
PROCEDURAL IRREGULARITIES IN RESPECT OF DEFINITIVE MAP MODIFICATION ORDERS AND PUBLIC PATH ORDERS**Introduction**

1. This advice is for Inspectors dealing with orders made under section 53 (2) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), sections 26, 118, 118A, 118B, 119, 119A, 119B and 119D of the Highways Act 1980 ("the 1980 Act") and sections 257 and 258 of the Town and Country Planning Act 1990 ("the 1990 Act") where, in respect of an order it is claimed by a party to the order that the procedural requirements set out in the appropriate schedules to the legislation has not been adhered to.
2. This advice note is publicly available. It has no legal force and is not itself an authoritative interpretation of the law.

Background

3. The suggestion has been made in a number of recent cases that the failure of the Order Making Authority to comply with the procedural requirements set out in the relevant schedules renders the order under consideration invalid and beyond the Inspector's powers of modification and confirmation. The frequency of such suggestions has prompted the need to consider what procedural irregularities would render an order invalid, and what solutions are available to address those irregularities which have occurred but which are not fatal to the validity of an order.

General

4. Orders which bring about a change to the public rights of way network and the Definitive Map and Statement are principally made under the Wildlife and Countryside Act 1981, the Highways Act 1980 and the Town and Country Planning Act 1990. Each statute sets out the various tests that have to be satisfied before an Order can be confirmed, and the schedules to each Act describe the mechanisms and procedures that are to be followed when a surveying authority, a highway authority or a local planning authority contemplate making an order.

Wildlife and Countryside Act 1981

5. Applications to modify the Definitive Map and Statement are subject to the provisions of schedule 14 to the 1981 Act; orders made under section 53 (2) to modify the Definitive Map and Statement are subject to the provisions of schedule 15 to that Act. Both schedules specify the procedures to be followed at each stage in the process leading to the modification of the map and statement.

Schedule 14

6. Schedule 14 (1) provides that an application shall be made in the prescribed form¹ and shall be accompanied by a map at the prescribed scale, together with copies of any documentary evidence and statements of witnesses that the applicant wishes to adduce in support. Paragraph (2) to schedule 14 provides that the applicant shall serve a notice stating that the application had been made on every owner and occupier of land to which the application relates. Paragraph (3) provides for the determination by the surveying authority of the application and that the surveying authority shall consult with every other local authority² before determining whether or not to make an order to modify the map and statement.
7. In the case of *R (on the application of the Warden and Fellows of Winchester College and Humphrey Feeds Ltd) v Hampshire County Council and the Secretary of State for Environment and Rural Affairs* [2007] UKHL 28 ("the *Winchester* case"), the court considered whether a list of documents³ and the provision of a copy of part of the existing definitive map, as opposed to copies of the documents relied on, and a map of the claimed route at the prescribed scale, was sufficient for an application to have been validly made, along with the effect of the failure by the applicant to serve notice on all the owners and occupiers of land affected by the claimed rights of way.
8. The *Winchester* case demonstrates that the process by which procedural irregularities at the schedule 14 stage in Wildlife and Countryside Act cases can be challenged is by way of the judicial review of the surveying authority's decision.
9. Inspectors appointed under paragraph 10 (1) of Schedule 15 to the 1981 Act are not appointed to determine whether any or all of the procedural requirements of schedule 14 have been carried out, and it is not the Inspector's role to determine whether the application that led to the Order was correctly made, or in those cases where the OMA makes an application to itself in pursuance of its general duty to keep the map and statement under continuous review, to determine whether the OMA should or could have made such an application.
10. The correct course of action for any party aggrieved by procedural irregularities in the schedule 14 process is to seek judicial review of the surveying authority's decision. If this course of action has not been followed, then the opportunity to question the validity of any Order on the grounds of procedural defects in the schedule 14 stage will have lapsed.
11. Whilst Inspectors are not appointed to determine whether the procedural requirements at the schedule 14 stage have been carried out, one exception to this general rule arises in those cases involving applications for

¹ Prescribed by schedule 7 to regulation 8(1) of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 SI 12 1993.

² As defined in schedule 14 paragraph 5 (1).

³ Schedule 7 to regulation 8 (1) of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 SI 12 1993.

the additions of Byways Open to All Traffic ("BOATs") to the definitive map and statement where the application would give rise to exception from the provisions of section 67 (1) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"). In such cases an investigation of the schedule 14 application is necessary in order to be able to determine the correct status of a route at issue.

12. In these circumstances, it will be necessary for an assessment of the application to be made to ensure that it fully complied with the requirements of schedule 14 (1) and was thus a qualifying application under section 67 (6) of the 2006 Act. Non-compliance would mean that the exception to the extinguishment of MPV rights found in section 67 (3) would not apply, and MPV rights would not have been preserved. A non-compliant application would not however be grounds for rejecting any Order arising from the application; the Order would remain capable of determination, but if none of the other exceptions set out in section 67 (2) were applicable, any right the public may have had to use MPVs over the Order route would have been extinguished on 2 May 2006. In such cases, the route at issue could be recorded as a Restricted Byway if the evidence was such to show that carriageway rights existed over it.

Schedule 15

13. Paragraph 1 to schedule 15 provides that "*Before making an Order, the authority shall consult with every local authority whose area includes the land to which the order relates*". "Local authority" is defined in schedule 15 as being a non-metropolitan district council, a parish or community council or the parish meeting of a parish not having a separate parish council. Paragraph 3 sets out the mechanism whereby publicity is given to the order once it has been made and stipulates the parties on whom notice has to be served, and that a period of not less than 42 days is allowed from the first publication of the notice for objections or representations to be made to the order.
14. Paragraph 12 provides a means by which the validity of an order which has come into effect can be challenged by means of judicial review in the High Court on the grounds of procedural failings. Irrespective of the opportunity to apply to the High Court given by paragraph 12, Inspectors should satisfy themselves that any procedural aspects of the order making process have been complied with. Order making authorities should ensure that a certificate confirming that the requirements of paragraph 3 to schedule 15 have been complied with is submitted and should confirm at an inquiry or hearing that these provisions have been fulfilled.
15. The failure of an order making authority to stipulate in an order that they have undertaken the consultations required by paragraph 1 to schedule 15 may lead to the order being rejected as invalid, unless the order making authority can demonstrate to the Inspector's satisfaction that such consultations had been carried out prior to making the order, and that the

failure to record such consultations in the preamble to the order⁴ had been an administrative oversight. In such cases, Inspectors should seek evidence of pre-order consultations before rejecting the Order, and if satisfied that the required consultations had been carried out, can exercise their powers to modify the order accordingly.

16. In those cases where the statutory requirement to consult before the order is made has not been carried out at all, the order should be rejected as invalid, as there is no opportunity for the order making authority to rectify such a failure; consultations with other local authorities after the order has been made would not be compliant with the provisions of paragraph 1 to schedule 15.
17. If a failure to comply with the other procedural requirements of schedule 15 is brought to light at inquiry or hearing or at any other point before the determination of the order, Inspectors should seek to remedy this; prejudice to the interests of a party to the order may be avoided by requiring the order making authority to carry out the procedures fully before the order is determined. Instances may arise, for example where the order making authority has failed to serve notice on a party, or failed to publicise the order on site or in the local newspaper, or had given less than 42 days from the date of publication of the order for objections or representations to be made. In such cases, it would be possible for the determination of the order to be delayed whilst the appropriate notices are served, if necessary by an adjournment of any hearing or inquiry being held into the order. In those cases where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation.

Rights of way already shown on the definitive map and statement

18. As Inspectors are not appointed to inquire into the procedural aspects of the schedule 14 stage, it follows that when considering whether a right of way already shown on the definitive map and statement should be deleted or shown as a way of a different description, Inspectors are not empowered to adjudicate on whether any procedural defects occurred at the time the right of way was originally added to the definitive map and statement. Unless evidence concerning a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status had been ignored) there can be no reason for an inspector to consider it and a procedural defect would not of itself be grounds to re-open a case. There must be a presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all.

Highways Act 1980

Applications for orders

⁴ Schedule 2 to regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended)

19. Sections 118ZA, 118C, 119C and 121A of the Highways Act 1980 (as amended by the Countryside and Rights of Way Act 2000) set out the process whereby landowners, lessees or occupiers can apply for a public path extinguishment, special extinguishment, diversion or special diversion order and whereby an appropriate conservation body can apply for a public path diversion order for the protection of a site of special scientific interest.
20. The amendments made to the 1980 Act place the application process for public path extinguishment and diversion orders on a similar statutory footing to applications to modify the definitive map and statement found in schedule 14 of the 1981 Act. Where an application has been made under the relevant provisions of the 1980 Act, any failure to comply with the procedural requirements of the application process are not matters for Inspectors to consider; the appropriate means of challenging the validity of any order resulting from a procedural failure at the application stage would be by means of judicial review.

Determination of Orders

21. Paragraph 1 of schedule 6 to the 1980 Act sets out the mechanism whereby publicity is given to orders made under sections 26, 118, 118A, 118B, 119, 119A, 119B and 119D. It also stipulates that notice has to be given in at least one newspaper circulating in the area; sets out those parties on whom notice has to be served, and stipulates that a period of not less than 28 days is allowed from the first publication of the notice for objections or representations to be made to the order.
22. Paragraphs 26(3) and 120(2) provide that before making a public path creation order or public path diversion or extinguishment orders, the order making authority has to consult with other local authorities in whose area the land crossed by the path at issue is situated. Local authority is defined in section 329 (1) of the 1980 Act as the council of a district or London borough or the Common Council, or a Welsh council. For special extinguishment or special diversion orders the order making authority is also required to consult with the relevant police authority before making an order⁵.
23. The failure of an order making authority to stipulate in an order that they have undertaken the consultations required by sections 26 (3) or 120 (2) may lead to the order being rejected as invalid, unless the order making authority can demonstrate to the Inspector's satisfaction that such consultations had been carried out prior to making the order, and that the failure to record such consultations in the preamble to the order⁶ had been an administrative oversight. In such cases, Inspectors should seek

⁵ Section 118B(6) and 119B(6) of the 1980 Act

⁶ Schedule 1 to regulation 2(1) of the Public Path Orders Regulations 1993 SI 11 1993 (as amended); Schedule 2 to regulation 3(1) of the Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (as amended); the Highways, Crime Prevention etc. (Special Extinguishment and Special Diversion Orders) Regulations 2003 SI 1479 2003

evidence of pre-order consultations before rejecting the order, and if satisfied that the required consultations had been carried out, can exercise their powers to modify the order accordingly.

24. In those cases where the statutory requirement to consult before the order is made has not been carried out at all, the order should be rejected as invalid, as there is no opportunity for the order making authority to rectify such a failure; consultations with other local authorities after the order has been made would not be compliant with the provisions of Sections 26 (3) or 120 (2).
25. If a failure to comply with the other procedural requirements of the relevant sections of the 1980 Act is brought to light at inquiry or hearing or at any other point before the determination of the order, Inspectors should seek to remedy this; the guidance offered in paragraph 17 above should be followed. In those cases where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation.

Town and Country Planning Act 1990

26. Orders made under section 257 of the 1990 Act will come before Inspectors as a result of planning permission having been granted and where it is considered that the diversion or extinguishment of a right of way is required in order for the permitted development to be carried out. Where land has been acquired for planning purposes by a local authority and is held by the authority for the purpose for which it was acquired, a public right of way over the land may be extinguished or diverted under section 258 of the 1990 Act if the authority is satisfied that an alternative way has been or will be provided, or that the provision of an alternative way is not required.
27. When giving consideration to a section 257 or section 258 order, Inspectors are not appointed to consider the merits of the planning application or the permissions granted, and their sole responsibility is to determine the diversion or extinguishment order. Arguments that are sought to be aired at an inquiry or hearing into the validity of the order on the grounds that planning permission should not have been granted are irrelevant and should be dismissed.
28. Paragraph 1 of schedule 14 to the 1990 Act sets out the mechanism whereby publicity is given to orders made under sections 257 or 258 of the 1990 Act. It stipulates that notice has to be given in at least one newspaper circulating in the area; gives details of those parties on whom notice has to be served which includes any statutory undertakers whose apparatus is found on, in or under the land. A period of not less than 28 days is allowed from the first publication of the notice for objections or representations to be made to the order.
29. It is not necessary for an order making authority to consult with other councils before making an order under sections 257 or 258, but notice of the making of the order must be served on the council of any county,

district, London borough, parish or community or parish meeting whose area includes the land affected by the order.

30. If a failure to comply with any of the procedural requirements of the relevant sections of the 1990 Act is brought to light at inquiry or hearing or at any other point before the determination of the order, Inspectors should seek to remedy this; the guidance offered in paragraph 17 above should be followed. In those cases where prejudice cannot be avoided, the order should be considered as flawed and incapable of confirmation.