

Draft guidance on diversion or extinguishment of rights of way that pass through gardens, farmyards and commercial premises

1. This guidance summarises the key considerations for Government policy on rights of way through gardens of family homes or working farmyards and other commercial premises. It sets out how local authorities should respond to requests to divert or extinguish such rights of way, or to applications under the 'right to apply' introduced by the Countryside and Rights of Way Act 2000, or negotiations under the new 'modification consent order' process set out in paragraph 5 of Schedule 6 to the Deregulation Bill. It should be read in conjunction with the relevant section of rights of way circular 1/09 and sections 118 and 119 of the Highways Act 1980; both are appended to this draft guidance.

Context

2. Public rights of way often cross private land. In general, members of the public and farmers/landowners are used to the concept, and see no inherent inconsistency between the fact that land may be privately owned and the presence of public routes across it for both passage from A to B and enjoyment of the countryside and the natural environment.
3. However the general view of both groups tends to change markedly in situations where public rights of way pass through contained spaces such as private gardens or working farmyards.
4. Members of the public may not be comfortable following a path through a contained space of this type because doing so feels like infringing on the privacy of a house owner, or potentially disrupting, or being endangered by activities within a farmyard. So such path alignments can deter people from exercising the public's right to walk along the path.
5. The less contained such a space is, the fewer the public's concerns tend to be. People are used to walking past a house along an adjacent road or pavement, and this feels acceptable because they are clearly outside its visible domain. The degree of proximity can make a big difference too. Few people are troubled by using public paths across privately owned land around a house or farm, so long as they feel they can keep a reasonable distance from it. But the more that a route over private land forces people into close proximity with the associated house or operational farm buildings, the less likely they are to feel comfortable using it. Conversely members of the public can be frustrated when a right of way they have been using becomes enclosed in a newly-formed or extended garden.
6. Even where a public path through a private garden or farmyard has existed for centuries, and perhaps even pre-dates the use of the land for these purposes, the property owner often resents its existence for one or more of these reasons.

- a) A legitimate expectation of being able to relax in the garden or spend time with family and friends without strangers appearing in the same contained space;
- b) Greater concerns today than in previous eras about the security of children or property in such situations;
- c) An increased use of public rights of way for general leisure and recreational use rather than local people using them to get around the locality, particularly where rights of way are promoted by local authorities.
- d) A concern that having a public path close to the house suppresses the potential value of the property;
- e) Farmyard operations putting the public potentially at risk, or being regularly disturbed, because of the limited space within which a route passes.

The principles that authorities should follow are as follows.

7. This guidance applies where a public right of way passes through:
 - a) a garden which forms part of the curtilage of a residential dwelling,
 - b) a working farmyard or forestry yard, or
 - c) other operational business or working industrial premises;
 and the owner of the land affected by the right of way seeks an order to divert or extinguish the right of way, either through a modification consent order or an application for a public path order.
8. In such cases, the order-making and confirming authority should weigh the interests of the landowner against the overall impact of the proposal on the public as a whole, noting that reducing or eliminating the impact of the current route of the right of way on the landowner, in terms of privacy, security and safety, are important considerations to which due weight should be given.
9. In these limited circumstances only, the order-making authority should therefore be predisposed to make the order provided it satisfies all the relevant tests¹ for the making of an order set out in the legislation.
10. In such circumstances, it is in the public interest that any change to remove or reduce the impacts on the property owner of the existing public right of way should, wherever possible, involve diversion or replacement of the way rather than extinguishment alone. The following schedule sets out the most probable

¹ There are different tests for extinguishment and diversion; these are set out in s.118 and s.119 (respectively) of the Highways Act 1980. These are appended to this draft guidance.

scenarios. They are listed in decreasing order of acceptability in terms of their potential effect on the public as a whole. In every case, the authority should consider the potential of any proposed change for improving the network, for example, for the replacement of stiles with gates.

- a) Cases where the landowner has the ability to arrange, by way of a diversion, for a replacement route to be created as public right of way and is willing to do so, so that it passes further away from the private space immediately around the dwelling or no longer passes through a working area of the farmyard or commercial premises. In such cases the authority should be disposed to so diverting the right of way, provided it meets the tests set out in Section 119 of the Highways Act 1980.
- b) Cases where there is no scope for the landowner to arrange for a replacement route to be created nearby², but there is a suitable right of way (or other suitable highway) nearby that would broadly meet the need served by the existing right of way. In such cases the authority should be disposed to extinguishing the existing way, on the basis that it is not needed for public use, given that the need is served by the other nearby right of way or highway.
- c) Cases where there is no scope for the landowner to arrange a replacement alternative route², and there is no suitable right of way (or other highway) nearby that would broadly meet the need served by the existing right of way. In such a case there may be scope for the landowner to defray the cost of improving or creating an alternative right of way nearby that would broadly compensate the public for the loss of the existing route. In such cases the authority should be prepared to consider using their powers to create or improve a right of way nearby and be disposed to extinguishing the existing route on the basis that the existing right of way would be no longer needed for public use because that need would be served by the created or improved right of way.
- d) Cases where an existing route is unused or substantially unused by the public³, has no strategic value to the rights of way network and is not identified as important in a Rights of Way Improvement Plan. This situation may arise, for example, because the right of way is not a through route and does not lead to a point of interest or the destination point has ceased to be accessible to the public. Where the evidence supports the conclusion that a path has to date been substantially unused, the authority should give weight

² Perhaps because the landowner cannot provide a suitable alternative on his/her own land and neighbouring landowners are unwilling to cooperate in providing an alternative route.

³ Disregarding any temporary or permanent obstructions (see paragraph 5.23 of Appendix A below).

to the desirability of extinguishing the path on the basis that it is not needed for public use, whilst applying the relevant tests in the legislation. In this situation, the order-making and confirming authority should note that in order to be “not needed for public use”⁴, a public right of way does not necessarily have to be unused.

11. In circumstances where a garden, dwelling or premises have been established without the necessary permissions then paragraphs 9 and 10 will not apply.
12. In all other cases, if an application is made that does not meet the criteria in paragraphs 7 to 10, it is for the authority to consider the case on all its merits taking into account all the statutory requirements and available guidance. In making its decision as to whether the existing path should be extinguished, an authority should consider in particular whether the impact on the property owner of having the existing path through the land is out of all proportion to the benefit that having the right of way through the land brings to the public.

⁴ See section 118(1) of the Highways Act 1980 in appendix 2.

Public path extinguishment orders

5.22 Section 118 of the 1980 Act enables authorities to make orders extinguishing footpaths, bridleways and restricted byways. Ways need not be shown on the definitive map and statement before they can be extinguished but authorities must be satisfied as to the status of ways before making an order and take care to ensure that no unrecorded or unacknowledged rights are overlooked in the order-making process.

5.23 An extinguishment order can be made only if the authority considers it expedient that the way should be stopped-up because it is not needed for public use. Authorities must disregard temporary circumstances, including any buildings or other structures preventing or diminishing the use of the way. Further information is available in the Planning Inspectorate [Advice Note 9](#)⁵ (s18).

Public path diversion orders

5.24 Section 119 of the 1980 Act enables authorities to make orders diverting footpaths, bridleways and restricted byways. Ways need not be shown on the definitive map and statement before they can be diverted but, as with section 118 orders, authorities must be satisfied as to the status of ways before making an order and take care to ensure that no unrecorded or unacknowledged rights are overlooked in the order-making process.

5.25 Section 119 of the 1980 Act does not specifically entitle an authority to disregard temporary circumstances, including any buildings or structures preventing or diminishing the use of the existing way in considering whether or not to make an order and the consideration is equally not available to the body confirming the order. The Planning Inspectorate [Advice Note 9](#)⁶ (s28) indicates that in forming an opinion on whether the replacement route is not substantially less convenient to the public, a fair determination can only be made on the assumption that the existing route is available to the public to its full legal extent.

5.26 A public path diversion order may not propose the alteration of the terminating point of a way if that point is not on a highway or, if it is on a highway, it must be to another point on the same highway or a highway connected with it and which is substantially as convenient to the public. Where appropriate, authorities may consider a concurrent order (paragraph 5.54) if these exclusions apply to a proposed diversion order.

⁵ Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

⁶ Advice note no9. General guidance to Inspectors on public rights of way matters : The Planning Inspectorate February 2008

5.27 Section 119(1) of the 1980 Act provides that a diversion order can be made in the interests of the owner, lessee or occupier or of the public. A diversion order may therefore be made as long as it is expedient to divert all or part of a way in the interests of at least one of the parties.

5.28 In making an order under section 119 of the 1980 Act, subsection (3) requires that the authority should give consideration to any necessary works that will be required to bring the way in to a fit condition for public use. If necessary the order should state that, firstly, the public rights across the replacement section of the diversion do not take effect for a specified number of days following confirmation to allow for the necessary physical implementation of the way and, secondly, that the extinguishment element of the diversion does not come in to force until the highway authority certifies that the physical implementation has been carried out.

Confirming orders

5.29 Authorities may confirm orders which are unopposed or to which all duly made representations and objections have been withdrawn. Authorities have the discretion not to proceed with orders to which there are representations or objections or may withdraw an order for other reasons, such as external factors making a scheme no longer appropriate. In order to bring the procedure to an end, the authority must make a formal resolution not to proceed, and should notify the applicant and those who have made representations or objections of the passing of the resolution.

5.30 In the case of an order to which there are duly made representations or objections, or which require modification, an Inspector appointed by the Secretary of State will determine whether or not to confirm it. Once an order is submitted to the Secretary of State the power of decision passes to him, or his appointed Inspector, however if all the representations and objections to a 1980 Act order are subsequently withdrawn, the authority will be asked whether it wants to confirm the order itself. The Planning Inspectorate, which administers the submission on behalf of the Secretary of State, has a [*checklist*](#)⁷ of documents which must accompany an order submitted for a decision on whether or not it should be confirmed. Paragraph 10.8 describes in outline the process that is followed once an order is submitted to the Secretary of State.

5.31 When considering whether to confirm a creation, extinguishment or diversion order, the Secretary of State or the order making authority, must give consideration to any material provision within a right of way improvement plan for the relevant area.

5.32 Section 119(6) of the 1980 Act provides - with direct reference to section 119(1) - that in deciding whether or not to confirm a diversion order, the Secretary of State (or the order making authority if the order is unopposed) must be satisfied that, in the interests of the owner, lessee or occupier or the public, it is expedient to divert

⁷ Document required by the Planning Inspectorate – Checklist for Order Making Authorities : The Planning Inspectorate June 2008

the way. In the case of an opposed order, this does not mean that the Inspector's rôle is confined to auditing the reasons for which the order making authority made the order. The Inspector is entitled to take his or her own view, on the basis of the evidence submitted by interested parties, and may confirm an order, even where the reasons, under section 119(1), for doing so do not align with those of the order-making authority, provided that the Inspector is satisfied that in the interests of the owner, lessee or occupier or the public, it is expedient to divert the way.

5.33 In deciding whether or not it is expedient to confirm a diversion order under section 119 of the 1981 Act the Secretary of State, or the order making authority if there are no outstanding objections, must have regard to the effect that

- the diversion would have on the public enjoyment of the path as a whole
- the coming into operation of the order would have as respects other land served by the existing right of way
- any new public right of way created by the order would have with respect to any land held with it.

given that there are rights to compensation for those affected under the second and third of these considerations.

Appendix B – sections 118 and 119 of the Highways Act 1980.

Section 118 – Stopping up of footpaths, bridleways and restricted byways

- (1) Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.

An order under this section is referred to in this Act as a “public path extinguishment order”.

- (2) The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.
- (3) A public path extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.
- (4) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.
- (5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering—
 - (a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or
 - (b) under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public,the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.

(6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.

(6A) The considerations to which—

(a) the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order, and

(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order,

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would extinguish a public right of way.

Section 119 – Diversion of footpaths, bridleways and restricted byways

(1) Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one that is a trunk road or special road) that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order,—

(a) create, as from such date as may be specified in the order, any such new footpath, bridleway or restricted byway as appears to the council requisite for effecting the diversion, and

(b) extinguish, as from such date as may be specified in the order or determined in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the council requisite as aforesaid.

An order under this section is referred to in this Act as a “public path diversion order”.

(2) A public path diversion order shall not alter a point of termination of the path or way—

(a) if that point is not on a highway, or

(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.

(3) Where it appears to the council that work requires to be done to bring the new site of the footpath, bridleway or restricted byway into a fit condition for use by the public, the council shall—

- (a) specify a date under subsection (1)(a) above, and
 - (b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.
- (4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.
- (5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—
- (a) any compensation which may become payable under section 28 above as applied by section 121(2) below, or
 - (b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public, or
 - (c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.
- (6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—
- (a) the diversion would have on public enjoyment of the path or way as a whole,
 - (b) the coming into operation of the order would have as respects other land served by the existing public right of way, and
 - (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it,
- so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a) above.
- (6A) The considerations to which—
- (a) the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and

- (b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order, include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.
- (7) A public path diversion order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed,—
- (a) showing the existing site of so much of the line of the path or way as is to be diverted by the order and the new site to which it is to be diverted,
 - (b) indicating whether a new right of way is created by the order over the whole of the new site or whether some part of it is already comprised in a footpath, bridleway or restricted byway, and
 - (c) where some part of the new site is already so comprised, defining that part.
- (8) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path diversion orders.
- (9) Section 27 above (making up of new footpaths[, bridleways and restricted byways]) applies to a footpath, bridleway or restricted byway created by a public path diversion order with the substitution, for references to a public path creation order, of references to a public path diversion order and, for references to section 26(2) above, of references to section 120(3) below.