

Dave Waterman
Recreation & Access Policy
Room 1/02, Temple Quay House
2 The Square, Temple Quay
Bristol BS1 6EB
London SW1P 3JR

Tel: 0117 372 8584
Fax: 0117 372 8587
Email: Recreation.Access@defra.gsi.gov.uk
Website: www.defra.gov.uk



1st August 2008

Dear consultee/stakeholder

The right to apply for public path orders Conclusions following consultation on a proposed approach to implementation

Introduction

This letter sets out our conclusions following the public consultation on the legislation in the Countryside and Rights of Way Act 2000 that provides for a right to apply, and associated rights of appeal to the Secretary of State, for orders to permanently extinguish or divert certain public rights of way.

Background

Local authorities currently have powers to make extinguishment and diversion orders “in the interests of the owner, lessee or occupier”, and for school security. However, these powers are discretionary and it can be difficult for landowners to persuade authorities to act, even where strong land management reasons exist. Some authorities simply refuse to consider requests, and many authorities decline to make orders which they suspect might be controversial. Applicants can also face long delays and high charges.

In recognition of these difficulties, a statutory right to apply was introduced.

The statutory right to apply for orders to permanently extinguish or divert certain public rights of way, and the associated rights of appeal to the Secretary of State was introduced by section 57 and schedule 6 of the Countryside and Rights of Way Act 2000 (CROW Act). This inserts new 118ZA, 118C, 119ZA, 119C, 121A, 121C, 121D and 121E (and consequential amendments) into the Highways Act 1980.

Summary of the statutory right to apply provisions

On implementation, the provisions would give certain landowners and occupiers a statutory right to apply to a local authority (or National Park authority) for an order to extinguish or divert certain public rights of way across their land, and provide for the timely determination of all such applications.

The provisions would restrict the new rights to:-

- owners, lessees and occupiers of land used for agriculture, forestry or for the breeding or keeping of horses, in respect of public path extinguishment orders and public path diversion orders made under sections 118 and 119 of the Highways Act 1980; and
- proprietors of schools, in respect of special extinguishment orders and special diversion orders made under sections 118B and 119B of the Highways Act 1980.

The rights of appeal would give applicants statutory rights of appeal to the Secretary of State at two stages: firstly, if a local authority refuses to make the order applied for, and secondly where (after having made an order) an authority refuses to confirm it or to submit it to the Secretary of State.

The provisions are prescriptive about how the new rights would operate in several important respects. For example, they require that application charges be fixed by the Secretary of State, and applicants would be entitled – after four (or two months) – to ask the Secretary of State to direct an authority to determine an application (or to decide whether to confirm or submit an order to the Secretary of State) within a specified time.

The provisions also prescribe an appeal procedure, whereby if an applicant appeals against an authority's refusal to make the order applied for, the Secretary of State would be obliged to make an order and ensure that it is publicised. The order would then be processed as if it had been submitted to the Secretary of State for confirmation, with a public enquiry, hearing or exchange of written representations as appropriate.

Exercising the new rights would not guarantee that an applicant can obtain an extinguishment or diversion order, but they would ensure that the arguments, both for and against extinguishing or diverting a right of way, would be duly considered in a timely fashion.

Consultation

In May 2007 Defra undertook a public consultation exercise to seek views on a proposed approach to implementing the new rights through the making of regulations. It also sought views on the level of prescribed charges to be paid by applicants and the likely costs, risks and benefits, set out in detail in the partial Regulatory Impact Assessment.

The 160 responses that were received were carefully considered and analysis of these responses compiled. An analysis of the responses is available on Defra's website, through the following link.

<http://www.defra.gov.uk/wildlife-countryside/issues/public/diversion-exting.htm>

Considerations

Defra is committed to introducing a right to apply and appeal for extinguishment and diversion of public rights of way, particularly as a right of application and appeal already exists for definitive map modification orders. However, we are keen to ensure that the new rights are introduced in a way which delivers real benefits for applicants, without imposing undue burdens on local authorities and others. In light of consultations with practitioners in local authorities and other key stakeholders, about how the provisions could be put into practice, and the responses from the wider public consultation, we have concluded that the legislation as it stands would not achieve this.

The key concerns are as follows.

- The rights of application and appeal would be limited to certain types of landowner.
- The application charges would have to be prescribed by the Secretary of State and there is little or no scope to take account of local circumstances or for local authorities to use discretion in charging.
- Given that there is no guarantee of the outcome of an application (only that the local authority would consider the application fully and within a certain timescale), exercising the right could prove costly and be of doubtful benefit to applicants.
- If an applicant were to appeal against a refusal to make an order, the Secretary of State would be required to make an order and offer a public inquiry, even where the order clearly has no prospect of success (because the statutory criteria for confirming an order cannot be met).
- Local authorities could easily shift the burden and cost of order-making onto the Secretary of State simply by refusing all applications.
- Any application could result in a public inquiry if it receives just a single objection – regardless of how minor or misplaced the objection proves to be.

Conclusion

Because the primary legislation is so prescriptive, there is little room for manoeuvre in addressing these shortcomings through regulations. Whilst we remain committed to introducing a right to apply and appeal for

extinguishment and diversion of public rights of way, we have concluded that further primary legislation would be required in order to make such a right work effectively. It is not clear at this stage when a suitable opportunity for the necessary primary legislation would arise. However, we will work with stakeholders to develop an alternative solution.

Yours faithfully

A handwritten signature in black ink, appearing to read 'D. Waterman', with a stylized, cursive script.

DAVE WATERMAN
Recreation & Access Policy