

**Property Bar Association and Planning And
Environment Bar Association Joint Seminar**

OBSTACLES TO DEVELOPMENT

STOPPING UP AND DIVERTING HIGHWAYS

INTRODUCTION

1. It is both a civil public nuisance¹ and a criminal offence² to obstruct a highway. This is so whether the highway is a vehicular highway, a footpath or a bridleway. A highway of whatever sort remains in existence in perpetuity unless and until it is extinguished by some due legal process.³ The only exception is in the limited case of a highway which is physically destroyed as a result of natural causes.⁴ This does not include deliberate action by the landowner to remove the highway. That would be an obstruction. Thus, the existence of a highway on land which is proposed for development is a potentially serious obstacle to achieving that development.

IS THERE A HIGHWAY ON THE LAND?

2. It is therefore important to establish whether there are any highway rights over the proposed development site in the early stages of planning a project. Metalled roads will be obvious from site inspection and in urban areas the highway authority's List of Streets⁵ will identify whether they are highways maintainable at public expense. The List of

¹ Fritz v Hobson (1880) 14 Ch.D 542; civil proceedings can be brought by the highway authority under s.130(1) Highways Act 1980, potentially following a complaint by a highway user under s.130A HA 1980; or where there is proof of special damage, individuals can bring civil proceedings in their own name to abate the nuisance: Winterbottom v Lord Derby (1867) LR 2 Ex 316.

² S.137(1) Highways Act 1980; Torbay Borough Council v Cross (1995) 159 JP 682.

³ Dawes v Hawkins (1860) 8 CB(NS) 848.

⁴ R (Gloucestershire County Council) v SSETR [2001] JPL 1276.

⁵ S.36(6) Highways Act 1980.

Streets should properly extend to vehicular highways in rural areas⁶ but in any event enquiries of the highway authority should identify whether a particular metalled road is regarded as a highway.⁷ The Definitive Map⁸ is the primary source for information on footpaths and bridle ways (and also Byways Open to All Traffic and Restricted Byways).⁹ However, neither set of records is comprehensive and it is perfectly possible for an unrecorded highway to exist. This is a particular problem with footpaths, where a lightly used (or even unused) path may not be readily apparent from site inspection.

3. Applications for a Definitive Map Modification Order¹⁰ (to add a claimed route to the Definitive Map) are not unknown as a response to development proposals¹¹ and so careful enquiries should be made to ascertain the status of all paths and tracks which are apparent either on the ground or on the available conveyancing documentation and any Ordnance Survey or similar maps.

CAN THE HIGHWAY BE ACCOMMODATED OR RE-ALIGNED?

4. If the site is subject to a highway the first question to be considered is whether the development can be arranged or laid out so as to accommodate the retention of the highway in its existing position. The

⁶ The definition of “street” in s.329(1) Highways Act 1980 relies on the quasi-definition in s.48(1) New Road & Street Works Act 1991 which provides that a “street” includes “any highway”. In A-G v Laird [1925] 1 Ch 312 the CA said it was a question of fact in the individual case whether a particular highway was a street (for the purposes of a similarly worded provision in s.4 Public Health Act 1875), and the presence of frontage buildings would be a relevant factor; in A-G of Hong Kong v Mighty Stream Ltd [1983] 1 WLR 980 the Privy Council declined to follow this approach (when construing a similarly worded Hong Kong planning ordinance).

⁷ NB: not all highways are maintainable at public expense (depending on the manner and date of their creation) and the highway authority may not have records of vehicular highways for which they have no maintenance liability.

⁸ Part III Wildlife & Countryside Act 1981.

⁹ See definitions in s.66(1) W&CA 1981 (as amended).

¹⁰ S.53(5) W&CA 1981.

¹¹ This was the tactic adopted by the objectors in Beckley Parish Council v Secretary of State for Transport [2010] EWHC 606 (Admin). They objected to a development and unsuccessfully sought judicial review of the grant of planning permission. They also successfully claimed that a BOAT incorporating part of the development site should be added to the Definitive Map and the developer then had to seek a stopping up order to extinguish the BOAT. The BOAT was extinguished and the objectors then unsuccessfully challenged that decision in the High Court.

processes involved in seeking the removal of a highway are time consuming, can be expensive, and success is not by any means guaranteed. Adapting the scheme to accommodate the highway may therefore be an easier solution and should certainly be considered as one of the options.

5. Where it is not possible to accommodate the highway in a way which is compatible with the development proposals for the land in question, then the next consideration should be whether the highway can be diverted to a suitable alternative route. Generally speaking, it is easier to secure the stopping up of a highway if an alternative is provided than it is to show that the highway is not needed by the public and so need not be replaced.
6. If the alternative route can be achieved wholly through the use of other existing highways then strictly there is no diversion as such and the highway would simply be extinguished. If the alternative route requires the creation of highway rights over new land, on all or part of its alignment, then there is a diversion. The developer will need control over the new land, and the agreement of its freehold owner and all lesser interests, in order to create a new highway over it.
7. If the development cannot be arranged so as to accommodate the highway and a suitable alternative route cannot be achieved then the only option is to secure its extinguishment.

PARTIES WHO MAY BE INVOLVED

8. Before looking at particular powers that can be used, it is helpful to identify the parties who may be involved in the process. The highway authority for the highway in question will be involved in every case, either as the body with the necessary powers or as a consultee. In 2 tier local government areas, the highway authority for all highways other than trunk roads and special roads (motorways) will be the

relevant county council. In single tier local government areas, the equivalent highway authority will be the unitary council. Trunk roads and special roads are the responsibility of the Secretary of State for Transport (acting through the Highways Agency).

9. If the highway in question is a footpath or bridleway then it will be necessary to deal not only with the highway department of the relevant authority but also with the rights of way section. The two parts of the authority may have different priorities and objectives and may not agree between themselves on what changes to the highway network are in the public interest. Thus there may be delicate tactical decisions to be made as to how best to approach the highway authority and elicit its support.

10. The highway authority will also have established a Local Access Forum (under the provisions in the Countryside & Rights of Way Act 2000)¹², which is an advisory body concerned with a wide range of access matters, including improved access to the rights of way network. Whilst the LAF has no statutory powers, its views are required to be taken into account¹³ and are likely to carry weight with the highway authority.

11. Where the development which it is intended to implement either has benefit of planning permission or a planning application is intended, then the local planning authority will need to be involved. For most forms of development this will be the relevant district council, unless there is a unitary council.

12. Because many highways are used by utilities companies to accommodate their equipment, and relocating such equipment is generally expensive, they are important consultees in the process. In practical terms they may be in a position to exercise an effective veto if the development does not have sufficient value to enable it to meet

¹² S.94 Countryside & Rights of Way Act 2000.

¹³ S.94(5) CROWA 2000.

their requirements (which may include the relocation of their equipment).

13. Where the highway in question is a footpath or bridleway then the relevant parish council is likely to be a consultee on proposed changes and in some instances will have a veto on whether particular powers can be used.

14. All of the available powers involve the carrying out of public consultation, to a greater or lesser degree. Changes to the rights of way network are of particular concern to a number of national organisations, many of which have local representatives who closely monitor any proposals for change. Key bodies are the Ramblers' Association, the Open Spaces Society, the British Horse Society, the Cyclists' Touring Club, and the Land Access and Recreation Association.

AVAILABLE POWERS AND THE PLANNING POSITION

15. In looking at the available powers a first question to resolve is whether the development proposal is sufficiently advanced that it can come forward as a planning application. This is not always the case. Existing businesses may occupy premises which are subject to highway rights and their expansion plans can be dependent on whether they can secure the removal or relocation of a highway away from their land.

16. Depending on the scale of development involved the investment needed simply to support an application for planning permission can be considerable (especially where Environmental Impact Assessment is required). It is usually necessary to have a full planning permission rather than an outline permission to secure the stopping up or diversion of a highway (otherwise the effect of the planning permission on the highway will be unclear) and this adds to the expense of a planning application. For some businesses there is a need for certainty as to the

removal of highway rights before the investment decision can be made that it is worthwhile applying for planning permission.

17. In cases where there is no planning permission and no realistic prospect of securing it at this stage of the project, the statutory powers for dealing with highway rights are limited to those in the Highways Act 1980.

STOPPING UP OR DIVERSION WITHOUT A PLANNING PERMISSION

18. If the highway is a vehicular highway, there is only one practical option: an application to the Magistrates' Court for a stopping up or diversion of the highway under s.116(1) Highways Act 1980. Only the highway authority for the highway in question can make such an application. However, any person (including therefore a landowner or developer) can make a request to the highway authority that it should make such an application.¹⁴ Provision is made for the highway authority to be indemnified for the costs incurred. The highway authority is not obliged to agree to such a request and in considering it will need to form a view on whether the application is likely to succeed: R (Spice) v Leeds City Council [2006] EWHC 661 (Admin). Thus, a first step for the developer is to persuade the highway authority of the merits of the case.

19. Whilst s.116 HA 1980 is particularly suited to vehicular highways it is not limited to such highways and can also be used to address footpaths and bridleways.¹⁵ The Secretary of State has, however, recommended the use of other powers where they are available¹⁶ and so the highway authority may need to be persuaded that s.116 HA 1980 is an appropriate power to use in the particular case.

¹⁴ S.117 HA 1980.

¹⁵ S.118 and s.119 HA 1980 are limited to footpaths, bridleways, and restricted byways.

¹⁶ See para 5.58 of Defra Circular 1/09. This Circular replaces DoE Circular 2/93: see para 1.2.

20. The Magistrates can only divert a highway under s.116(1)(b) HA 1980 if they think that by doing so the highway will be made “*nearer or more commodious to the public*”. Most diversions to enable development tend to make routes longer rather than shorter and so the “*nearer*” part of the test is unlikely to be satisfied (unless the existing highway followed a particularly tortuous alignment). Whether a diverted route is “*more commodious to the public*” is a question of fact and will involve considerations of utility, convenience, roominess and spaciousness.¹⁷
21. Where a route is primarily used for leisure or recreational purposes, a diversion could be “*more commodious*” even when longer than the existing highway, if it was provided with attributes that would make it more enjoyable to use (for example greater width and so more segregation between different classes of user, a better surface,¹⁸ better passive surveillance, and possibly more enjoyable views).¹⁹ Given that the public includes persons with disabilities, providing a diverted route that would be more easily accessible to persons with impaired mobility (for example ramps and shallow gradients instead of steps or steep slopes) could be a factor that would help show that the diversion was more commodious to the public.
22. If a diversion is not possible then consideration should be given to stopping up under s.116(1)(a) HA 1980. This requires the applicant to show that the highway “*is unnecessary*”. Where a highway is in use this will be a difficult hurdle to overcome but the Divisional Court has accepted that when looking at this question regard can be had to whether “*the public are or are going to be provided with a reasonably suitable alternative way*”: Ramblers’ Association v Kent County Council (1990) 60 P&CR 464.

¹⁷ Gravesham Borough Council v Wilson & Straight [1983] JPL 607.

¹⁸ If the poor surface of the existing highway is attributable to a lack of maintenance, an improved surface on a diversion would not be a weighty factor if it was no more than effectively the result of putting the highway into repair.

¹⁹ NB: on the question of whether amenity considerations are an aspect of “*commodiousness*”, note the difference of wording between s.116(1)(b) and s.119(6)(a) HA 1980, as considered in R (Young) v SSEFRA [2002] EWHC 844 (Admin).

23. This is a more flexible test than the requirement in s.116(1)(b) HA 1980 for some form of improvement in the public's position ("*nearer or more commodious*"). A reasonably suitable alternative will not necessarily be better than the highway it is replacing. It also allows for alternative routes to be relied on that only use other existing highways rather than require the creation of new routes (and so they cannot be seen as diversions). Lastly, s.116(1)(a) HA 1980 makes it possible to consider the different categories of highway users differently. For example a vehicular highway may be used by vehicles only as a means of access to particular premises, by equestrians not at all, and by cyclists and pedestrians only for utilitarian journeys. If private rights of way are granted to maintain full vehicular access to the relevant premises, and a reasonably suitable alternative route is provided for the cyclists and pedestrians, the Magistrates may be able to conclude that the existing highway is unnecessary and can be stopped up.²⁰

24. One weakness in the use of s.116 HA 1980 is the fact that an application cannot be made if the relevant district council or the relevant parish council (or parish meeting if there is no parish council), having been notified of the proposal to make the application, refuse to give their consent.²¹ Thus, these bodies have a veto over the use of s.116 HA 1980. This requirement may make it difficult to rely on s.116 HA 1980 in cases where there is significant local opposition to the proposal because of the risk that the parish council will decide to support that opposition.²²

25. Where the circumstances which would justify the making of an order under s.116 HA 1980 are made out (i.e. it is shown that the highway is

²⁰ This situation arose in relation to Roman Way, Cowley, Oxford, where District Judge Loosley stopped up a vehicular highway and a bridleway which provided access to and across the BMW MINI factory at Plant Oxford on being satisfied that an alternative route would be provided for cyclists and pedestrians, and being unpersuaded that there was any genuine use by equestrians (2007, unreported).

²¹ S.116(3) HA 1980.

²² In the Cowley example, the area in question was "*unparished*" and the City Council did not object to the application.

“unnecessary” or that the diversion is “nearer or more commodious”) the Magistrates are not obliged to make the order. They still have a discretion to exercise and can decline to make an order.²³ Hence, the applicant (or more probably the developer) should be prepared to advance a positive case as to why the order should be made in the wider public interest (including the benefits of the proposed development) as well as demonstrating that the requirements of either s.116(1)(a) or s.116(1)(b) HA 1980 are met. Orders made under s.116 HA 1980 can be appealed on the merits to the Crown Court²⁴ and on a point of law to the High Court by case stated.

26. If the highway is a footpath, bridleway, or restricted byway, and there is no relevant planning permission which can be relied on, stopping up may be achievable under s.118 HA 1980 and a diversion may be achievable under s.119 HA 1980. These provisions involve the making of an order by the highway authority and its submission to the Secretary of State for confirmation if it is opposed.²⁵ Opposed orders may be considered at a public inquiry or hearing or (with the agreement of all parties) by the exchange of written representations. PINS prefers hearings or written representations wherever appropriate.²⁶

27. The PINS website includes details of all decisions made on s.118 and s.119 HA 1980 orders from February 2007 onwards and this is a useful source of information on how Inspectors are in practice applying the statutory tests they have to consider.

28. Diversion orders are easier to secure than extinguishment orders since there is generally less of an interference with the public’s rights. There is also explicit recognition of the landowner’s interests as part of the tests for making and confirming the order.

²³ Judicial opinion differs on the breadth of this discretion: cf the contrasting approaches in Maile v Manchester City Council (1997) 74 P&CR 443 and R (Spice) v Leeds City Council (supra).

²⁴ S.317 HA 1980.

²⁵ Unopposed orders can be confirmed by the order making authority.

²⁶ Para 1.9 of “*Guidance on Procedures for considering objections to Definitive Map and Public Path Orders in England*” (PINS, November 2008).

29. S.119(1) HA 1980 gives the highway authority the power to make a diversion order if it “*appears*” to that authority that, in the interests of the owner, lessee or occupier of land crossed by the highway, or in the interests of the public, it is expedient to divert the line of the highway, in whole or in part, onto other land. A diversion order will contain 2 elements: (i) the creation of a new highway which is requisite for effecting the diversion and (ii) the extinguishment of so much of the existing highway as is requisite for effecting the diversion.

30. A diversion order cannot be made so as to alter the termination point of a highway, unless the termination point is itself on a highway, and the new termination point is also on a highway and is “*substantially as convenient to the public*” as the original termination point. Thus, if the end of a highway is a cul de sac giving only access to private land, it cannot be diverted. If a highway ends on another highway, it can be diverted, either onto another point on the same highway or to a point on a different highway which is connected to that highway, but in either case only if the new termination point is substantially as convenient to the public as the original termination point. This will be a question of fact but will typically involve considering the relationship between the highway in question and the destinations that it enables its users to reach and its connectivity with the wider rights of way network.²⁷

31. A diversion order can only be confirmed either by the Secretary of State (in the case of an opposed order) or by the highway authority (in the case of an unopposed order) if they are “*satisfied*” that the same expediency test for making the order is made out in terms of the interests of the owners, occupiers or the public, and that the diverted highway “*will not be substantially less convenient to the public*”, and that confirmation is expedient having regard to the effect that (a) the

²⁷ In a decision made on 25 August 2010 an Inspector was satisfied that a diversion which altered the termination point of a footpath by some 250 metres met this test because the new termination point was closer to where a number of other footpaths converged. The order was not confirmed for other reasons: see Order Decision FPS/W2275/4/33.

diversion would have on public enjoyment of the highway as a whole, (b) the order would have on land served by the existing highway, (c) the new sections of highway would have on the land it crosses or which is held with that land, and (d) the order would have on any material provisions in the highway authority's Rights of Way Improvement Plan.

32. Whilst the 2 expediency tests in s.119(1) and s.119(6) HA 1980 clearly involve balancing a variety of factors, and negative impacts in some respects could be outweighed by positive impacts in others, the requirement in s.119(6) that the diverted highway "*will not be substantially less convenient to the public*" is an absolute test. If it is not satisfied, no diversion order can be made, whatever the other merits in its favour. As already noted, where a diversion is proposed in order to accommodate development it usually will involve creating a longer route than the existing highway. Usually the aim is to move a highway which cuts across a site to a more peripheral location on or near the site perimeter (so as to maximise the developable area) and this invariably results in a longer route. An increase in the length of a route is generally "*less convenient*" for users and it is a question of degree whether, when that increased distance is balanced with the other attributes of the diverted route (for example better width, surface, gradient, protection from the elements, and safety), the net result is "*substantially less convenient*" to the public.

33. If a diversion under s.119 HA 1980 is not achievable, then extinguishment needs to be considered. The highway authority can only make an extinguishment order under s.118 HA 1980 if it "*appears*" to it expedient that the highway should be stopped up "*on the ground that it is not needed for public use*".²⁸ This requirement only applies at the order making stage and the position only has to "*appear*" to the highway authority.²⁹ The test is therefore different to the "*unnecessary*" test which applies in s.116(1)(a) HA 1980. That test applies to the final

²⁸ S.118(1) HA 1980.

²⁹ R v SoSE ex parte Cheshire County Council [1991] JPL 537.

decision (and would have to be made out on the balance of probabilities) but allows the decision maker (the Magistrates) to take into account alternative routes which may be created in conjunction with the proposed stopping up and which would render the existing highway “unnecessary”.³⁰ There is no similar flexibility to have regard to alternative routes under s.118(1) HA 1980 unless the alternatives already exist at the time that the order is made.³¹

34. The test at the confirmation stage under s.118(2) HA 1980 does not revisit this initial question of whether it appears that the highway is not needed for public use. At the confirmation stage the decision maker (the Secretary of State or the highway authority as appropriate) is concerned with a wider question of expediency. The decision maker needs to be “satisfied” that it is expedient to extinguish the highway having regard to (a) the extent to which it appears that the highway would, apart from the order, be likely to be used by the public, (b) the effect that extinguishment would have on the land served by the highway (taking into account the compensation provisions), and (c) any material provisions in the Rights of Way Improvement Plan. The interests of the landowner, who may benefit from the extinguishment of public rights over his land, are only obliquely included in this exercise, as an aspect of considering the effect of extinguishment on the land served by the highway.

35. If the highway is in general use by the public (albeit that the highway authority has accepted that it is not needed for public use), it will be difficult to persuade the decision maker that the benefits that would accrue to the landowner’s land if it were not subject to highway rights render it expedient to extinguish that highway. Only a project of very obvious public benefit is likely to be able to begin to mount such an argument. However, even in such a case, the absence of planning

³⁰ Ramblers’ Association v Kent CC (supra).

³¹ Hertfordshire County Council v SSEFRA [2006] EWCA Civ 1718; albeit that this decision related to a confirmation of an order under s.118(2) HA 1980, the Court of Appeal discussed in some detail the proper operation of s.118(1) HA 1980.

permission would seriously weaken that claim of public benefit because of the uncertainty that would exist as to whether the benefit would ever be realised. Thus s.118 HA 1980 is unlikely to be a particularly fruitful way of removing a highway which is an obstacle to development.

STOPPING UP OR DIVERSION WITH A PLANNING PERMISSION

36. If the development project is sufficiently advanced that a planning application is a viable option then it is important not to leave the question of the effect of the development on any highways out of account in the planning stage simply because a separate statutory process will be involved to remove or relocate those highways. The more it can be shown that the effect on those highways was considered at the planning decision stage, including the effects on highway users and the evaluation of alternatives, in particular the options for any proposed diversions, the easier it will be at the stopping up/diversion order stage to persuade the decision maker to respect that planning decision and to give it significant weight.

37. In the particular context of footpaths and bridleways, planning decision makers are advised that they should take into account the effect of development on existing rights of way³² as a material planning consideration.³³ There is no reason why this approach is not equally valid for vehicular highways.³⁴ In addition, if an alternative route is being proposed to compensate for the intended loss of the highway, it may well be the case that elements of its provision would involve development requiring planning permission. This is generally better

³² With a glorious sense of unreality, local planning authorities are asked to take into account ways shown on the Definitive Map, ways shown in proposed Definitive Map Modification Orders, ways shown in applications for Definitive Map Modification Orders, the possible existence of unrecorded rights on ways which are shown on the Definitive Map, and “*any ways not yet recorded on the Definitive Map*”: para 7.4 of Defra Circular 1/09. The Circular is silent on how the LPA should ascertain the existence or “*possible existence*” of such unrecorded highway rights or how they should be weighed in the balance.

³³ Para 7.2 of Defra Circular 1/09.

³⁴ It is a curiosity that Circular 1/09 is issued only by Defra, is entitled “*Rights of Way Circular*”, and yet gives some advice on vehicular highways that are matters for the Secretary of State for Transport.

addressed as part of the overall development project than as a separate planning application so that it can be shown to be deliverable.

38. S.247 Town & Country Planning Act 1990 applies to all highways and authorises their stopping up or diversion where the decision maker is “satisfied” that it is “*necessary to do so in order to enable development to be carried out*” either in accordance with a planning permission granted under Part III TCPA 1990 or by a government department. This could in principle include GPDO permissions³⁵, although not apparently if the highway in question is a footpath or bridleway.³⁶ However, since GPDO permissions are not locationally specific it would be difficult in any event to show that the stopping up or diversion of a particular highway was “*necessary*” to enable such wide ranging permissions to be carried out.

39. Outside of Greater London, the only decision maker who can make a s.247 order is the Secretary of State. His policy is not to make such orders where the local planning authority has concurrent jurisdiction under s.257 TCPA 1990, other than in exceptional cases.³⁷ Essentially this policy therefore limits the use of s.247 TCPA 1990 to vehicular highways.

40. Where the power under s.247 TCPA 1990 is available, there are 2 elements to its exercise. First, the decision maker must be satisfied that the stopping up or diversion is “*necessary to enable the development to be carried out*” and, second, he must be persuaded on the merits that the stopping up or diversion should be authorised, having regard to all relevant considerations. The making of a s.247

³⁵ GPDO permissions are granted “*under*” Part III TCPA 1990 even though the actual grant is by the GPDO 1995 itself: s.59(1) TCPA 1990.

³⁶ Shepherd v SoSE [1998] JPL 215.

³⁷ Para 10.1 of Defra Circular 1/09. Where there is an appeal or a call in inquiry into the underlying planning application, the Secretary of State may be prepared to make a s.247 order for a non-vehicular highway.

order is not an inevitable consequence of satisfying the necessity test.³⁸

41. The necessity test entails examining the activities authorised by the planning permission (both operational development and changes of use) to see whether they are or are not compatible with the retention of highway rights over the highway in question. An activity which would involve an obstruction of a highway (for example the erection of a structure across the line of a highway or introducing a use such as outdoor storage or long term parking) would be incompatible with the highway. If that activity was expressly authorised in that location by the planning permission (preferably by being clearly shown on the approved plans) then the stopping up or diversion of the highway would be necessary to enable that development to be carried out.
42. If stopping up is sought but it is apparent that a diversion onto other land controlled by the developer and not affected by the development would be a realistic possibility, then the decision maker may well not be satisfied that the stopping up is necessary.
43. If the necessity test is met, then the discretionary test is applied, without very much guidance being available on the factors which are considered. It is clear that the existence of planning permission for the development is not determinative.³⁹ However, it is also clear that the decision maker is not involved in assessing (or re-assessing) the planning merits of the development proposal.⁴⁰ He may take into account matters which were not considered in the planning process (such as effects on individual businesses of removing vehicular access). He may also take into account matters which were considered in the planning process but which have a particular relevance to his

³⁸ K C Holdings (Rhyl) Ltd v SSW [1990] JPL 353.

³⁹ Para 7.11 of Defra Circular 1/09.

⁴⁰ Vasiliou v Secretary of State for Transport [1991] 2 All ER 77.

own responsibilities (such as highway safety).⁴¹ In essence, the primary focus of the decision maker should be on the effects that the stopping up or diversion will have on users of the highway or on land served by the highway. If there are adverse effects then these need to be balanced against the fact that planning permission has been granted. The more the adverse effects have already been identified and weighed in the balance in the planning process, the easier it will be to persuade the decision maker to respect that decision.

44. Where the highway in question is a footpath or bridleway, an application for its stopping up or diversion can be made under s.257 TCPA 1990. The application is made to the local planning authority.⁴² The tests for making an order are the same as for orders under s.247 TCPA 1990. The guidance is similarly somewhat opaque as to how the balance is to be struck but there is at least advice that there must be “*good reasons*” not to make an order once planning permission has been granted.⁴³ The guidance draws attention to a need to consider the disadvantages likely to arise to users of the highway or adjoining owners as a result of the stopping up or diversion of the highway and that this should be “*weighed against the advantages of the proposed order*”.⁴⁴ It is unclear whether this is an invitation to assess the advantages that would follow if the development was carried out, or whether it is limited to a general view that it is advantageous for any planning permission, once granted, to be carried out. Without opening up the planning merits for further scrutiny, it is difficult to see how it is possible for the decision maker to weigh anything more than that general advantage. If objectors to the order wish to challenge the advantages of the development being carried out (for example by suggesting that the development is not in the public interest, or its benefits are less than has been claimed), it is hard to see how the

⁴¹ R (Batchelor Enterprises Ltd) v SSETR [2001] EWCA Civ 1293.

⁴² Opposed orders have to be confirmed by the SoS; only unopposed orders can be confirmed by the LPA: s.259(1) TCPA 1990.

⁴³ Para 7.15 of Defra Circular 1/2009.

⁴⁴ Para 7.15 of C.1/2009.

decision maker is to resolve such objections without exploring the planning merits.

45. In practical terms, the developer seeking an order under either s.247 or s.257 TCPA 1990 should ensure that an assessment is carried out of the effect of the order on all categories of highway user, that an explanation is provided of the alternative ways of dealing with the highway, and how they were considered through the planning process, and that a broad outline is provided of the principal planning advantages of the authorised development. Wherever possible this should utilise the material that has been recognised in the grant of permission (for example in the officer report or in the summary reasons for the grant) rather than seeking to provide additional material that it could be said invites a reconsideration of the planning merits.

46. Reference should be made to the PINS decision letters for practical examples of the decision maker's approach. In a s.257 case decided in August 2010 an Inspector found that the stopping up of a footpath without replacement would disadvantage users by causing "*a loss of access to and enjoyment of the countryside*" but that this significant disadvantage would be outweighed by the public interest in allowing a new primary school to be built on the development site.⁴⁵

OTHER POWERS

47. This paper has considered the options open to a private sector developer or landowner. If the development project involves a public authority, potentially as a landowner or as a promoter or co-promoter of the proposal, then there are other powers available which can be considered. A local authority's powers to appropriate land that it owns for planning purposes can provide a means to address existing

⁴⁵ Order Decision FPS/Q2371/5/1 (2 August 2010).

footpaths, bridleways and restricted byways on that land.⁴⁶ In addition, if a local authority with compulsory purchase powers can be persuaded to exercise those powers there are yet further options for dealing with non-vehicular highway rights.⁴⁷

PRACTICAL CONSEQUENCES OF STOPPING UP/DIVERSION

48. Whether a highway is stopped up or diverted, all highway rights over its former alignment are extinguished, and the public no longer has a right to go onto the land. If the legal estate to the surface of the highway was vested in the highway authority, that legal estate is automatically extinguished as well. The land is then vested by operation of law (rather than by any disposition) in the owner of the subsoil.
49. When promoting a stopping up or diversion order it is therefore necessary to consider the practical consequences of these effects in terms of land ownership and rights of access, to ensure that the resulting state of affairs is likely to be satisfactory to both the decision maker and the developer.
50. Where the highway crosses land in single ownership, there is unlikely to be a problem because the owner of the subsoil will invariably be the owner of the surrounding land and if the development is to proceed that owner will need to be “*on board*” in any event. Where the highway divides two or more ownerships, consideration will need to be given to whether the maxim “*ad medium filum viae*” applies to make each adjoining owner the owner of the subsoil upto the centre line of the highway (and so the recipient of half of the land comprising the former highway when highway rights are extinguished). The conveyancing documents or material relating to the origin of the highway may provide information that displaces this maxim.⁴⁸

⁴⁶ S.258 TCPA 1990.

⁴⁷ S.32 Acquisition of Land Act 1981.

⁴⁸ See for example Pardoe v Pennington (1996) 75 P&CR 264.

51. For example, if the highway derives from an inclosure or tithe award, it may be that the commissioners laid out new highways on land belonging to the lord of the manor and awarded parcels either side to different owners. Would the maxim apply to extend the award to the subsoil beneath the highway or would it remain with the lord of the manor? If the highway was subsequently extinguished could the lord of the manor claim that land (and so a very valuable ransom strip)?
52. Consideration should also be given to whether any private rights of way exist over the former highway. A route that has become a highway through deemed dedication from a requisite period of public use, rather than by an express act of creation, may have been subject to pre-existing private rights of way (for example giving access to adjoining land). Those private rights would be wholly unaffected by any stopping up or diversion of the highway and would therefore remain in existence. They would need to be accommodated or acquired if the land was to be developed.
53. Where a highway provides a means of access to land, its stopping up or diversion is likely to attract an objection from the owner of that land unless suitable arrangements are made for the grant of private rights to maintain access (perhaps on a different route). The decision maker considering whether to stop up or divert the highway will need to be satisfied with those arrangements if the objection remains outstanding.
54. If any of the public utility companies have equipment within the highway, consideration will also need to be given as to whether it is to be retained (with private rights granted for access) or relocated.

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