

Rights of way and development

Plans to build on land which is crossed by public rights of way often cause concern because of fears that the paths will be lost or changed beyond recognition. But there are legal procedures which apply when rights of way are affected by development.

Development is defined in the Town and Country Planning Act 1990 as “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land”. The Act says that, with certain exceptions, planning permission must be obtained before development is carried out.

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Planning permission

Most applications for planning permission are made to the district council if there is one, or otherwise to the unitary authority. The main exceptions are applications for mineral extraction and waste management which are decided by the county council where counties still exist, or by the park authority within national parks.

After an application for planning permission has been made it is listed on the local authority's planning register, which is open to the general public, often on the authority's website.

The authority sends the application to other relevant councils for their comments, for example to county and parish councils, and sometimes also consults local groups who carry out regular activities in the area, such as Ramblers groups. Members of the public are only given a short period (up to 21 days) to comment because the Government expects planning authorities to decide applications within eight weeks.

The Department for Communities and Local Government (DCLG) has **guidance** (refer to section 48.d) for local authorities on the validation of planning applications. The guidance states that applications for full

planning permission should be accompanied by a plan of the proposed development showing all rights of way crossing or adjoining the site.

If an application for planning permission affects a right of way then a special rule applies and the application must be advertised at the proposed site and in a local paper*. Again, a notice has to be displayed for 21 days. This is an important way path users can find out about possible threats to the path network and make comments about them.

Protecting rights of way when development is proposed

To protect a public right of way over a site proposed for development it's important that the paths at risk are given proper consideration before the decision on the planning application is taken, and that the paths are kept open and unobstructed until the legal procedures which authorise the closure or diversion of a path (if planning permission is granted) have been carried out.

There is important Government advice on this subject in section 7 of Defra's ***Rights of way circular (1/09)***** which says that the effect that a proposed development will have on a right of way must be considered by planning authorities when deciding whether or not to approve an application for planning permission.

This means that, while the existence of a right of way across the site of a proposed development won't automatically mean an application is rejected, the fact that it is there must be taken into account by the officer or committee which decides the application.

This is why it's very important that any concerns about paths, alongside any concerns about the development as a whole, are made, in writing, to the planning authority when the application is advertised.

Planning applications are approved or rejected by a local authority with reference to its Local Plan (which sets planning policies in a local authority area) which will have been prepared following extensive local consultation. Local Plans also have to be developed within the ***National Planning Policy Framework*** (the NPPF) which sets out the government's economic, environmental and social planning policies for England.

There are a number of useful references to pedestrian access and

paths in the NPPF and it's a good idea to get involved with the preparation of your Local Plan to make sure it contains policies which seek to protect paths and improve pedestrian routes.

Paragraph 35 of the NPPF says that “developments should be located and designed where practical to ... create safe and secure layouts which minimise conflicts between traffic and cyclists or pedestrians, avoiding street clutter and where appropriate creating home zones”.

Paragraph 69 of the NPPF says that “Planning policies and decisions ... should aim to achieve places which promote ... safe and accessible developments, containing clear and legible pedestrian routes, and high quality public space, which encourage the active and continual use of public areas.”

If included in Local Plans these policies can be very important when objecting to planning applications.

We believe that in most cases rights of way can be incorporated into new developments as safe and convenient features. It's often possible to keep a distinct path separate from the pavements alongside roads, whether on its existing route or through or around open spaces or woodland or by water features.

Paragraph 7.8 of Defra circular 1/09 firmly supports this view by saying that any alternative route should avoid the use of estate roads wherever possible, with preference given to the use of made up estate paths through landscaped or open space areas, away from vehicle traffic.

There is further helpful advice about providing ‘green infrastructure’ – a term which includes public rights of way and other paths – in **guidance** produced by the Town and County Planning Association and the Wildlife Trusts .

The closure and diversion of rights of way affected by development

Planning permission is a right to carry out development, not to interfere with, move or block a right of way. If the planning authority is satisfied that it wouldn't be possible for a development to go ahead as described in the planning application unless any paths on the site (footpaths, bridleways or restricted byways) are closed or moved, the authority can make an order to bring about the change.

The public has the right to object to any order which proposes to close or move a right of way to allow a development to go ahead. These orders are made under section 257 of the Town and Country Planning Act 1990. The path order procedure is set out in our **path order flow chart**.

Objections to such orders have to be on the grounds that the diversion or closure of a right of way isn't necessary for development to take place. Even though a proposed development may affect the line of a right of way, the order will not necessarily be confirmed.

It might, for example, be possible to divert a path instead of closing it, and there are court judgments which allow wider considerations to be taken into account, for example, the effect that the order would have on those entitled to use the path which would be lost if it were to close.

Previously such orders couldn't be made until planning permission had been granted, but a change in the law in 2013 means that an order can now be made and considered at the same time as the relevant planning application and before the planning permission is granted, although an order can't be confirmed before planning permission is granted.

It's hoped that this change will mean that rights of way are given more thorough consideration during the decision making process for the planning application. It's still possible for orders to close or divert a path to be made after planning permission has been granted, in which case any objection to the path order is not an excuse to object again to the development itself.

Orders made by the Secretary of State

The Secretary of State for Transport also has the power to make orders affecting rights of way for reasons similar to those available to local authorities. The Secretary of State's powers extend to the closure or diversion of byways open to all traffic (BOATs) and ordinary roads. The Secretary of State rarely exercises these powers in relation to footpaths, bridleways and restricted byways.

How orders to close or divert rights of way come into effect

An order which closes a right of way under the Town and Country Planning Act 1990 is normally written in such a way that the change

comes into effect as soon as the order is confirmed, regardless of whether or not the development ever takes place.

Orders which divert or create new rights of way should be drafted to come into operation not on confirmation of the order, but when the planning authority certifies that the new route has been properly created.

This gives the developer an incentive to get any new routes ready for use, and prevents the order from taking effect if for any reason the development doesn't go ahead as planned. It's the job of the developer to get the new path ready for the public to use, not the planning authority.

If an order comes into operation other than on the date on which it was confirmed, or after a certain period of time specified in the order, the authority has to advertise that the order has come into operation in a local paper.

Development, in so far as it impacts any rights of way on a site, mustn't be started (and the paths must be kept open for public use) until any orders to close or divert the paths have come into effect.

A developer who interferes with a right of way before it has been formally closed or moved could be prosecuted. Any such interference with a public right of way should be reported to both the planning authority and the highway authority (where they're separate bodies).

Occasionally a local authority will agree to facilitate development work from taking place by making a temporary traffic regulation to stop the public from using a path across a development site before any permanent orders to close or divert the path have been made and confirmed.

This may be done for safety reasons but should not pre-empt the confirmation of an order by allowing the path to be destroyed as a local authority can't guarantee that an order will be confirmed.

Further reading

- ***Rights Of Way: A Guide to Law and Practice***, John Riddall and John Trevelyan, Open Spaces Society and the Ramblers' Association, 2007

***Article 13 of the Town and Country Planning (Development Management**

Procedure) (England) Order 2010. SI 2010 No 2184 or Article 12 of The Town and Country Planning (Development Management Procedure) (Wales) Order 2012. SI 2012 No 801.

****In Wales, the same information is provided in Annex D to DoE Circular 2/93 (Welsh Office 5/93).**

- See more at: <http://www.ramblers.org.uk/go-walking/the-expert-view/rights-of-way-and-access-issues/rights-of-way-and-development.aspx#sthash.BcwuitZ2.dpuf>