

TRAINING NOTES SECTION 4

March 2016

AN OVERVIEW OF RIGHTS OF WAY CASE PROCESSING

RIGHTS OF WAY ORDERS

Introduction

- 4.1 Where an order making authority (OMA) makes a rights of way order they are required to publicise it to allow an opportunity for objections to be made. If no objections are received or objections made are subsequently withdrawn, the order may be confirmed by the OMA. Should there be objections outstanding, the order must be submitted to the Secretary of State (or NAW) for confirmation. Unopposed orders may also be submitted where the authority wishes to modify it.

Validation

- 4.2 When an order is received in the Rights of Way section it has to pass through a number of stages before being determined. Firstly it is validated to ensure that it has been drafted in accordance with the appropriate regulations. There are three Acts under which the orders are made –
- *Wildlife and Countryside Act 1981,*
 - *Highways Act 1980, and*
 - *Town and Country Planning Act 1990*
- 4.3 Each Act has its own set of regulations setting out how orders should be drafted, how much notice should be given and what documents should accompany an order when it is submitted to the Secretary of State for determination.
- 4.4 Checks are carried out to ensure that the authority has submitted all the required documents. A checklist showing the documents to be submitted will be attached to the left-hand side of the case file. The function of the Rights of Way section is to process both opposed orders and unopposed orders submitted to the Secretary of State for modification.

- 4.5 Rights of Way Orders are determined following either the Written Representations (WR), Hearing (H) or Local Inquiry (LI) procedure. Orders are dealt in accordance with the Rights of Way (Hearing and Inquiries Procedure) (England) Rules 2007.
- 4.6 The written representations procedure is offered at the discretion of the Secretary of State. All objectors have a right to be heard so in order to proceed by the written method all parties to the order must agree. The written representations procedure is only suitable in straightforward cases where there are a maximum of four objectors and where none of them is a local authority. A decision on the order is made on the basis of the statements sent in by the OMA and the objectors, and a visit to the site may be made by the Inspector.
- 4.7 Occasionally a party to an order asks to accompany the Inspector on the site visit. Where this happens a date is negotiated with the OMA, the Inspector and the party making the request. Other statutory objectors to the order may attend if they so wish. The purpose of the site visit is for the Inspector to see the order path and surrounding area and to take note of physical features such as stiles, gates, fences, walls, hedges and trees. During the site visit the Inspector cannot discuss the arguments put forward, but any party to the order can point out physical features. Inspectors also must not under any circumstances accept or request further information at a site visit. Any further information must be sent in to the office (so that it can be properly recorded and logged) and any additional information must be requested by a letter sent from the office. (See Section 8 of these Training Notes.)
- 4.8 The hearing procedure is a discussion led by the Inspector between the parties in a simple and informal way considering all the reasons and evidence for and against the order. Everyone should sit around a table and everyone who attends the hearing and who wishes to take part, not just the main parties, should be involved. If the case is considered appropriate for dealing with at a hearing the rights of way team will give notice that a hearing will take place. The date of the hearing will be within 20 weeks of the start date (the date specified on the notice and the date of the letter setting out the timetable for the order)
- 4.9 A hearing would not be suitable if –
- a. so many people wanted to speak that a round-table discussion would not be feasible;
 - b. there are complicated policy matters;
 - c. there are important legal issues;
 - d. cross-examination is needed.
- 4.10 In the case of a local inquiry we write to the parties to say that an inquiry is to take place. We will write to the OMA offering them a date for the inquiry. If this date is not acceptable, we will liaise with them in order to obtain a more suitable one. The date of the inquiry will be within twenty-

six weeks of the start date (the date specified on the notice and the date of the letter setting out the timetable for the order)

- 4.11 Occasionally none of the above procedures are suitable/necessary and we will suggest that a decision is made on the basis of the information already on file; this is none as an '**in-house**' decision. It is generally used in the following circumstances;
- Where all the objections which contain no material that is relevant (Wildlife and Countryside Act 1981).
 - Where an unopposed order has been submitted to the Secretary of State for confirmation with a request for modification.
 - Where all the objections to an order have been withdrawn.
 - Where an order making authority decide they no longer wish to proceed with an order (this does not apply to an order made under the Wildlife and Countryside Act 1981).
- 4.12 Once the date has been arranged we will send details to the OMA, the objectors and certain "prescribed organisations" listed in Annex A of the Department for Environment, Food and Rural Affairs' Rights of Way Circular 1/09 (version 2, October 2009).
- 4.13 The OMA must then advertise the inquiry arrangements in a local newspaper and put up notices at either end of the right of way affected by the order; and wherever public notices are usually displayed in the district.

When a file is sent to the Inspector

- 4.14 Once the exchange of written representations is complete or, in the case of a hearing or local inquiry three weeks before the start, the file is sent to the Inspector so that he or she can read up on the case and request any missing documentation etc.

Inspector's Jurisdiction

- 4.15 In the majority of rights of way cases jurisdiction for deciding the order is transferred to the Inspector not the Secretary of State. The various Acts contain provisions that allow the Secretary of State to recover jurisdiction in the case of individual orders so that he may take the final decision. Such powers are rarely exercised and only in exceptional circumstances.

Procedures pre-site visit, hearing, local inquiry

- 4.16 Any correspondence received before the start of a site visit, hearing or local inquiry will be sent to the Inspector for consideration. Such correspondence should be disclosed to the parties at the hearing, or local inquiry.

Procedures post site visit, hearing, local inquiry

- 4.17 Any correspondence received after the site visit, hearing or local inquiry but before a decision is issued will be sent to the Inspector for consideration. If the Inspector considers it does not raise any new issues no further action is needed, but where it raises issues which could affect the decision and the inspector proposes to consider the material in the decision it will be necessary to copy the correspondence to the other parties for their comments. An inspector may however disregard any material received after the close of proceedings even if it raises new issues. It may be necessary in light of these additional representations to reopen the hearing or local inquiry, which will be decided in consultation with the Group Manager.

Decisions

- 4.18 There are three possible decisions that can be reached on a rights of way order submitted to the Secretary of State: -
- a. Not Confirmed;
 - b. Confirmed;
 - c. Confirmed with modifications
- 4.19 If the decision is either to confirm or not confirm the order no further action from the Inspector is called for. However, if the proposed decision is to confirm the order subject to modifications, it may be necessary to advertise the proposed modifications in order to give an opportunity for objections to be made. Circumstances which require advertisement of a proposed modification are: -
- a. if the proposed modification includes land not included in the original order; (*Paragraph 2(3): Schedule 6: Highways Act 1980; Paragraph 8(1)(a): Schedule 15: Wildlife and Countryside Act 1981 and Paragraph 3(6): Schedule 14: Town and Country Planning Act 1990*), and
 - b. in the case of a Definitive Map Order where the proposed modifications seek to delete from or add a path to the order or alter the status of the path shown in the order. (*Paragraphs 8(1)(b) and 8(1)(c): Schedule 15: Wildlife and Countryside Act 1981*)
- 4.20 Where objections to a proposed modification are received, it may be necessary to hold a second inquiry. This inquiry is not intended to be a re-run of the original one. It is concerned only with hearing objections to the proposed modifications (see Advice Note 10).

Return of Order and Decision

- 4.21 When the decision has been written it must be sent to the Rights of Way section at Temple Quay House, Bristol or the Crown Buildings in Cardiff where the case is in Wales.
- 4.22 Before being issued, the Order Decision or Report may be forwarded to a reader depending on the case allocation level and the Inspector's grade. The reader may telephone the Inspector to discuss the Decision or Report, to offer constructive criticism or to make suggestions. However it is ultimately for the Inspector to decide on the contents of his or her Decision or Report, bearing in mind the advice offered and the likely consequences of ignoring it.

High Court

- 4.23 Once a decision has been issued neither the inspector nor the Secretary of State have the power to amend or change it. Decisions are therefore final unless successfully challenged in the High Court. We can only reconsider an order if a challenge is successful and the decision is returned to us for re-determination. If a decision is quashed and the case is referred back to us for re-determination, a new Inspector will be appointed to deal with it.
- 4.24 Where the decision is to confirm the order (with or without modifications) there are statutory provisions within the various Acts which allow an application to be made to the High Court within 6 weeks from the date the order making authority publishes a notice of the decision. Such a challenge must be made on the grounds that the decision is not within the powers of the relevant Act or that any requirements of the Act or the regulations made under the Act have not been complied with in relation to the order. If the challenge is successful, the order will be quashed.
- 4.25 The Inspector's decision can also be open to challenge in the High Court where the aggrieved party makes application to the Courts for a Judicial Review. This is the only course of action open to anyone wishing to challenge a decision not to confirm an order; but it can also be used where the decision is to confirm the order. An application for Judicial Review must be made within three months of the date of the inspector's decision. If the application is allowed and is subsequently successful, the judge will either quash the order, or quash the decision and ask the Inspectorate to re-determine the case.
- 4.26 When a High Court challenge is received the Inspector will be given the opportunity to comment on the Notice of Motion. The decision on whether the matter should be defended will be taken by the Rights of Way section in consultation with DEFRA's Countryside Division (Policy Branch), DEFRA's lawyers, the Treasury Solicitor (who represents the Secretary of State in the matter) and Counsel. Inspectors are not normally required to appear in Court in person. However, they may be asked to provide a witness statement (*affidavit*), which will be prepared in consultation with the Rights of Way section.

- 4.27 Inspectors will be notified of the High Court's decision in due course, and sent a copy of the judgement once it is received.
- 4.28 Should the judgement in a particular case establish new case law then it is normal practice to issue an Advice Note explaining the implications of the judgement in the determination of future cases.
- 4.29 It is our practice to defend applications where this is likely to be successful. Where an Inspector has misdirected him or herself in law to the extent that the decision is seriously flawed we will submit to judgement on one or more of the grounds of the Notice of Motion.

Some Do's and Don'ts

- 4.30 Under no circumstances write, mark or alter in any way the original sealed orders. They are sealed documents and if written on or defaced are very hard to put right.
- 4.31 During accompanied site visits, hearings or local inquiries never tell the parties when the decision is likely to be issued as it may not prove possible to meet the target date. For example, late representations may delay the issue of the Order Decision (OD); or the OD may have to be returned to the Inspector for correction or amendment; perhaps the Inspector or someone in the office becomes ill. The Department would, therefore, be viewed in a poor light if an Inspector were to tell the parties they could expect a decision in three weeks and it actually took longer to issue! If asked, an Inspector should simply reply that the decision will be issued just as soon as possible.

RIGHTS OF WAY APPEALS – Schedule 14 Wildlife and Countryside Act 1981

Introduction

- 4.32 Section 53(5) of the Wildlife and Countryside Act 1981 enables anybody to apply to the surveying authority for an order to modify the definitive map if they consider that any of the events specified in Section 53(3)(b) or Section 53(3)(c) have taken place. The surveying authority must investigate the application, and decide whether to make the order sought.
- 4.33 If the surveying authority fails to make a decision within twelve months of receiving a certificate from the applicant that due notice of the application has been served on all landowners and occupiers, then the applicant may make representations to the Secretary of State for Environment, Food and Rural Affairs (SSEFRA). The Secretary of State may, after consulting the surveying authority, direct that the application be determined within a specific period. He is not under a duty to give such a direction, but clearly must act reasonably in dealing with the representation.

- 4.34 If the surveying authority decides not to make an order, the applicant may appeal to the SSEFRA under paragraph 4 of Schedule 14 to the 1981 Act.

Case processing

- 4.35 Appeals are received by the procedure teams in the rights of Way section who will check that all the required documents are received and index these on the file. Comments on the appeal will be invited from the surveying authority and thereafter the matter will be dealt with by written exchange until no further submissions are made by either party. The Secretary of State must then decide whether or not he will direct the surveying authority to make the requested order.
- 4.36 Where important information appears to be missing from a Schedule 14 file, for example the original application or user evidence forms have not been submitted, Inspectors should request the relevant documents through the office staff who will approach the relevant party to the appeal for the information.
- 4.37 The majority of Schedule 14 appeal cases are likely to be determined by way of written representations without a site visit being made by the Inspector. However, where, having reviewed all the evidence submitted, the Inspector considers it is necessary to ensure procedural fairness, or where he or she considers that the conflict of evidence cannot be fairly resolved on consideration of the written representations and papers alone, a more formal oral procedure can be used to determine the appeal. In these circumstances the local authority should be asked to provide a suitable venue for the holding of that appeal. For further information see Defra's letter to PINS on Schedule 14 procedures dated 13 February 2014.

Return of File and Decision

- 4.38 When the decision has been written it must be sent, with the file, to the Rights of Way section.