by highway authorities for future maintenance

R (on the application of Redrow Homes Ltd) v Knowsley Metropolitan Borough Council (2014) EWCA Division 1433; (2015) 1 EGLR 6 established that it was lawful for a local authority to demand payment on account for future maintenance under Section 38(6) of the Highways Act 1980. The developers appeal to the Court of Appeal was dismissed on 31 October 2014 (Times 12 December 2014. So it is possible for the local authority to insist that any new paths that are not strictly a diversion to be dealt with under the 1980 Act rather than under Section 257 of the Town and Country Planning Act 1990. This can be a problem for those seeking to enhance the rights of way network as part of the pre-order negotiations over a development site and act against the public interest something that may need to be addressed at the political level.

21. Hedge Cutting, Ground Clearance and Path Widths

This section draws attention to the constraints that landowners, the highway authority and Ramblers' working parties face in hedge cutting and ground clearance caused by the need to protect wildlife and the implications that this has for keeping paths clear that run adjacent to hedges where the landowner opts to fence the right of way separately from the other land holdings. In Diversion Orders a greater right of way width needs to be provided where the route proposed is to be adjacent to a hedge.

Under Section 1 of the Wildlife and Countryside Act of 1981 if any person intentionally— (a) kills, injures or takes any wild bird; (aa) takes, damages or destroys the nest of a wild bird included in Schedule ZA1; (b) takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or (c) takes or destroys an egg of any wild bird, he shall be guilty of an offence.

This applies whether the subject matter is on, under or above the ground and whatever the time of the year. Working parties should be very careful not to be caught by these provisions and if possible to do such works during October to February inclusive.

The nesting season is not prescribed, some say it is 1 March to 31 July. Even then there will still be many birds tending to chicks in nests well in to September and some birds like Barn Owls that breed all the year round. Note though that birds can and do nest earlier and later in in the south of England with its milder climate. They do not have calendars and often get confused by unseasonal weather and the restrictions start from when they start building a nest and end when they and their off spring are not there. It is very difficult when undertaking hedge or scrub clearance to ensure that there are no nesting birds. A lot of firms will not undertake such work until October when ground frosts would have prevented the survival of any late nesting chicks. Developers and contractors also get their ecologists to undertake surveys to place on record that there are no nests and prove that they took all reasonable steps to comply with the law before undertaking work of this nature.

It is unusual for a highway authority to be responsible for a hedge unless they actually built the highway. Ancient roads preserved by Inclosure Awards were fenced out by the those enclosing the adjoining land. For all post Inclosure Award highways it is necessary to find how the hedges came in to existence or in whose registered title they fall and get the permission of the hedge owner to cut it. The highway authority owns the surface of a highway and the extent of the highway is normally between the hedges on either side if the public have had highway use of that area. The highway authority has responsibility for maintaining the surface to the condition it was in when it was adopted or any higher standard to which they have improved it, so they can authorise a working party to undertake the work although it would be common courtesy to inform the owner of the subsoil and consider his views.

In a decision in *Walker v Horner* (1875) it was held that a hedge growing naturally to obstruct a public highway cannot be a criminal offence because it was decided the landowner did not willfully cause the obstruction. The procedure for rectifying such a situation is set out in Section 154 of the Highways Act 1980 which gives the highway authority and district councils (not parish councils) the power to serve a notice on the owner or occupier requiring them to lop or cut back the overgrowth and if he does not do so within the stated period they

may do the work themselves and recover the cost. The person who is served with the notice has the right to appeal to a magistrate's court. If there were nests or the reasonable prospect of nests an appeal against being asked to do works during a period when there might be nests would be a reasonable ground to get a deferment.

When paths are diverted to run along the side of hedges it should be remembered that the width specified in the Order is all that the owner of the adjoining owner has to leave and he can fence out the path from the rest of his property. Hedge cutting is normally a once a year task and usually done in the winter months. Between cuts the hedge will grow restricting the original width that was reserved and associated brambles growing in the hedge may also grow over an even wider area. For this reason, paths that are diverted or created adjacent to a single hedge should be at least three metres wide otherwise a two-metre path could easily be a one metre path for a long period unless the highway authority is going to be unusually active in serving and pursuing Section 154 notices. If the path is to have hedges on both sides the path width needs to be four metres. If the Order making authority insists on a lesser width – say two metres – the path should be described in the Order as being located one metre away from the hedge or hedges. The landowner and the highway authority should also consider whether a wider right of way or a location further from the hedge should be prescribed in the Order having regard to the type of machinery they propose to use to maintain the surface and cut back the hedge and remove the arising waste material. Correspondingly larger widths would also be needed in respect of higher categories of rights of way like bridleways and byways.

22. Further reading

Rights of Way: A Guide to Law and Practice, John Riddall and John Trevelyan, Open Spaces Society and the Ramblers' Association, 2007 <http://www.ramblers.org.uk/advice/rights-of-way-law-in-england-and-wales/the-blue-book.aspx> as updated in Blue Book Extra <http://www.ramblers.org.uk/advice/rights-of-way-law-in-england-and-wales/the-blue-book/the-blue-book-extra.aspx>

Footpaths – A Practical Handbook published by The Conservation Volunteers <http://store.tcv.org.uk/product/footpaths-a-practical-handbook/>

****** THE END******