

Rights of Way Inspectors

TRAINING NOTES

SECTION 6

September 2009

PUBLIC PATH ORDERS

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Annex 6.1 - Special Extinguishment and Diversion orders

Introduction

- 6.1 The purpose of this paper is to provide guidance to Inspectors on the determination of orders which propose alterations to the rights of way network on present or future merit as opposed to being decided on the basis of historical evidence.

Legislative Background

- 6.2 Public path orders (PPOs) can be made under the Highways Act 1980 (HA80) or the Town and Country Planning Act 1990 (TCPA90). The most common types of PPO are:

HA80	Section 26	Creation order
HA80	Section 118	Extinguishment order
HA80	Section 119	Diversion order
TCPA90	Section 257	Diversion or stopping up order
TCPA90	Section 258	Extinguishment order
TCPA90	Section 261	Temporary stopping up for mineral extraction

- 6.3 Orders for extinguishing public rights of way, other than those with vehicular rights, can also be made under Section 32 of the Acquisition of Land Act 1981.
- 6.4 Section 25 of the HA80 enables highway authorities to enter into agreements to create new footpaths, bridleways and restricted byways.

Definitions

- 6.5 PPOs are concerned with footpaths, bridleways and restricted byways. The HA80 defines these types of public path as follows:

A FOOTPATH means a highway over which the public has a right of way on foot only, not being a footway¹ (Section 329(1) HA80)

A BRIDLEWAY means a highway over which the public have the following but no other rights, that is to say, a right on foot and a right of way on

¹ Footway means 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 (S 329(1) HA80).

horseback or leading a horse, with or without a right to drive animals of any description along the highway (Section 329(1) HA80)

A RESTRICTED BYWAY means a highway for the public on foot, horseback or leading a horse. Also a right of way for vehicles (bicycles and horse drawn vehicles but not mechanically propelled vehicles).

Statutory Tests

- 6.6 Orders should always be determined in accordance with the relevant criteria set out in the respective Acts of Parliament. Abbreviated versions of these criteria are given in Annex 9.4 of the Training Notes. This should always be the starting point for your analysis of the case and should provide the framework for your decision (unless the particular circumstances of the case dictate otherwise).
- 6.7 Whilst some of these tests are quite narrow and relate to specific aspects of the route in question, for example the relative convenience of an alternative or the likely use of the order route, others require much wider issues to be considered when deciding the expediency of the proposal.
- 6.8 Perhaps even more than in Wildlife and Countryside Act casework, the variables in PPO cases are extremely diverse. Consequently where comparisons between similar cases reveal apparent inconsistencies in approach between Inspectors, these are perhaps more readily dismissed as being due to quite different circumstances.
- 6.9 The application of these guidelines will vary according to the particular circumstances of the case, but Inspectors are nonetheless reminded of the need to be as consistent as possible in their interpretation of the relevant statutory tests, case law, policies and legal advice.

Technical Matters

Order route not shown on the definitive map

- 6.10 A route does not have to be recorded on the definitive map and statement for a public path order to be made to divert or extinguish it. Section 56(1) of the Wildlife and Countryside Act 1981 states that the definitive map is conclusive evidence of the particulars contained therein. However, this is without prejudice to any question as to whether the public had, at that date, any right of way other than rights shown on the map. In other words, the map is evidence of what is shown on the map; it is not evidence against the existence of rights of way not shown on the map.

- 6.11 When faced with a stopping up or diversion order made in respect of an unrecorded right of way, an Inspector should not dismiss the claimed right of way out of hand. He or she is required to consider evidence of its existence in accordance with general principles for establishing a public right of way. This would mean that where an Inspector found on the facts, for example, sufficient evidence of a right of way he/she could then proceed to consider confirming the public path order on the statutory criteria. Where there was insufficient evidence to support the claim for the unrecorded right of way, the order would not be capable of being confirmed. If it becomes evident that the status of the route is the main issue in dispute, a definitive map modification order would be the appropriate mechanism to determine this. In such circumstances, further advice should be sought from the Office Manager as necessary.

Form of order

- 6.12 Various sections of the Acts listed in paragraph 6.2 above refer to orders being in the form provided by relevant Regulations.
- 6.13 The Public Path Order Regulations 1993 (as amended) and the Town and Country Planning (Public Path Orders) Regulations 1993 prescribe the forms which PPOs made by local authorities must take or be "in a form substantially to the like effect".
- 6.14 If an order differs from the prescribed form, Inspectors will need to decide whether or not it is substantially the same and whether anyone may have been misled or prejudiced as a result of any departures from the norm. If an order is so badly drafted that members of the public would be likely to misunderstand its intention or effect, it should not be confirmed.
- 6.15 Some OMAs still consider that the specification of a width for a new highway is optional. PINS takes the view that such a width must be included in a PPO (See Advice Note 16). If it is not, the Inspector should invite comments from the parties on the appropriate width and, in the OD, propose that the order be modified to record a width. This will require further advertisement; see Section 7 of these Training Notes for further details.

Case Analysis

General approach

- 6.16 Having started with the relevant statutory tests providing the framework for your analysis, you will need to consider the facts and submissions put to you by the parties in relation to the various tests.
- 6.17 There may be some matters which Inspectors considers relevant to their determination of the order, even if the parties themselves do not raise them. If such issues are to be referred to in the decision, they must be raised with the parties, either directly at the inquiry or hearing, or in correspondence if the case is being dealt with by written representations. The case of *Todd and another v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 1450* made clear that a decision will be vitiated if it is decided on grounds that are not canvassed with the parties.
- 6.18 In each case it is for the Inspector to decide on the weight to be given to the various arguments for or against a proposed alteration to the rights of way network, having established the facts and heard the submissions and opinions from those concerned.

Highways Act Orders

Creation orders

- 6.19 Section 26 enables the highway authority to compulsorily create a footpath, bridleway or restricted byway (although it can also be used in situations where there is no element of compulsion where, for example, a landowner supports a proposal)². Section 26(1) sets out the criteria to be satisfied if an order is to be confirmed.

- 6.20 The Inspector must consider:

whether there is a need for a footpath, bridleway or restricted byway along the line indicated on the plan attached to the order and whether it is expedient to create it having regard to:

(a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and

² Section 58 of the Countryside and Rights of Way Act 2000 also provides for the Countryside Agency or the Countryside Council for Wales to make application to the Secretary of State or National Assembly for Wales respectively for a public path creation order to create access to any designated access land.

(b) the effect which the creation of the path or way would have on the rights of persons with an interest in the land, account being taken of the provisions as to compensation.

- 6.21 An Inspector must be aware of the provisions of section 28 and that compensation will be payable if the order is confirmed. The amount of compensation due is not a matter before the Inspector; it is for the order making authority (OMA) to pursue with the party affected.
- 6.22 In determining creation orders, the Secretary of State (and his Inspectors) are required to have regard to any material provision in a rights of way improvement plan prepared by any local authority whose area includes land over which the proposed footpath, bridleway or restricted byway would be created (section 26(3A)).
- 6.23 Rights of Way Advice Note 9 makes clear that in deciding whether it is expedient to create a right of way, the factors to be considered are how much the way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area. This does not preclude the consideration of other matters in deciding whether it is expedient to confirm an order made under Section 26, and that, in any event, the fact that there is a discretion whether to make and confirm such orders means that other factors may be taken into consideration (see *R(Hargrave) v Stroud D.C.* [2003] JPL 35).
- 6.24 Statutory requirements which have general effect include Section 11 of the Countryside Act 1968: *"In the exercise of their functions relating to land [which includes rights over land] every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty [which by Section 49 includes the conservation of [the countryside's] flora, fauna and geological and physiographical features] and amenity of the countryside"*, and Section 74 of the Countryside and Rights of Way Act 2000: *"It is the duty of any Minister of the Crown in carrying out his functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biological diversity in accordance with the Convention [the 1992 Convention on Biological Diversity]"*.
- 6.25 Other statutory requirements may come into play if a potential right of way is in an Area of Outstanding Natural Beauty (AONB), a National Park, a Site of Special Scientific Interest (SSSI), a National Nature Reserve (NNR), or a Scheduled Ancient Monument.
- 6.26 If in a National Park, sections 5, 11a and 114(2) of the National Parks and Access to the Countryside Act 1949 apply. Section 11a incorporates the 'Sandford Principle' of attaching greater weight to the purpose of the

conservation of natural beauty etc. than to the purpose of promoting opportunities for the enjoyment of the special qualities of National Parks where it appears that there is a conflict between those purposes.

- 6.27 If in a NNR/SSSI, section 28(G) of the Wildlife and Countryside Act 1981 applies. This imposes a duty on section 28(G) authorities (which includes inspectors carrying out their duties) *“to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of Special Scientific Interest”*.
- 6.28 If in an AONB, section 85 of the Countryside and Rights of Way Act 2000 applies. A relevant body (which again will include inspectors carrying out functions in relation to an AONB) has a duty to *“have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty”* [which again, by section 92, includes *their flora, fauna or geological or physiographical features*].
- 6.29 It may be a consideration in deciding whether to confirm a creation order where the proposed path crosses a Scheduled Ancient Monument that English Heritage has stated it would not give consent to the carrying out of any works to bring a path into a suitable condition for use.
- 6.30 Some of the above considerations may equally apply to diversion and extinguishment orders.

Extinguishment orders

- 6.31 When making an order to extinguish a footpath, bridleway or restricted byway a highway authority must be satisfied that “it is expedient that the path or way should be stopped up on the ground that it is not needed for public use”. However when deciding whether or not an extinguishment order should be confirmed, the OMA or Secretary of State must apply a different test.
- 6.32 Section 118(2) states the criteria to be satisfied as:
- whether it is expedient that a path or way should be stopped up having regard to:
- (a) the extent that it appears that the path or way would, apart from the order, be likely to be used by the public; and

- (b) 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.

6.33 It is not for an Inspector to delve too deeply into the issue of 'need' for a path when dealing with an extinguishment order. The case of *R v SSE ex parte Cheshire County Council [1991] JPEL 537* deals with this point, and reference is made in this to the earlier case of *R v SSE ex parte Stewart [1980] JPEL 175*.

6.34 Section 118(6) of the 1980 Act requires any temporary circumstances preventing use of the paths in question to be disregarded when determining the likely use that might be made of them. The type of conditions that constitute temporary circumstances was also addressed in the *Stewart* case (above). It appears that the Courts will, for example, regard as temporary trees or hedges or even an electricity sub-station but not a path that has ceased to exist because it has been eroded or fallen down a cliff. The principle that appears to have been endorsed is that to accept the deliberate obstruction of a path as grounds for its closure would encourage those who improperly obstruct public rights of way and, as a matter of policy, should not be condoned. Where the order route is impassable, an Inspector will need to consider the likely use if the obstruction is removed.

6.35 Paragraphs 6.21 to 6.29 are also applicable to extinguishment orders. In particular it should be noted that any material provision in a rights of way improvement plan prepared by the relevant local authority should be taken into account (section 118 (6A)) in determining whether or not an extinguishment order should be confirmed.

Diversion orders

6.36 Section 119 enables the highway authority to divert a footpath, bridleway or restricted byway. The various criteria to be satisfied before an order is confirmed are spread between a number of subsections.

6.37 Section 119(6) of the HA80 requires that, before confirming the Order, the Secretary of State must first be satisfied that:

- (a) it is expedient, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public³, that the right(s) of way in question should be diverted;

³ Whichever is specified in the order; note however that the SoS submitted to judgement in the Pearson case (see consent order) on the grounds that where an order had been made in the interests of both the landowner and the public, an Inspector could consider confirmation of the Order even if it had been concluded that the interests of only one party were served by it.

(b) the new route to be provided will not be substantially less convenient to the public; and

(c) it is expedient to confirm the Order having regard to:

(i) the effect of the diversion on public enjoyment of the path as a whole; and

(ii) the effect the coming into operation of the Order would have as respects other land served by the existing path; and

(iii) the effect which 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;

iv) The provisions as to compensation.

6.38 Paragraphs 6.21 to 6.29 are also applicable to diversion orders. In particular it should be noted that any material provision in a rights of way improvement plan prepared by the relevant local authority should be taken into account (section 119 (6A)) in determining whether or not a diversion order should be confirmed.

6.39 Whereas section 118(6) provides that, for the purposes of deciding whether a right of way should be stopped up, any temporary circumstances preventing or diminishing its use by the public shall be disregarded, section 119 contains no equivalent provision. However, [it is the Inspectorate's view that] when considering orders made under section 119(6), whether the right of way will be/ will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. Therefore, in all cases where this test is to be applied, the convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it.

6.40 Subsection 119(2) requires that a diversion order shall not alter a point of termination of the way if (a) 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 another one connected with it, and which is substantially as convenient to the public. The case of *R v West Dorset DC, ex parte Connaughton* [2002] EWHC 794, All ER (D) 392 is helpful on this issue. There, the purpose of Section 119(2) was interpreted as ensuring "that a walker between two points is not left unable to reach his destination".

- 6.41 It is an established principle that a diversion cannot wholly follow an existing right of way (see *R v Lake District Special Planning Board, ex parte Bernstein* [1982] *The Times*, February 3).
- 6.42 Subsection 119(5) permits the OMA to reach agreement with the applicant (owner, lessee or occupier of the land) to defray any claims for compensation or expenses that may follow or to cover the cost of bringing the new route into a fit condition for public use. The details of these issues are not a matter for the Inspector but it may be relevant to be satisfied that it is physically possible to create a suitable path or way on the line shown in the order.
- 6.43 It should be noted that the new subsection 119(3) (as inserted by paragraph 9(3) of Schedule 6 to the Countryside and Rights of Way Act on 12 February 2003) has a requirement that the extinguishment date should be tied to the date on which the local authority certifies that any works required to make good the new path have been carried out. The current form of order (Regulations SI 1993 No.11) makes no provision as regards the certification on which the extinguishment now hinges. In the absence of a prescribed form of order, it is acceptable for PINS to continue processing such orders.
- 6.44 The case of *Young v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 844 clarified that the relative convenience of the new route is to be addressed separately from enjoyment of the route. Whether the diverted route will be substantially less convenient or not, is a matter for the Inspector's judgement. There is little judicial guidance on what is 'substantially' less convenient. The Oxford English Dictionary (2nd Edition) defines "substantially" as meaning 'in substance'; 'essentially'; 'actually' 'in all essential characters or features'. Websters defines it as meaning 'being largely but not wholly that which is specified'. This suggests the margin for inconvenience may not be all that great.
- 6.45 There are no prescribed measures for degrees of (in) convenience but issues such as gradient, length, accessibility, numbers of stiles or gates, and width may be relevant, depending on the context.

Other extinguishment and diversion orders

- 6.46 Sections 118A and 119A provide for the stopping up or diversion of a footpath, bridleway or restricted byway that crosses a railway or tramway. These are referred to as "rail crossing extinguishment/diversion orders".

- 6.47 Sections 118B and 119B provide for the stopping up or diversion of a footpath, bridleway or restricted byway for the purposes of crime prevention in an area designated for the purpose by the Secretary of State or for the purposes of school security. These are referred to as “special extinguishment/ diversion orders”, “crime prevention orders” or “school security orders” (see Annex 6.1).
- 6.48 Sections 118C and 119C provide for the proprietor of a school to apply to the highway authority for a school security order.
- 6.49 Section 119D provides for the diversion of a highway which is in, or forms part of, or is adjacent to or contiguous with, a site of special scientific interest for the purpose of protection. These are referred to as “SSSI diversion orders”.

Acquisition of Land Act 1981

- 6.50 This provides for the extinguishment of rights of way which are not vehicular highways over land acquired by an authority by compulsory purchase or similar circumstances but not where an order could have been made under the TCPA90 (sections 251 or 258).
- 6.51 Details of the criteria for these orders can be found in Annex 9.4 of these Training Notes.

Concurrent orders

- 6.52 Where several orders are being considered together, care must be taken to deal with each order individually and on its own merits, even where these are put forward as a package by the order making authority.
- 6.53 Generally, the only exception to this is provided by section 118(5) of the Highways Act 1980 which allows the extent to which a concurrent creation or diversion order would provide an alternative route to be taken into account when determining an extinguishment order. However, advice on a recent case has brought to light the possibility of a further exception.
- 6.54 Where a council make a number of creation orders – each providing a different alternative solution (and the council only wish the Inspector to confirm one of the orders), Defra Legal has taken the view that the council’s reasons for making the order in the first place can be a material consideration for an Inspector to balance against any other considerations in coming to the decision. Therefore an Inspector may confirm one of the

orders and decide not to confirm the remaining three. This appears to be supported by Schiemann LJ in *Hargrave (R on the application of) v Stroud District Council 2001*. In referring to paragraph 2(2) of Schedule 6 to the 1980 Act he commented "...there is no duty imposed upon the Secretary of State to confirm the order....I would hold that as a matter of construction of the Statute it is open to the Secretary of State on receiving the order, ...to decide that he will not confirm the order". It's the word 'may' in paragraph 2(2) which seems to give the Secretary of State, or the Inspector on his behalf, the discretion to confirm the order.

- 6.55 Where an extinguishment (s118 or 118A) order is concurrent with a creation (s26(1)) or diversion (s119) order, it is necessary to consider the creation and diversion order first. Having considered that on its own merits and come to a conclusion, the extinguishment order should be addressed, starting with your consideration of whether you can take the first order into account⁴, followed by consideration of the s118 criteria set out above. In considering those criteria, you may also have regard to:

The extent to which the public creation order or public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way (s118(5)(b)).

- 6.56 Although the Act does not expressly provide for orders made under section 118B and 119B to be considered concurrently with other orders, Defra does not believe there is anything in legislation to prevent them from being so.

Creation agreements

- 6.57 Section 25 of the HA80 allows highway authorities to enter into agreements with landowners to create new public footpaths, bridleways and restricted byways.
- 6.58 These agreements are essentially a matter for the parties concerned. They do not require confirmation and do not come to the Secretary of State for determination. Although they are sometimes linked to diversion or extinguishment orders, there was no express provision, until recently, for such agreements to be taken into consideration when determining orders. Following a recent court of appeal judgement in the case known as *Tyttenhanger (Hertfordshire County Council v Secretary of State for Environment Food and Rural Affairs (2006))*. The judges agreed that creation agreements which are conditional and rely on the confirmation of the order cannot be taken into account when determining orders. A

⁴ The first order would be taken into account if its confirmation had been found to be justified on its own merits; in which case it would be liable to affect the likely use by the public of the rights of way affected by the stopping up order.

sealed unconditional creation agreement already in force can however be considered.

Town and Country Planning Act Orders⁵

Section 257

- 6.59 Section 257 empowers the local planning authority to authorise the stopping up or diversion of any footpath, bridleway or restricted byway, if satisfied that it is necessary to do so in order to enable development to be carried out in accordance with a planning permission granted under Part III of the Act (which includes works classed as “permitted development”), or to enable development to be carried out by a government department. The grant of planning permission does not of itself authorise any obstruction of a right of way.

The statutory criteria

- 6.60 The first consideration is whether there is a valid planning permission. This is not usually a matter of dispute, but you need to be sure that the permission has not, for example, expired by the passage of time, or that it is not invalid on some other ground. Note that the standard time condition attached to planning permissions is 3 years. Although the existence of the planning permission may not be in issue, its merits may still be a matter of hot dispute; as to which, see below.
- 6.61 You must next consider whether the stopping up or diversion of the footpath or bridleway is **necessary** in order to enable the development to be carried out. It is not enough that the stopping up or diversion is desirable, for example because it would make the implementation of the planning permission more convenient. On the other hand, as with all such judgments, the word “reasonably” is to be imported: is the stopping up or diversion reasonably necessary to enable the planning permission to be implemented? Remember that the standard of proof applicable to the conclusion you are to reach is the balance of probabilities.
- 6.62 Objectors to such Orders will often put forward alternative proposals which, in their view, would make the stopping up or diversion unnecessary. Some of these can be far-fetched: in one such case a representative of the Ramblers suggested that the footpath in issue (crossing what was to become a quarry) could be left in place on a narrow

⁵ For further reading, refer to Part X of the TCPA 1990, Town and Country Planning (Public Path Orders) Regulations 1993, Defra Circular 1/08 section 7, Annex 9.4 of the Training Notes and *Vasiliou v SST* [1991] 2 All ER 77

causeway or bridge 60 metres above the quarry floor, perhaps with quarrying being carried on underneath it.

- 6.63 The Secretary of State (in whose shoes you stand) has no power to amend a planning permission. If you are minded to propose a modification to an Order, whether at the behest of an objector or otherwise, you must be sure that the proposed modification is wholly consonant with the planning permission as granted, including any conditions attached to it. In the case mentioned in the previous paragraph, there was a condition, imposed on grounds of health and safety, that quarrying should not take place within 10 metres of any public right of way. On the assumption that the 10-metre condition was to be interpreted horizontally rather than vertically, the minimum width of the causeway proposed on behalf of the Ramblers would have been 20 metres plus the width of the path - a serious impediment to implementation of the planning permission!
- 6.64 The conditions are part of the planning permission, and are imposed under principles set out in Circular 11 of 1995. If a condition cannot be met by the alternative implementation proposed by an objector, then the development could not be carried out "in accordance with the planning permission" as required by section 257.
- 6.65 The assessment of whether the stopping up or diversion is necessary can sometimes involve striking a fine balance. The need to stop up or divert rights of way through industrial developments, for example, will depend on the nature of the activities proposed and the exact relationship between the way and the proposed industrial facilities. Health and safety should have been in the mind of the local planning authority at the time of considering the application for planning permission, and, again, the position may well have been regulated by conditions.
- 6.66 If the planning permission is in "outline" terms only, you may well find that it is premature to confirm a stopping up or diversion order. In the case of residential development, for example, if the siting of the proposed houses is a matter reserved for later determination, it would be difficult to establish, on the basis of the information available at outline stage, that it is necessary to stop up or divert the right of way.
- 6.67 Objectors to section 257 Orders are often driven by opposition to the planning permission. You will need to make it very clear in your opening observations that the inquiry into the Order is not an opportunity to revisit the planning permission. Often, you will need to intervene later in the proceedings to remind parties that the merits of the planning permission are not before you.

The impact of the Vasiliou judgment

- 6.68 Prior to the judgment of the Court of Appeal in *Vasiliou v The Secretary of State for Transport* [1991] 2 All ER 77, the above criteria were the only matters which fell to be considered when making or confirming a TCPA Order. Mr Vasiliou was the owner of a restaurant, access to which was to be severely impacted upon by the proposed stopping up of a highway. He successfully applied to have the Order quashed, on the basis that the Secretary of State should have taken into account the disadvantage to Mr Vasiliou's business resulting from the stopping up.
- 6.69 The additional criterion to be applied as a result of *Vasiliou* (see Annex 9.4 of the Training Notes) is in the following terms: "The disadvantages or loss likely to arise as a result of the stopping up or diversion, either to members of the public generally, or to persons whose properties adjoin, or are near to the existing highway, should be weighed against the advantages to be conferred by the proposed order." These words are drawn from paragraph 7.15 of Defra Circular 1/09.
- 6.70 It follows that if the stopping up or diversion proposed would cause disadvantage or loss to the general public or to the owners of nearby property, you may decide not to confirm the Order, even though the above statutory criteria are fully met. You are required to strike a balance between the public and private benefit intrinsic in the development for which planning permission has been granted, and any detriment arising from the stopping up or diversion. It is probably fair to say that you would need to be satisfied that the disadvantage or loss is substantial before deciding not to confirm the Order, and you must carefully justify any such decision made on *Vasiliou* grounds.
- 6.71 There is no provision for compensation. Diversion of the footpath or bridleway across land owned by a third party requires the latter's express agreement; it is common sense to insist on this agreement being evidenced in writing.

Has the development permitted been substantially completed?

- 6.72 If so, an Order under section 257 cannot be made or confirmed. Section 257 states that the stopping up or diversion must be necessary "to enable development to be carried out". This requirement clearly cannot be satisfied if the planning permission has already been implemented. Some substantial part of the development permitted must remain to be carried out.

- 6.73 The meaning of “substantially completed”, was considered by the House of Lords in Sage v SSETR [2003] UKHL 22. This was a decision relating to a planning enforcement notice, but is also relevant to TCPA public path orders. The Court of Appeal had sought to define “substantially completed” by reference to other provisions of the TCPA. The House of Lords reversed this, restoring the previously-held view that the issue is to be approached holistically and that the question of whether a development is substantially complete is a matter of fact and degree to be determined in each case on the evidence.
- 6.74 Note also that, if the development has been implemented, section 257 cannot be engaged by demolishing part of the works already carried out. If the development has been substantially completed, an Order will need to be obtained under the Highways Act 1980.

Orders under sections 258, 261 and 247

Section 258

- 6.75 Orders under section 258 are very rare. They extinguish a footpath, bridleway or restricted byway in cases where land has been acquired or appropriated for planning purposes by a local authority. You need to be satisfied only that an alternative right of way has been or will be provided, or that no alternative is required.

Section 261

- 6.76 Orders under section 261 (which you will come across more frequently) relate to the temporary stopping up or diversion of highways for mineral working, and section 261(2) applies this power to footpaths, bridleways and restricted byways. The criteria to be met are that the stopping up or diversion is required for the purpose of enabling minerals to be worked by surface working, and that the footpath, bridleway or restricted byway can be restored, after the minerals have been worked, to a condition not substantially less convenient to the public. Although here the first criterion refers to “required” rather than “necessary” as in section 257, the test to be applied appears to be the same.
- 6.77 Note that “temporary” does not necessarily imply “short-term”. A stopping up or diversion planned to last for 30 years may be temporary if 30 years is the period during which the extraction of the minerals is to continue, and the stopping up or diversion is to be reversed at the end of that period.

Section 247

- 6.78 Orders may also be made under section 247 in relation to “highways”, including both vehicular highways and rights of way. Section 247 orders have traditionally been allocated to transport Inspectors, but will now be offered to rights of way Inspectors.

Reaching Conclusions

- 6.79 Inspectors should identify the main issue(s) in the context of the appropriate criteria. For each identified issue they should review the relevant facts and arguments, consider whether or not the scheme is in accordance with the criteria, and assess whether these facts and arguments should lead to the order being confirmed, not confirmed or modified. Where consideration of the evidence pulls in opposite directions, or where the order would have both positive and negative effects, a balancing exercise may be necessary.
- 6.80 Every decision or report should be drafted so as to demonstrate progress from statements of policy and facts to a decision or recommendation by rigorous and logical reasoning and the exercise of sound judgement. Every decision or report should deal fully with each issue on which the decision will turn. Other issues which the Inspector considers are not central to the decision but which are considered important by the parties should be referred to, to the extent that the parties are left in no doubt that they have been taken into account in the process leading to the decision. Only in this way will the Inspector's decisions or recommendations be seen to be fair, impartial and arrived at openly. Separate, detailed guidance is given on writing decisions in Section 11 of the Training Notes.