

LIST OF RELEVANT CRITERIA

HIGHWAYS ACT 1980 SECTION 26(1)

Creation of footpath or bridleway

whether there is a need for a (footpath)(bridleway) 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*
- (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.*

(when referring to criteria during opening announcements reference should be made to the grounds specified in the order)

The considerations to which the Secretary of State is to have regard in determining whether or not to confirm a public path creation order include any material provision of a rights of way improvement plan prepared by any local authority whose area includes land over which the proposed footpath or bridleway would be created (26(3A)).

NB the compensation issue only arises in s26(1)(b) cases

HIGHWAYS ACT 1980 SECTION 118

Stopping-up of a footpath or bridleway

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.*
- (c) The considerations to which the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order include any material provision of a rights of way improvement plan prepared by any local authority whose area includes land over which the order would extinguish a public right of way (118(6A)).*

Note on concurrent Orders under section 118, 118A, 26(1) and 119 of the Highways Act 1980

Where the stopping-up (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 first¹. Having considered that on its own merits and come to a conclusion, the stopping up order should be addressed, starting with your consideration of whether you can take the first order into account*, 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, public path diversion order or rail crossing diversion order would provide an alternative path or way (s118(5)(b)).

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.

* 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.

HIGHWAYS ACT 1980 SECTION 118A

Stopping up of a footpath or bridleway over a railway or tramway:

whether it is expedient to stop up the (footpath) (bridleway) having regard to all the circumstances, and in particular to:

- (a) *whether it is reasonably practicable to make the crossing safe for use by the public; and*
- (b) *what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.*

HIGHWAYS ACT 1980 SECTION 118B(1)(a)

Stopping up of a highway for the purposes of crime prevention (in an area designated for the purpose by the Secretary of State):

*whether the premises adjoining or adjacent to the highway are affected by high levels of crime; and
that the existence of the highway is facilitating the persistent commission of criminal offences; and*

¹ Creation agreements made under s25 may also be considered concurrently with extinguishment orders but only if such agreements have been concluded and their coming into operation is not conditional upon the confirmation of the extinguishment order; a conditional or uncompleted agreement cannot be taken into consideration – see [R. \(on the application of Hertfordshire CC\) v Department of Environment, Food and Rural Affairs \[2005\] EWHC 2363 \("Tyttenhanger"\)](#)

that it is expedient, for the purpose of preventing or reducing crime which would otherwise disrupt the life of the community, that the highway should be stopped up; and

that it is expedient to confirm the order having regard to all the circumstances, and in particular to:

- (a) whether and, if so, to what extent the order is consistent with any strategy for the reduction of crime and disorder prepared under section 6 of the Crime and Disorder Act 1998;*
- (b) the availability of a reasonably convenient alternative route or, if no reasonably convenient route is available, whether it would be reasonably practicable to divert the highway under section 119B rather than stopping it up; and*
- (c) the effect which the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation.*

HIGHWAYS ACT 1980 SECTION 118B(1)(b)

Stopping up of a highway for the purposes of school security

whether it is expedient, for the purpose of protecting the pupils or staff from:

- (i) violence or the threat of violence,*
- (ii) harassment,*
- (iii) alarm or distress arising from unlawful activity, or*
- (iv) any other risk to their health or safety arising from such activity,*

that the highway should be stopped up; and

that it is expedient to confirm the order having regard to all the circumstances, and in particular to:

- (a) any other measures that have been or could be taken for improving or maintaining the security of the school;*
- (b) whether it is likely that the coming into operation of the order will result in a substantial improvement in that security;*
- (c) the availability of a reasonably convenient alternative route or, if no reasonably alternative is available, whether it would be reasonably practicable to divert the highway under section 119B rather than stopping it up; and*
- (d) the effect the extinguishment of the right of way would have as respects land served by the highway, account being taken of the provisions as to compensation.*

HIGHWAYS ACT 1980 SECTION 119

Diversion of a footpath or bridleway

*whether it is expedient in the interests of (the owner, lessee or occupier of land crossed by the path or way or of the public^{*2}) that the line of the path or way, or part of that line should be diverted^{**}; and:*

that the path or way will not be substantially less convenient to the public; and

that it is expedient to confirm the order having regard to:

- (a) the effect which the diversion would have on public enjoyment of the path or way as a whole; and*
- (b) the effect which the coming into operation of the order would have as respects other land served by the existing right of way; and*
- (c) 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.*

Provision for compensation of persons with an interest in the land will also be taken into account.

The considerations to which the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order include any material provision of a rights of way improvement plan prepared by any local authority whose area includes land over which the order would create or extinguish a public right of way (119(6A)).

* When listing criteria during opening announcements, reference should be made to the party/parties specified in the order.

** A diversion order cannot alter a point of termination of the way –

- if that point is not on a highway; or
- (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.

² However, 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.

HIGHWAYS ACT 1980 SECTION 119A

Diversion of a footpath or bridleway over a railway or tramway

whether it is expedient to divert the path or way having regard to all the circumstances, and in particular to:*

- (a) whether it is reasonably practicable to make the crossing safe for use by the public; and*
- (b) what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.*

* A rail crossing diversion order cannot alter a point of termination of the path or way-

- if that point is not on a highway over which there subsists a like right of way (whether or not other rights of way also subsist over it); or
- (where it is on such a highway) otherwise than to another point which is on the same highway, or another such highway connected with it.

HIGHWAYS ACT 1980 SECTION 119B(1)(a)

Diversion of a highway for the purposes of crime prevention (in an area designated for the purpose by the Secretary of State)

whether premises adjoining or adjacent to the highway are affected by high levels of crime; and

whether the existence of the highway is facilitating the persistent commission of criminal offences; and

that it is expedient for the purpose of preventing or reducing crime which would otherwise disrupt the life of the community, that the line of the highway, or part of that line should be diverted (whether on to land of the same or another owner, or lessee or occupier); and*

that it is expedient to confirm the order having regard to all the circumstances, and in particular to:

- (a) whether and, if so, to what extent the order is consistent with any strategy for the reduction of crime and disorder prepared under section 6 of the Crime and Disorder Act 1998;*
- (b) the effect which the coming into operation of the order would have as respects land served by the existing public right of way; and*
- (c) 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, taking into account the provisions as to compensation.

HIGHWAYS ACT 1980 SECTION 119B(1)(b)

Diversion of a highway for the purposes of school security

whether it is expedient, for the purpose of protecting the pupils or staff from:

- (i) violence or the threat of violence,*
- (ii) harassment,*
- (iii) alarm or distress arising from unlawful activity, or*
- (iv) any other risk to their health or safety arising from such activity,*

that the line of the highway, or part of that line should be diverted (whether on to land of the same or another owner, lessee or occupier); and*

that it is expedient to confirm the order having regard to all the circumstances, and in particular to:

- (a) any other measures that have been or could be taken for improving or maintaining the security of the school;*
- (b) whether it is likely that the coming into operation of the order will result in a substantial improvement in that security;*
- (c) the effect which the coming into operation of the order would have as respects land served by the existing public right of way; and*
- (d) 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, account being taken of the provisions as to compensation.*

* A special diversion order cannot alter a point of termination of the highway -

- if that point is not on a highway; or
- (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it.

HIGHWAYS ACT 1980 SECTION 119D

Diversion of a highway which is in, forms part of, or is adjacent to or contiguous with, a site of special scientific interest for the purpose of protection

whether public use of the highway is causing, or that continued public use of the highway is likely to cause, significant damage to the flora, fauna or geological or physiographical features by reason of which the site of special scientific interest is of special interest; and

that it is expedient that the line of the highway, or part of that line should be diverted (whether on to land of the same or another owner, lessee or occupier) for the purpose of preventing such damage; 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 right of 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, account being taken of the provisions as to compensation.*

* A SSSI diversion order cannot alter a point of termination of the highway -

- if that point is not on a highway; or
- (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it.

ACQUISITION OF LAND ACT 1981 SECTION 32

Extinguishment of a public right of way (not being a vehicular right of way)

whether the stopping up of the way in question is necessary in order that the proposals for the future use of the land subject to compulsory acquisition can be carried out, if satisfactory provision of a suitable alternative right of way has been or will be provided, or that the provision is not required.

TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257

Stopping up or diversion of a footpath or bridleway to enable development to be carried out

Whether it is necessary to stop up or divert the (footpath)(bridleway) in question to allow development to be carried out –

- (a) in accordance with the planning permission already given but not substantially completed; or*
- (b) by a government department*

An additional criterion has to be applied to s257 diversions as a result of the judgement in the case of Vasiliou v The Secretary of State for Transport [1991] 2 All ER 77: "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."

TOWN AND COUNTRY PLANNING ACT 1990 SECTION 258

Stopping up or diversion of a footpath or bridleway over land owned by an authority for planning purposes

whether an alternative right of way has been or will be provided; or

whether the provision of an alternative right of way is not required.

TOWN AND COUNTRY PLANNING ACT 1990 SECTION 261(2)

Temporary stopping up of a footpath or bridleway to enable minerals to be worked at surface level

whether the right of way in question needs to be stopped up to enable minerals to be worked by surface working; and

that the highway can be restored, after the minerals have been worked, to a condition not substantially less convenient to the public.

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53

Alterations to the Definitive Map

- (a) the coming into operation of any enactment or instrument, or any other event, whereby:
 - (i) *a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;*
 - (ii) *a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or*
 - (iii) *a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path.*
- (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path,
- (c) the discovery by the authority of evidence which (when considered with all the other relevant evidence available to them) shows that:

- (i) *a right of way which is not shown in the map and statement subsists or, is reasonably alleged to subsist* over land in the area to which the map relates;*
- (ii) *a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*
- (iii) *there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

* This is the criteria to be used by the order making authority in making an order. It should not be confused by the confirmation criteria to be applied by Inspectors which is that a right of way subsists on the balance of probabilities see *Todd and another v Secretary of State for the Environment, Food and Rural Affairs* [2004].

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 54

Reclassification Orders

A road used as a public path shall be shown in the definitive map and statement as follows:

- (a) *if a public right of way for vehicular traffic has been shown to exist, as a byway open to all traffic;*
- (b) *if not (a), and if public bridleway rights have not been shown not to exist, as a bridleway; and if not (a) or (b), as a footpath.*

Note that reclassification orders made before 2 May 2006 (11 May 2006 in Wales) are to be determined according to s54 of the 1981 Act but are subject to the provisions of s67 of NERC.