

**Procedure** for  
**Public Path Diversions**  
under **Section 119**  
and  
**Public Path**  
**Extinguishments**  
under **Section 118**  
**Highways Act 1980**

October 2010



# **Application pack for Public Path Orders Highways Act 1980**

## **Diversions under Section 119**

**and**

## **Extinguishments under Section 118**

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# Advice note for applicants of public path Orders

## Section 119 Diversion and Section 118 Extinguishment Highways Act 1980

### Purpose

This is an advice note for landowners, tenants, occupiers and applicants who are considering making an application to divert or extinguish a public footpath, bridleway, or restricted byway.

### Background

Public Rights of Way provide an essential means of access to the countryside for travel and recreational purposes and form an integral functional and sustainable link to shops, services and schools in urban and semi-urban areas.

Public Rights of Way are recorded on the Definitive Map of Public Rights of Way, which is a statutory document. This document records footpaths, bridleways byways and restricted byways but not footways/pavements or cycle tracks. Footpaths are for use by walkers, bridleways by walkers, horse riders and pedal cyclists; and byways being ways open to all vehicular traffic (although mainly used as public paths) plus aforementioned users. A restricted byway is a highway over which the public have a right of way on foot, horseback but not a right of way for mechanically propelled vehicles.

Sections 118 and 119 Highways 1980 make provision to extinguish or divert footpaths, bridleways and restricted byways (but not byways) where such proposals are in the interests of the owner, occupier or lessee of the land over which the existing and proposed routes are aligned, with or without an interest to the public at large.

Alteration to the legal alignment of a footpath, bridleway or restricted byway for this purpose can only be effected by a legal order, which must pass through an extensive period of public notification. Such requirements apply regardless of how minor the proposed alteration may be.

Given the nature of the statutory procedures to be followed and the extensive consultation that follows the submission of any diversion proposal to the County Council as the order making authority, the Council cannot guarantee the successful outcome of any Public Path Order.

In those cases where a published order attracts objections which cannot be resolved by the applicant at the local level, the order making authority must refer to the Department for Environment, Food and Rural Affairs (DEFRA) for determination.

As a general observation, it is always advisable to consider the minimum movement of a path required to effect the desired change, so that points of access are as convenient as the existing route and the alternative line is not substantially less convenient to the public.

Application is usually made by the person(s) who would benefit from the application i.e. the owner, occupier or lessee of the land over which the current path is routed. Consent of the owner over whose land the proposed diversion is to be aligned (if this owner is different from the applicant) is a prerequisite to any proposal.

The processing of a public path order can incur considerable costs for the order making authority both in terms of administrative officer time and advertising costs incurred due to the statutory requirements, (page 8 ‘charging policy’ refers).

**Please note:**

For applications relating to Public Path Orders at railway crossings under Section 118A or Section 119A Highways Act 1980 or for Public Path Orders for school security under Section 118B of Section 119B Highways Act 1980 please contact the Essex County Council direct. (See contact details on Page 9 of this advice notice).

**Development**

Applications regarding public path orders affected by development under the Town and Country Planning Act 1990 are processed by respective local planning authorities except where the development relates to mineral extraction and waste in which case Essex County Council as the Order making authority will process the application. The overall procedure is similar to the Highways Act Orders and reference should be made to the ‘Development and Public Rights of Way’ advice note (available on request or viewable on the Essex County Council Public Rights of Way website).

## **Explanation of process and factors to be considered prior to submission**

### **Policy**

Essex County Council approved its Rights of Way Improvement Plan in July 2009, the section of the document entitled ‘Extent of the Network’ deals with issues associated with Public Path Orders.

Essex County Council has powers to process applications for Public Path Orders under the Highways Act 1980. The County Council using its discretion will consider the merits of each application, both in terms of the users of the public path network and the landowner and/or interested parties.

Essex County Council are processing all such orders in the County Districts and Boroughs apart from Rochford and the Unitary Authorities of Southend and Thurrock, where these respective councils continue to be the relevant order making authorities.

Currently the County Council has a list of proposed public path orders and a register is being established to manage all new applications in accordance with the date received, unless there are exceptional circumstances. The current wait for a new application is approximately 2 years, although this is expected to reduce as further progress is made with the works programme.

The Council will provide an appropriate level of advice following receipt of an application, such advice being chargeable officer time. Only minimal advice can be given at the pre-application stage, which is non chargeable.

Charges for Public Path Orders include; staff time, advertising fees and works on the ground costs (if required), all of which are clearly itemised at the staged invoicing periods.

## **Applicant requirements/responsibilities**

Applicants for Public Path Orders will be expected to:

- agree by means of completing the application form to pay all costs associated with the making and confirming of an order. Such an application form is to be regarded as a legally binding contract. (Application forms are available as separate documents from the Essex County Council website by following the 'Travelling/Public Rights of Way' links)
- pay all costs and agree all works required to implement the diverted route on the ground
- ensure the on site welfare of any consultees and Essex County Council officers during site visits and ensure all affected landowners, owners and tenants are aware of the possible impending site visits by consultees
- mark out as far as possible the proposed route on the ground at pre-order consultation stage
- ensure the current legal line is free of obstructions unless there are exceptional circumstances. In such cases, the applicant should ensure that there is a clear convenient way round the obstruction

## **Procedures**

Thorough preparation on the part of the applicant is essential prior to submitting an application. The applicant will be responsible for the following information:

- establishing an acceptable proposal
- supplying a plan clearly showing the proposed diversion and where it connects to the existing route
- obtaining full written agreement from other affected landowners
- supplying evidence of title of ownership of land crossed by existing and proposed routes

## Stage 1 – Pre order making

### County Council

- the County Council can provide preliminary advice on request from an applicant
- receive the fully completed application form with application plan
- application to be acknowledged within 5 working days. If the application form is incomplete return to applicant with advisory notes
- applicant advised of the approximate processing date
- at commencement of processing and on receipt of deposit, determine feasibility of proposal; arrange site inspection as required, determine and agree extent of works required; produce Order plan for applicant approval
- on receipt of confirmation to proceed from applicant, extent of highway boundary and land ownership to be verified, conduct informal consultations with consultees and consider responses after the 21 day consultation period; advise the applicant of outcome
- recommend (if any) modifications subsequent to the informal consultation period

### Applicant

On being advised of agreement by Essex County Council to progress with the proposal, applicant to:

- complete relevant application form
- provide deposit
- supply any third party written landowner agreements
- provide land title ownership documents

Applicant to respond to any additional information requested.

## Stage 2 – Order Making

### County Council

- prepare authority to make formal Order
- post notice of making of Order on site and in a local newspaper
- invoice applicant for all costs incurred to date in respect of making of the Order
- allow 28 days for representations or objections to be made

## Opposed Order

If objections to an order are received, the following procedure will apply:

- objections are considered by Definitive Map Officer and discussed with applicant
- if objections are considered not to relate to the statutory tests for making or confirming the Order negotiations with objector(s) to commence
- if objections are considered to raise valid issues related to the statutory tests for making or confirming the order, then the Definitive Map Service may recommend;
  1. reviewing the proposal
  2. submitting to the Secretary of State - Planning Inspectorate (PINS) for determination
  3. or, in some cases withdrawing the proposal
- if the order is referred to PINS, the final decision will be made by an independent inspector by way of a written representation procedure, a Hearing or a full Public Inquiry
- the decision of the Inspector is final and binding unless overturned by a Court within a specified period

Note 1. Essex County Council's costs incurred when an order is submitted to the Secretary State cannot be recharged to the applicant.

Note 2. The applicant is required to defend the case at a Hearing or Public Inquiry, which will include appearing at these proceedings to justify the proposal, with any legal representation appointed by the applicant derayed at their own expense.

## Unopposed Order

- if no objections or representations are received or any received have been withdrawn, Essex County Council are able to confirm the order as unopposed and will progress to Stage 3

## Stage 3 – Confirmation of Order

- Essex County Council will post a notice of confirmation on site and in a local newspaper
- applicant will be advised to complete any works as agreed to provide the new route to a condition appropriate with its status
- the new route will be inspected by a Public Rights of Way Officer in order to satisfy the route is provided as specified in the Order
- if the works are not satisfactorily completed, the County Council will carry out the works and recharge applicant
- applicant invoiced for any outstanding costs
- minimum period of 6 weeks allowed for procedural challenge to the High Court from date of confirmation
- Order completed, the Definitive Map and Statement to be amended to show changes, and Ordnance Survey informed

# Factors to be considered prior to making an application

## Section 119 Diversion

Prior to submitting an application, the proposed diversion needs to satisfy the following criteria:

### **Condition**

Minimum restriction in terms of limitations on the new route should always be considered when planning a diversion route. Provision of gaps in fence lines and hedgerows to accommodate the new route will normally suffice, but where a structure is deemed absolutely essential, gates are preferable to stiles and other structures. Such limitations can be included in the schedule of the diversion order, but may constitute a point of objection when the order is advertised.

### **Enjoyment and convenience**

The proposed new route should not unreasonably lengthen the path other than where it is in the interests of an overall improvement to the local network. The proposed new route should avoid introducing substantially increased walking distances. It should retain or improve a connection with another public right of way to reduce the distance travelled along metalled carriageways and not be substantially less convenient. It should be considered expedient to divert the path having regard to public enjoyment of the path or way as a whole.

### **Width**

The proposed new route should have a minimum width of 2m for a footpath 3m for a bridleway, and not less than 4m for a restricted byway, dependent upon historical width of the existing route.

### **Landscape**

The proposed new route should not result in a lower quality or diversity of views for the path users. Where a path is being diverted for development purposes, the new route should not follow estate roads/existing roads as this would effectively amount to an extinguishment of the path.

### **Features of Interest**

Other than in exceptional circumstances, the proposed new route should not remove paths from significant features of interest, natural or man-made.

### **Status**

There will be no downgrading of the existing rights other than where it is in the interests of an overall improvement to the local network.

### **Financial**

The proposed new route should not result in significant additional maintenance costs. Applicants may be required to enter into a maintenance agreement with Essex County Council.

### **Safety**

The proposed new route must not subject users to any potential dangers or hazards. It should not introduce conditions (for example darkness, narrowness, poor visibility, and hiding places) likely to encourage antisocial or criminal behaviour against users, nor should it create a perception that this may be the case.

### **Needs of all users**

Proposed new routes should include features to improve access for the mobility impaired user. For example gates rather than stiles, ramps rather than steps. Authority for the erection of stiles/steps will be given only in exceptional circumstances.



## Section 118 Extinguishment

Section 118 Highways Act 1980 can only be used to extinguish Footpaths, Bridleways and Restricted Byways (not Byways).

The requirements of Section 118 that must be satisfied are:

- i) the extent, if any, that it appears that the path would, apart from the order, be likely to be used by the public. When considering likely use, temporary obstructions to the current path must be disregarded
- ii) the effect which the extinguishment would have in respect of land served by the path
- iii) any material provisions of a Rights of Way Improvement Plan prepared by a local highway authority whose area includes land over which the order would extinguish a public right of way

The statutory tests for extinguishment are very difficult to meet, therefore a diversion would normally be favoured and only in exceptional circumstances would the County Council support the making of a standalone extinguishment order.

One of the primary functions of the Definitive Map is to protect public rights and matters of extinguishment are contrary to this key responsibility. Accordingly it is expected an alternative route will be provided by a Creation Agreement under S25 of the same above mentioned Act to counter the extinguishments of routes that are no longer used and do not meet the current or likely future needs of the public.

### Legal guidance

This note draws on UK Public General Acts, Statutory Instruments, Government Circulars, and County Council policy:

- o Highways Act 1980
- o The Countryside and Rights of Way Act 2000
- o The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (SI No. 407)
- o The Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 (SI No. 1978)
- o DoE Circular 11/96, Recovery of Costs for Public Path and Rail Crossing Orders - Amendment Regulations
- o DEFRA Rights of Way Circular (1/09) Version 2
- o Essex County Council charging policy for processing of Public Path Orders under Section 119 Highways Act 1980

## Charging policy

The County Council is required to maximise cost recovery in all areas of work.

In respect of public path Orders, under Statutory Instruments 1993 No. 407 and 1996 No. 1978 and Government Circulars 11/96 and (1/09) the Order Making Authority has the power to charge in respect of the making and confirmation of public path orders. Authorities may charge for the administrative costs incurred and the amount charged must not exceed the costs actually expended. In the case of opposed orders, a charge may be made only for the costs up to the point where the order is submitted to the Secretary of State and, where such orders are subsequently confirmed, in advertising that confirmation.

In general terms the County Council seek to recover approximately 95% of all costs associated where an Order is unopposed.

A deposit of £250 will be requested from the applicant prior to the commencement of any work on the processing of an application, other than in extremely exceptional circumstances.

An order will not be progressed to the next stage until the work already undertaken is paid for by the applicant upon receipt of an invoice.

Prompt payment at all stages will be expected.

The exact time spent and the amount charged will be carefully recorded, these costs include :

### **Where an order is unopposed:**

- Definitive Map Service Officer time
- legal executive expenses
- publication costs
- works which are required to bring the new route into being (if appropriate)

### **Where the order is opposed:**

- Definitive Map Service Officer time
- legal executive expenses
- publication costs
- in addition the applicant may incur the expense of any legal or professional representation arranged by themselves for a hearing or public inquiry

The overall cost for processing an individual typical order which does not receive objection is approximately £2000 - £3000 based on 2010 prices.

## Contact details

Enquiries should be addressed to:

### By post

The Definitive Map Service  
Environment Sustainability and Highways  
Essex County Council  
E3, County Hall  
Chelmsford  
Essex CM1 1QH

### By telephone:

Garry White	Definitive Map Manager	(01245) 437563
Laurie Page	Definitive Map Officer	(01245) 437112
Ann Tompkins	Definitive Map Officer	(01245) 437197 (Monday – Wednesdays only)
Andrew Ritchings	Definitive Map Officer	(01245) 437112 (Wednesday – Fridays only)

Enquiries relating to Public Path Orders in the Rochford district and the Unitary Authorities of Southend and Thurrock should be addressed to the following:

### Rochford District Council

Council Offices, South Street  
Rochford, Essex. SS4 1BW  
Angela Law (Legal Department) 01702 546366  
[www.rochford.gov.uk](http://www.rochford.gov.uk)

### Southend Unitary Authority

Southend-on-sea Borough Council  
Civic Centre, Vicotria Avenue,  
Southend-on-sea, Essex. SS2 6ER  
Nick Burley 01702 215000  
[www.southend.gov.uk](http://www.southend.gov.uk)

### Thurrock Unitary Authority

Thurrock Borough Council  
Civic Offices, New Road,  
Grays, Essex. RM17 6SL  
Margaret Willson 01375 652652  
[www.thurrock.gov.uk](http://www.thurrock.gov.uk)