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## Public Rights of Way

Consultation on implementation of the right to apply for orders to extinguish and divert public rights of way, and associated rights of appeal

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## **Executive Summary**

The consultation paper seeks views on a proposed approach to commencing new statutory rights of application and appeal in connection with making changes to the public rights of way network. The new rights were introduced by the Countryside and Rights of Way Act 2000 (which inserted new provisions into the Highways Act 1980), and were in recognition of the difficulties that land managers can encounter in persuading authorities to use their discretionary order-making powers.

The right to apply would enable owners, lessees and occupiers of land used for agriculture, forestry or for the breeding or keeping of horses, and school proprietors, to apply to a local authority (or National Park authority) for a public path or special order to permanently extinguish or divert a public right of way.

The rights to appeal would enable applicants to appeal to the Secretary of State at two stages in the decision-making process: firstly, if a local authority refuses to make the order applied for, and secondly where (after having made an order) the authority refuses to confirm it or to submit it to the Secretary of State. Making an appeal will ensure that the applicant's reasons, and any objections, are considered at a public inquiry, hearing or through an exchange of written representations.

The new provisions contain two other significant features - the level of charges would be prescribed by the Secretary of State in the regulations, and if authorities are slow to deal with an application or an order, the Secretary of State could be asked to direct the authority to deal with it within a specified time.

The new rights provide no guarantee that applicants would be able to obtain an order. However, an order should usually be forthcoming provided all the relevant statutory criteria and requirements are met (including those relating, as appropriate, to the convenience and enjoyment of the public, payment of charges and agreement to defray or contribute towards certain costs and expenses).

The consultation paper seeks views on the proposed approach to implementing the new rights through the making of regulations, including the level of prescribed charges to be paid by applicants.

An assessment of the likely impacts, costs, risks and benefits has been carried out. The results are set out in the partial Regulatory Impact Assessment (partial RIA) which accompanies the consultation paper (Annex F). Views are sought on whether the partial RIA is a realistic assessment upon which decisions can be taken. Since it shows that there might be only marginal net benefits for applicants and, at the national level, a significant dis-benefit, the consultation also seeks views on whether the legislation relating to the new rights should be commenced in present form, repealed or amended.

## 1. Introduction

1.1 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 are introduced by section 57 and Schedule 6 of the Countryside and Rights of Way Act 2000 (the “CROW Act”). This inserts new sections 118ZA, 118C, 119ZA, 119C, 121A, 121C, 121D and 121E (and consequential amendments) into the Highways Act 1980. The legislation also enables the Secretary of State to prescribe, by regulation, procedural matters to provide clarity in administration of the new rights, as well as to prescribe the charges to be paid by applicants.

1.2 This consultation paper sets out a proposed approach to commencing the new rights. Sections 2 and 3 provide background information; Section 4 outlines proposed application procedures; section 5 outlines proposed appeal procedures; Section 6 looks at the issue of prescribed charges; and Section 7 deals with implementation. Section 7 also invites views on whether the legislation should be commenced in its current form, repealed, or amended. Six annexes are included, and the attention of readers is particularly drawn to the partial Regulatory Impact Assessment (partial RIA) presented at **Annex F**.

1.3 The partial RIA estimates that the total annual cost of the application and appeals system is between £2.2 million and £8.6 million, depending on the volume of applications and other variables. Views are sought on whether the partial RIA is a realistic assessment upon which decisions can be taken, and on ways it might be improved.

1.4 Advice on how to respond to this consultation can be found in **Annex A**. The consultation closing date is **31 August 2007**. All responses will be considered in deciding how to proceed.

1.5 Further information is available on the Defra website at <http://www.defra.gov.uk/corporate/consult/row-rights/index.htm>.

1.6 Defra intends to publish non-statutory guidance (for order making authorities and applicants) to accompany the regulations. This will set out how the application and appeals procedures operate in detail.

1.7 This consultation relates to England only. The National Assembly for Wales has devolved responsibility for implementing these provisions in Wales.

## 2. Background

### Present position

2.1 Owners, lessees and occupiers of land, and school proprietors, who seek to permanently extinguish (stop-up) or divert a public right of way currently need to persuade an authority with the necessary powers to make a public path order or special order.<sup>1</sup> The bodies with order-making powers (which could be affected by the new right to apply) are:

- local highway authorities;
- district or borough councils;
- National Park authorities, and;
- the Secretary of State.

2.2 Except for the Secretary of State, these bodies are collectively referred to as 'authorities' in this document. In those parts of the country with two-tier authorities, or a National Park authority, any or each of the authorities can be asked to make an order.

2.3 Owners, lessees and occupiers may want to divert or extinguish a right of way for a variety of reasons. The existence of a right of way may affect or constrain land management practices, thereby increasing costs and reducing income from the land, or there may be concerns about security and the risk of intentional or unintentional damage to land or property.

2.4 School proprietors may wish to divert or extinguish a right of way because of concerns about public access to the school grounds, and the risks which this poses to pupils and staff. Management responsibility for school security, including rights of way, is usually shared between the local education authority (in the case of community and voluntary controlled schools), the school's governing body and the headteacher.

2.5 Currently, when a request (often called an 'application') is received, it is for the authority to decide whether it is prepared to make an order. Order-making powers are discretionary and the authority is therefore under no obligation to make an order, even where the applicant has good reasons for requesting one. If the authority refuses to make an order, there is currently no right of appeal and there is little that an applicant can do about it.

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<sup>1</sup> Either a public path extinguishment order (under section 118 of the Highways Act 1980), a public path diversion order (under section 119), a special extinguishment order (under section 118B), or a special diversion order (under section 119(B)). Alternatively, anyone is free to request that an appropriate authority (e.g. a highway authority) apply to a magistrates' court for an order under section 116 of the Highways Act 1980 (although this procedure is less frequently used).

2.6 The attitude of authorities towards the use of their powers vary widely. Some authorities will only make orders in exceptional circumstances or refuse to make an order unless there is a clear public benefit. Even when an authority is prepared to make an order, applicants can experience significant delays and wide variations in cost. It was in response to these difficulties that the CROW Act included provision for a statutory right to apply, and associated rights of appeal.

2.7 The Government believes that the rights of way network needs to continue to evolve over time and in ways which take account of the needs of land managers as well as the wider public interest.

### ***Scope of the new rights***

2.8 The new rights would enable applicants to:-

- **apply to an authority**, for an order under the Highways Act 1980 to extinguish or divert certain rights of way which cross their land;
- **ask the Secretary of State to direct** the authority to (i) determine an application and (ii) to decide what action to take on an order within a specified period; and
- **appeal to the Secretary of State** if a local authority refuses (i) to make an order, (ii) to confirm an unopposed order, or (iii) to submit an opposed order to the Secretary of State for determination

2.9 The primary legislation limits the new rights to:-

- **owners, lessees and occupiers** of land<sup>2</sup> used for **agriculture**<sup>3</sup>, **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

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<sup>2</sup> Section 205 of the Law of Property Act 1925 defines "land" as including "land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and any other corporeal hereditaments; also a manor, an advowson, and a rent, and other incorporeal hereditaments and an easement, right, privilege, or benefit in, over or derived from land..." (Incorporeal hereditaments - or components - are intangible property rights) This definition does not include water, but section 329 of the Highways Act 1981 stipulates that "land" "includes land covered by water and any interest or right in, over or under land;" This is also consistent with how the Interpretation Act 1978 defines land.

<sup>3</sup> Section 329 of the Highways Act 1980 stipulates that "agriculture" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.

- **proprietors of schools**, in respect of special extinguishment orders and special diversion orders made under sections 118B and 119B of the Highways Act 1980.<sup>4</sup>
- **orders under the Highways Act 1980** (i.e. not orders under the Town and Country Planning Act 1990).

2.10 The new rights will not extend to other categories of land (e.g. land used as a domestic garden). However, anyone can request that an authority (or the Secretary of State) use their discretionary powers to make an order under the Highways Act 1980, or under the Town and Country Planning Act 1990 as appropriate.

2.11 Those having a right to apply would continue to be able to request that an authority use its discretionary powers to make an order, as they can now, but if the authority refused there will be no right of appeal.

2.12 Authorities remain free, at any time, to use their discretionary powers to make orders independently of the right to apply. In doing so authorities can levy charges in accordance with the Local Authorities (Recovery of Costs for Public Path Orders) Regulations.<sup>5</sup> In such cases there will be no rights of appeal, and the Secretary of State will have no powers of direction. Nevertheless, depending on the circumstances, a landowner and authority might sometimes agree that this is a more convenient, cost-effective and mutually beneficial way to proceed (instead of exercising a statutory right to apply).

### **Determination of applications and appeals**

2.13 It should be noted that authorities would have less discretion over whether to accept applications made under these provisions (i.e. they will have to accept, consider and issue a decision in respect of applications), but once a valid application is received the statutory criteria (set out in the Highways Act 1980) for deciding whether to make an order remain unchanged. Authorities would be required to state their reasons for refusing an application in writing.

### **The 'expediency test' and local authority discretion**

2.14 The 'expediency test' (contained in sections 118(1), 118B(1), 119(1) and 119B(1) of the Highways Act) would apply to the determination of all applications. This means that authorities could make an extinguishment order where it appears expedient to do so because the path or way is not needed for public use, or a

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<sup>4</sup> In 2003 local highway authorities were given powers, under sections 118B and 119B of the Highways Act 1980, to extinguish or divert certain highways which cross school land in order to protect pupils or staff from violence, or threat of violence; harassment; alarm or distress arising from unlawful activity; or any other risk to their health or safety arising from such activity. Sections 118C and 119C of the Highways Act 1980 will complement these powers by giving school proprietors a statutory right to apply to a highway authority for an order.

<sup>5</sup> SI 1993/407.

diversion order where it would be expedient to do so in the interests of the owner, lessee or occupier of the land, or of the public. For a special order, it would need to be expedient for the purposes of protecting the pupils or staff. If these criteria are not met then an application would have to be refused.

2.15 Authorities would therefore have to exercise discretion in deciding whether or not it would be expedient to make the order applied for. However, refusing to make an order on the basis of a general policy to refuse requests for orders, or in order to avoid costs for the local authority, or because the landowner is responsible for an illegal obstruction, are unlikely to constitute reasonable grounds for refusal.

2.16 Where an authority refuses to make an order, the applicant could appeal to the Secretary of State, who (in accordance with section 121D) would have to 'draft' an order **without** considering (at this stage) whether an order would be expedient.<sup>6</sup> The draft order will then be publicised and any objections will be considered through an exchange of written representations, a hearing or a public inquiry.

### **Confirmation of orders**

2.17 An authority cannot confirm an unopposed order, and the Secretary of State cannot make/confirm an order, unless all the criteria in sections 118, 118B, 119 and 119B are met, such as (where appropriate): whether it would be expedient for the order to be made/confirmed having regard to public convenience and enjoyment, to any material provisions of the Rights of Way Improvement Plan; and subject to any required agreement to defray or contribute towards certain costs and expenses. The statutory criteria that apply to the making or confirmation of orders would not be changed by the rights to apply and appeal.

2.18 The new rights provide no guarantee that applicants would be able to obtain an order, but will ensure that their reasons for wanting an order (and any objections made) are properly considered. An order should usually be forthcoming provided all the relevant statutory criteria and requirements are met.

### **Concurrent orders**

2.19 Section 118(5) and paragraph 3(2) of Schedule 6 allow for extinguishment orders to be considered concurrently with creation and diversion orders. Although there will be no right to apply for creation orders, they could continue to be considered concurrently where an authority agrees to make such an order, or the Secretary of State agrees to draft such an order (after receiving an appeal in relation to an extinguishment order).

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<sup>6</sup> Note on terminology: Authorities 'make' orders, which must then be 'confirmed' by the authority or by the Secretary of State before they can take effect. Where action is taken by the Secretary of State, he must 'draft' orders and invite and consider objections or representations. Only then can he 'make' the order. The Secretary of State does not 'confirm' his own orders. In effect the 'making' and 'confirmation' of orders by an authority equates to the 'drafting' and 'making' of an order by the Secretary of State.

## Summary of the main changes

2.20 Although many authorities already make extinguishment and diversion orders on behalf of landowners, the new rights would bring about some significant changes. In particular:

- (a) a new **statutory application procedure**;
- (b) **Prescribed charges** payable by the applicant **in advance**, which need only be refunded in prescribed circumstances;
- (c) where an authority **fails to determine an application within four months** (from receipt of a valid application) or **fails to decide on what action to take on an order within two months** (from the end of the period for making representations), the applicant would be entitled to ask the Secretary of State to direct the authority to reach a decision within a specified time;<sup>7</sup>
- (d) where an authority refuses to make an order, the applicant would (subject to certain limitations) be able to **appeal to the Secretary of State who would then draft an order, consult, consider the merits of the application and any objections, and (following written representations, a hearing or public inquiry if required) decide whether to make the order applied for**; and
- (e) where an authority make an order, but subsequently refuse to confirm an unopposed order, or to submit an opposed order to Secretary of State, the applicant would (subject to certain limitations) be able to **appeal to the Secretary of State who would then treat the order as if it had been submitted to him for confirmation**.

2.21 In summary, this means that applicants would be able to ensure that their reasons for seeking an extinguishment or diversion order are given full and due consideration.

2.22 The stages leading to the determination of an application (and any appeal) are shown in the flow chart at **Annex C**. There are similarities with the procedures for definitive map modification order (DMMO) applications/appeals, but also some important differences - as explained in **Annex D**.

## The benefits

2.23 The new rights are intended to benefit certain **owners, lessees and occupiers of land** and **school proprietors**, who would be able to follow clear and straightforward application and appeal procedures. This should ensure that due consideration is given to their reasons for seeking an order, and help to reduce the delays and inconsistencies which exist under the current arrangements.

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<sup>7</sup> Section 118ZA(7) and section 119ZA(8) of the Highways Act 1980 (as amended), and paragraph 2ZA of Schedule 6 of the same Act

2.24 There may be additional benefits for **users of rights of way** (e.g. because diversions may lead to improvements in the rights of way network, regularise informal diversions and reduce the number of illegal obstructions). Some **authorities** may benefit from standardised procedures and guidance, and from prescribed charges.

2.25 The prescribed charges may benefit some authorities because:

- charges might reflect the actual costs of considering and processing applications and orders;
- authorities would no longer need to provide applicants with detailed invoices;
- charges would be levied before rather than after the work is carried out;
- charges should be relatively straightforward and predictable, both for applicants and authority staff;
- in areas where charges are currently high, authorities would have an added incentive to seek efficiencies and reduce processing costs; and
- the charges would enable authorities to recover the costs of some activities which are not currently rechargeable (e.g. costs incurred in considering an application where it is subsequently decided not to make an order, order-making costs where it is subsequently decided not to confirm an unopposed order).

2.26 The anticipated benefits are detailed in the partial Regulatory Impact Assessment (partial RIA) at **Annex F**.

### **3. Amendments to the Highways Act 1980**

3.1 The new right to apply for orders to extinguish or divert public rights of way, together with the associated rights of appeal to the Secretary of State, were included in the CROW Act. Section 57 and Schedule 6 of this Act inserts new sections into the Highways Act 1980. The full text of these provisions is reproduced in **Annex B**, but the following is a summary.

**Sections 118ZA and 119ZA** Provide new rights for certain landowners, lessees and occupiers to apply to a local authority for a public path order to extinguish (section 118ZA) or divert (section 119ZA) any footpath or bridleway which crosses their land. If, after four months, the application has not been determined, the Secretary of State may, after consulting the authority, direct the authority to determine the application within a specified time.

**Sections 118C And 119C** Provide new rights for school proprietors to apply to a local authority for a special extinguishment order (section 118C) or special diversion order (section 119C) in relation to certain highways for the purposes of protecting pupils.<sup>8</sup> If, after four months, the application has not been determined, the Secretary of State may after consulting the authority, direct the authority to determine the application within a specified time.

**Section 121A** Enables the Secretary of State to make regulations with respect to applications under sections 118ZA, 118C, 119ZA and 119C.

**Section 121C** Sets out the circumstances in which an authority may decline to determine an application.

**Section 121D** Provides a right for applicants to appeal to the Secretary of State if an authority refuses to:

- (a) make an order,
- (b) confirm an unopposed order, or
- (c) submit an opposed order to the Secretary of State for determination.

**Section 121E** Sets out provisions in relation to the determination of appeals, including the making of regulations.

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<sup>8</sup> This applies to a footpath; a bridleway; a restricted byway; a highway shown on the definitive map and statement as a footpath, bridleway or restricted byway but over which the public have a right for vehicular and all other kinds of traffic; any highway which is shown on the definitive map and statement as a byway open to all traffic.

3.2 Schedule 6 of the CROW Act also contains consequential amendments, as well as new section 121B which will require local authorities to establish registers of applications. Defra carried out a separate public consultation on section 121B registers in 2004.<sup>9</sup>

3.3 Section 52(1) of the CROW Act enables the Secretary of State to amend sections 118ZA and 119ZA so that applications (and appeals) can also be made for public path orders to extinguish or divert restricted byways.

3.4 The legislation enables the Secretary of State to prescribe and make provision for certain matters through regulations. The key issues which would need to be addressed by regulations are set out in the following sections.

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<sup>9</sup> 'Public Rights of Way: Registers of definitive map modification order applications; and Highways Act applications and declarations' (2204).

## 4. Applications

### Manner in which applications should be made

4.1 When exercising the right to apply it is proposed that applicants should be required to use an application form obtained from the local authority, but that the precise content of the application form (and certificates) should not be prescribed in the regulations. Instead it is proposed that authorities should be under a duty to make available a form (and certificates) for applicants to use. This would allow authorities discretion over the contents of the form, and allow forms to be amended from time to time without the need for new regulations. It would also encourage potential applicants to contact the authority before making their application, providing an opportunity for authorities to give informal pre-application advice. Defra would provide a model template for authorities to use or adapt.

**Question 1 Do you agree that the regulations should (a) require authorities to make available application forms for use by applicants, and (b) that the content of the application form should be for the authorities to determine ?**

4.2 The CROW Act provides for a right of application to any “council for the area in which the land is situated”. This means any council with order-making powers - not only the local highway authority, but also any district or borough council for the area as well as any relevant National Park authority. All of these bodies would need to make available application forms (and certificates) for applicants to use, and be prepared to accept applications. However, in practice, we expect that in areas where there is more than one order-making authority, applicants would be encouraged to submit applications to the most appropriate authority.

4.3 Although it is not intended to prescribe the form of application (or certificates), we consider that the regulations should require authorities to request, as a minimum, the following information in the application form:

- (a) confirmation that the application is made under section 118ZA, 118C, 119ZA or 119C of the Highways Act 1980;
- (b) name and address of applicants(s);
- (c) the nature of the applicant’s interest in the land (i.e. whether owner, freeholder, or leaseholder etc);
- (d) a detailed description of the path or way to be extinguished/diverted, and of any proposed new path or way (by reference to the accompanying map);
- (e) the applicant’s assessment of the use currently made (by the public) of the existing path or way;

- (f) the applicant's reasons for wanting the path or way to be extinguished or diverted;
- (g) certification that the land over which the path or way crosses is used for agriculture, forestry and/or for the breeding or keeping of horses, or as a school;
- (h) certification that the application is made with the consent of every person with an interest in the land over which the path or way currently passes whose consent is required;
- (i) details of any other landowners, lessees or occupiers whose land the applicant considers will be affected by the order, if made, and certification that the applicant has given notice to those persons; and
- (j) certification that the application is made with the consent (where required) of the relevant highway authority(ies) and/or statutory undertaker(s).<sup>10</sup>

4.4 Authorities could require additional information as part of the application form.

**Question 2 Do you agree that the regulations should require authorities to seek basic information in the application form, as listed in the consultation paper ?**

### Restricted Byways

4.5 It is proposed to amend (in accordance with section 52(1) of the CROW Act) sections 118ZA and 119ZA of the Highways Act, so that applications (and appeals) can be made for public path orders to extinguish or divert restricted byways in the same way as for footpaths and bridleways.

**Question 3 Do you agree that the right to apply should allow for the making of applications to extinguish or divert restricted byways ?**

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<sup>10</sup> The Act requires that where the order will have the effect of creating a new right of way communicating with a classified road, a special road, a Greater London Authority road and/or a highway for which the Highways Agency is the highway authority, the applicant must first obtain the consent of the relevant highway authority before submitting an application. Where an order will have the effect of creating a new right of way over land covered by works used by a statutory undertaker (or the curtilage of such land) for the purposes of the undertaking, the Act requires the applicant to first obtain the consent of the statutory undertaker before submitting an application.

## The Map

4.6 It is proposed that the application form be accompanied by a map on a scale of not less than 1:2,500, or if no such map is available, on the largest scale readily available. This is the same scale as currently required by the existing public path order procedures.<sup>11</sup> What the map must show is already prescribed in the primary legislation.<sup>12</sup>

4.7 The regulations may prescribe the circumstances in which a map accompanying an application may be substituted with another map. It is proposed that the regulations should only allow for the map accompanying an application to be substituted with another map where agreement of the authority is obtained. This is because substituting the old map with a new map may lead to additional work for the authority, in terms of re-notifications and additional consultation.

**Question 4** Do you agree that the scale of the map accompanying an application should be at the scale of 1:2,500 or, where a map of such a scale is not available, at the largest scale readily available ?

**Question 5** Do you agree that the maps accompanying an application should only be amended with the agreement of the authority ?

## Amending applications and orders in the light of consultation and negotiation

4.8 After an application is made there will be some scope to amend an application (e.g. to amend the route, widths or infrastructure/furniture) through substitution of the accompanying map, provided the authority agrees.

4.9 Once the application is determined, the authority could make an order upon the application only if land over which the way or path to be extinguished and/or diverted is the same as that shown on the map which accompanied the application (or as substituted).

4.10 After an order is made by the authority, further modification might be possible (e.g. in order to overcome objections) but where this happens the order would need to be submitted to the Secretary of State for confirmation. The right to apply does not change the existing provisions in relation to the modification of orders.

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<sup>11</sup> The Public Path Order Regulations 1993 (SI 1993/11)

<sup>12</sup> New section 119E (1)(a) of the Highways Act 1980 (as inserted by Schedule 6 of the CROW Act 2000) sets out what the map should show.

4.11 Where an applicant appeals against an authority's refusal to make an order, the Secretary of State could, after consulting with other persons as he thinks fit, take account of amendments proposed by the applicant in drafting an order. This would enable the applicant, if he or she wished, to modify the proposals in order to address the concerns of the authority or objectors.

4.12 Authorities would remain free, at any time, to use their discretionary powers to make orders independently of the right to apply.

### **Notification and publicising of applications**

4.13 The Secretary of State may prescribe persons to be notified (by the applicant) when an application is submitted, and persons to be notified (by the authority) when an application is determined.

### **Notification by applicants**

4.14 It is proposed that the applicant should be required to notify any landowners, lessees or occupiers whose land they consider will be **affected** by the order (n.b. owners, lessees and occupiers of adjacent land might be **affected** even if the existing or a proposed route does not pass over their land). Notification would need to take place before an application is submitted, and the applicant would certify that this has been done.

4.15 Early consultation reduces the likelihood of objections later on, and local authorities may suggest that applicants informally notify other persons who might have an interest. Guidance to applicants should highlight the advantages of informal consultation at an early stage, but it is not proposed to make this mandatory.

<p><b>Question 6 Do you agree that the applicant should only be required to notify: other landowners, lessees or occupiers whose land they consider will be affected by the order ?</b></p>
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### **Notification by authorities**

4.16 The Highways Act already requires authorities to consult other councils (including parish and town councils) within whose area the path or highway lies, before making an order, and to publicise the making of an order before it can be confirmed or submitted to the Secretary of State. However, many authorities currently carry out additional informal consultation at an earlier stage (as recommended in DoE Circular 2/93).

4.17 It is proposed that the regulations should require an authority:

- (a) to consult any other councils within whose area the right of way lies, and such other persons as the authority considers appropriate, *before* deciding an application; and
- (b) to notify any persons who made representations on the application, of the decision reached on the application.

**Question 7 Do you agree that authorities should be required to consult other councils within whose area the right of way lies, and such other persons as the authority considers appropriate, *before* deciding an application ?**

**Question 8 Do you agree that authorities should be required to notify any persons who made representations on an application, of the outcome ?**

4.18 Details of all applications (and appeals) would be included in the register of applications (under new section 121B). Authorities would be required to make copies of application (and appeal) documents available for public inspection, and to provide copies of documents when someone requests a copy (at a reasonable charge).

#### **Time within which applications and orders shall be determined**

4.19 The legislation requires applications to be determined as soon as reasonably practicable. Where an application has not been determined within four months, sections 118ZA(7) and s119ZA(8) give the Secretary of State, at the request of the applicant and after consulting the authority, the power to direct the authority to determine it before the end of such period as specified in the direction.

4.20 Likewise, where within two months from the expiry of time for representations, an authority has not determined whether to confirm or submit an order, new paragraph 2ZA of Schedule 6, gives the Secretary of State, at the request of the applicant, the power to direct the authority to determine that question before the end of such period as specified in the direction.

4.21 It is not considered necessary to make further regulations in respect of directions, at this stage.

## 5. Appeals

5.1 Section 121D of the Highways Act 1980 gives applicants the right to appeal to the Secretary of State in three defined circumstances. These are where the authority:-

(a) refuses to make an order on the application (a “Section 121D(1)(a) appeal”);

(b) refuses to confirm (as an unopposed order) an order made on the application (a “Section 121D(1)(b) appeal”); or

(c) refuses to submit to the Secretary of State an order which was made on the application and against which any representation or objection has been duly made and not withdrawn (a “Section 121D(1)(c) appeal”).

5.2 It should be noted that applicants would have no right of appeal where the authority declines to determine an application in accordance with section 121C (i.e. where the Secretary of State has refused to confirm a similar order within the previous three years or where an authority is dealing with a similar order as the one applied for). In addition, the right of appeal is limited by section 121D(2) so that it does not exist where the necessary consents have not been obtained, or where the reason for refusal was that the applicant refused to enter into a legal agreement required by the authority.

5.3 The appeal procedures relating to public path and special orders would differ from appeal procedures which exist in connection with DMMO appeals in several respects (see **Annex D**).

5.4 When an appeal is submitted under section 121D(1)(a) the Secretary of State will be required to draft an order and publicise it. However, it would not be necessary for the Secretary of State to draft an order for appeals under sections 121D(1)(b) and (c), or to carry out such extensive publicity (see below), because the order will already have been made and publicised beforehand by the authority. The procedures followed in determination of an appeal would broadly follow the procedures followed when orders are submitted to the Secretary of State for confirmation.<sup>13</sup> This means that it would be dealt with by way of a public inquiry, hearing or exchange of written representations.

5.5 The regulations would formally invest powers in the Secretary of State or a person appointed by him. In practice this means that administrative and other tasks relating to appeals will largely be carried out by the National Rights of Way

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<sup>13</sup> Namely, the Highways Act 1980 (as amended), the Public Path Orders Regulations 1993 (SI 1993 No. 11), the Highways, Crime Prevention etc (Special Extinguishment and Special Diversion Orders) Regulations 2003 (SI 2003 No. 1479), and DOE Circular 2/1993.

Casework Team (in the Government Office for the North East (GO-NE)) and the Planning Inspectorate. References in this document to the Secretary of State should be taken to include the Government Office and the Planning Inspectorate where appropriate. In most cases an Inspector will take decisions on the Secretary of State's behalf. However, the regulations would need to make provision for decisions to be taken (recovered) by the Secretary of State, where this is considered appropriate.

### **Period within which appeals should be brought**

5.6 It is proposed that the regulations should require a duly made appeal to be submitted to the Secretary of State within a period of **56 days (8 weeks)** from the date of the decision notice. This is twice the amount of time allowed for DMMO appeals. We consider this reasonable, bearing in mind that applicants will have invested time and money in making an application.

**Question 9 Do you agree that 56 days is a fair period of time within which appeals should be brought ?**

### **Manner in which appeals should be brought**

5.7 We believe that in the interests of the parties and the efficient conduct of the appeals process, there should be a standard form for bringing an appeal. It would be too inflexible to prescribe such a form in regulations. Instead it is proposed that appellants should be required to use a form obtainable from the Secretary of State. This will enable forms to be amended without the need for new regulations when necessary. Appellants will also be required to certify that the requirements of the regulations have been complied with.

**Question 10 Do you agree that appeals should be brought by using a form obtained from the Secretary of State, but that the form of appeal need not be prescribed by regulations ?**

### **Provision of information by the authority**

5.8 It is proposed that the regulations should require the authority to whom the original application was made, to provide the Secretary of State with the application form and the latest version of the map, any certificates and documents as required by regulations, a copy of the decision notice, and any other information which the Secretary of State or the authority consider relevant, within **28 days (4 weeks)** of receiving notice from the Secretary of State (or by such other date as agreed with the Secretary of State). At the same time the authority should provide copies of all representations and objections.

**Question 11 Do you agree that the authority should be required to provide the Secretary of State with the required information within four weeks of receiving notice from the Secretary of State (or such other date as agreed with the Secretary of State) ?**

### Notice of appeal

5.9 It is proposed that the regulations should not require the applicant (appellant) to give notice of the making of an appeal to any other parties. This is because there will be other mechanisms through which interested parties can find out about an appeal (see below).

**Question 12 Do you agree that the applicant (appellant) should not be required to give notice of the making of an appeal to any other parties ?**

### Advertising of an appeal

5.10 The public should have the opportunity to participate in appeals, and it is therefore proposed that the regulations should require the Secretary of State to place a copy of the notice of appeal on an appropriate website. After an appeal is decided he will also provide copies of the decision letter to the authority and to anyone else who asks for a copy.

5.11 It is proposed that regulations should require the authority to update the section 121B register with the fact that an appeal has been made, and of the outcome of that appeal. The authority should also be required to make appeal documents available for public inspection, and allow copying at reasonable charge.

5.12 We anticipate that representative organisations and others, will inform themselves of appeals using these information sources. However, we think it is also desirable:

- (a) in the case of appeals **under section 121D(1)(a)** that the regulations should require the Secretary of State to give notice of an appeal to any person who made representations or objections on the application (which have not been withdrawn); and
- (b) in the case of appeals **under section 121D(1)(b) or section 121D(1)(c)** that Schedule 6 of the Highways Act should be amended so that it requires the Secretary of State, after receiving a duly made appeal, to give notice of the appeal to any person who made representations or objections on the order (which have not been withdrawn).<sup>14</sup>

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<sup>14</sup> This is provided for by sub-section 121E(8)(i) of the Highways Act as amended.

5.13 Where an appeal requires the Secretary of State to draft an order, then section 121E(1)(b) of the Highways Act would require him to give notice in accordance with Schedule 6 of the Act. Additionally, the Public Path Orders Regulations 1993 (SI 1993 No. 11) and the Highways, Crime Prevention etc (Special Extinguishment and Special Diversion Orders) Regulations 2003 (SI 2003 No. 1479), would require the Secretary of State to notify additional organisations before making an order.<sup>15</sup>

**Question 13 In the case of appeals under section 121D(1)(a) do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the application ?**

5.14 Further notification requirements would apply where an appeal leads to a hearing or public inquiry. There are currently no statutory provisions concerning notification of hearings and public enquiries in connection with public rights of way, but Defra expects to lay regulations setting out new procedural rules shortly. These rules will apply to hearing and inquiries held to consider orders submitted to the Secretary of State, as well as those public inquiries and hearing which arise from appeals.<sup>16</sup>

**Question 14 In the case of appeals under section 121D(1)(b) or section 121D(1)(c), do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the order (and which have not subsequently been withdrawn) ?**

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<sup>15</sup> These bodies are: the Auto-Cycle Union, British Horse Society, Byways and Bridleways Trust, Open Spaces Society, Ramblers Association, Cyclists Touring Club, the authority discharging the functions of fire authority under the Fire Services Act 1947, Peak and Northern Footpaths Society (for the counties of Cheshire, Derbyshire, Greater Manchester, Lancashire, Merseyside, South Yorkshire, Staffordshire and West Yorkshire only), the Chiltern Society (for the boroughs of Luton and Dacorum, and the districts of Mid Bedfordshire, South Bedfordshire, Chiltern, Wycombe, South Bucks, Aylesbury Vale, Three Rivers, North Hertfordshire and South Oxfordshire).

<sup>16</sup> The Planning Inspectorate currently publishes details of the date and venue of any public inquiry being held in connection with a public path or special order. The inquiry details are publicised through a newspaper notice and site notices. The details of hearings are publicised through site notices only (no newspaper notice).

## 6. Charges and costs

6.1 Under the existing arrangements, authorities are entitled to levy charges in accordance with the Local Authorities (Recovery of Costs for Public Path Orders) Regulations.<sup>17</sup> This means that when making a public path extinguishment or diversion order on behalf of a land owner, lessee or occupier, charges may be imposed to recover the costs of making and advertising orders, including any pre-order consultation. However, authorities:

- cannot recover any costs incurred where it is decided not to make an order;
- cannot recover additional costs involved in pursuing an opposed order; and
- are required to refund any charges where an order is made but not confirmed.

6.2 A recent survey of authorities revealed wide variations in the cost of making orders, and the charges paid. This reflects different policies, procedures, service-levels, charging mechanisms and newspaper advertising rates. Even in the same authority area there can be wide variations in cost between orders, reflecting differing levels of complexity or objections. However, the survey revealed that in an 'average' authority the **cost** of dealing with a typical application and order was around £1250 (excluding newspaper notices); whilst the average **charge** (excluding notices) was slightly less at £1090. The average cost per newspaper notice was around £400. Some 80% of the authorities dealt with a typical case at a cost of below £1400 (excluding newspaper notices). In 75% of authorities the cost per newspaper notice was below £400.

6.3 Under the right to apply the Secretary of State would have to prescribe (by regulation) any charges to be paid by applicants to the authority, at two stages :-

- (a) a prescribed charge payable on first making an application; and
- (b) further prescribed charge(s) payable if and when the local authority makes an order.

### Approach to setting the level of charges

6.4 Since applications would meet the private needs of applicants, who gain a benefit, the Government considers that applicants should make a reasonable contribution to the costs involved, as allowed for in the CROW Act. This will ensure that local authorities have the resources necessary to undertake the work involved.

6.5 The key objectives in regulating for the structure and level of the prescribed charges, are to:

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<sup>17</sup> As set out in the *Local Authorities (Recovery of Costs for Public Path Orders) Regulations* (SI 1993/407). Guidance on the procedures is contained in DOE circular 3/93: Recovery of Costs of Public Path and Rail Crossing Orders (as amended to allow recovery of the actual costs).

- (a) introduce a system of charges which is equitable, easy for applicants to understand and straightforward for local authorities to administer;
- (b) provide an incentive for authorities whose costs are currently higher than average to seek efficiency gains; and
- (c) allow full recovery of costs by authorities (in accordance with the principles contained in the HM Treasury's guidance on fees and charges). The charges should, on average, enable authorities to break even (rather than make a surplus).

6.6 Care is required to ensure that the prescribed charges are set at the right level - too high and authorities will generate a surplus and landowners will be discouraged from making applications. Too low and authorities will be underfunded, which will affect their ability to deliver an efficient service, and could result in more directions and appeals.

6.7 The level of existing charges levied by authorities provides a useful starting point from which to consider the level of the prescribed charges. However, it should be noted that:

- (a) the regulations would require authorities to deliver a more consistent and generally higher level of service than at present (e.g. issuing a decision notice and dealing with casework within statutory timescales or as directed by the Secretary of State);
- (b) the charges would need to be set at a level which takes account of the range of authority costs across England, meaning that in some areas the prescribed charges may be higher than the current charges and in some areas lower;
- (c) by imposing a statutory duty on authorities (in place of their discretionary powers) to consider applications, local authorities would have less discretion over whether to accept applications, and less discretion over the timetable for dealing with them;
- (d) there may be a higher proportion of complex or controversial orders (many authorities currently control their costs by declining to make orders which they consider will be complicated, controversial or costly); and
- (e) authorities have already received partial funding towards their increased costs through the Revenue Support Grant.

### **Pre-application advice**

6.8 The legislation does not provide for recovery of authority costs incurred before an application is made. It would be for authorities to decide for themselves

how much time and effort to invest in giving pre-application advice. However, such advice is important if the right to apply is to operate efficiently - it should reduce wasteful or abortive expenditure for both the authority and applicant (e.g. authorities might suggest modifications and improvements to the proposals, or discourage the making of applications which will have no prospect of success).

### **The level of charges**

6.9 The new rights to apply and appeal would probably result in higher costs for all stakeholder groups. These are assessed in the partial RIA at **Annex F**. All things being equal, the procedures involved in considering a single application and making an order should not be significantly different or more costly to the existing procedures. However, the overall cost of administering the new statutory procedures would be higher because:

- (a) the new rights introduce the possibility of appeals and directions, both of which inevitably give rise to new costs;
- (b) there would be more applications to deal with than under the current system (which means more consultations, objections and inquiries, etc);
- (c) authorities would be under a legal duty to consider and determine all applications, meaning that the 'average' application/order is likely to be more complex, controversial and hence costly to deal with than at present (many authorities currently keep the charges low by refusing to make orders, or by only agreeing to make orders which are going to be straightforward, non-controversial and low cost); and
- (d) applicants would receive a more consistent and speedy service (meaning authorities have less flexibility in managing workloads).

6.10 It is estimated that the charges for a typical application/order could be up to 30-40% higher than the average level of charges currently paid by land owners - assuming of course that he or she can persuade the authority to make/confirm an order (which is often not the case). Most of this increase is attributable to the fact that at present 'average' charges are kept artificially low: many authorities currently subsidise their charges for reasons of administrative convenience, and will refuse to make orders which they predict will be costly to deal with. The situation would be different under the right to apply because charges would not be subsidised in the same way, and because authorities would no longer be able to reject applications in order to keep costs down.

### **The Application Charge**

6.11 It is proposed that the regulations should prescribe an Application Charge payable on the making of an application. This would be a **uniform charge** to cover the local authority's costs in the processing and deciding the application. It is

intended to meet the costs incurred by the authority in the carrying out the following activities:

- receiving and checking the application, certificates, map and accompanying documents, verifying/seeking clarification where necessary;
- updating the section 121B register;
- receipt/banking of the application charge;
- notifying other local councils;
- research into the history and status of the path;
- informal consultation with any third parties as deemed appropriate by the authority;
- any site visit deemed necessary by the authority;
- negotiating with the applicant (over the terms of any proposed agreement to defray or contribute towards costs or any compensation payable, and over the schedule of works necessary to bring any new route into a fit condition);
- consideration, report preparation and determination of the application; and
- preparation and issue of the decision notice (including a statement of reasons) and notification of third parties.

6.12 It is considered that the time and cost of carrying out these functions would be broadly similar in the case of most applications and across most authorities. It would be for authorities to decide whether to invest more time and resources (e.g. in order to provide a higher quality service, achieve better quality results and/or to reduce the risk of higher costs at a later stage).

6.13 It is important that authorities are adequately funded to enable them to consult interested parties, to fully consider applications and to reach a well-reasoned decision on an application. When applications are refused, well-explained decision notices will also help applicants to judge whether it would be worth bringing an appeal.

6.14 It is proposed that the regulations prescribe an Application Charge to be paid by the applicant(s) upon making an application, and views are sought on the level of charge that would be appropriate. A provisional figure of **£1000** is proposed, but all the proposed charges will be reviewed in the light of this consultation to ensure they are fair and reasonable. The Application Charge should meet the reasonable costs and expenses incurred by a local authority in carrying out its duties in a timely fashion and to a satisfactory standard. It will be remitted or refunded in certain circumstances (see below).

<p><b>Question 15 Do you (a) agree that the regulations should prescribe an Application Charge set at £1000 per application, and (b) what impact do you consider this would have on the numbers of applications made ?</b></p>
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**Further Charges to be paid if an authority makes an order on an application**

6.15 In addition to the Application Charge it is proposed that the regulations should prescribe a menu of Further Charges. These would only become payable after the authority agrees to make an order (or orders) on the application (i.e. after the application is determined). The proposed Further Charges are set out in **Table 1**.

<b>Further Charges</b>	<b>When payable</b>	<b>Charge to met the costs of</b>	<b>Proposed Amount</b>
<b>Further Charge A (Standard order-making charge)</b>	per order	<ul style="list-style-type: none"> <li>- Dealing with further correspondence from the applicants, and liaison over drafting of the order</li> <li>- Updating the section 121B register</li> <li>- Receipt of the Further Charges</li> <li>- Giving notification of order-making, including site notices</li> <li>- Consideration of whether to confirm/submit order</li> <li>- Report preparation</li> <li>- Administrative costs of placing newspaper adverts and making any associated refund</li> </ul>	<b>£400</b>
<b>Further Charge B</b>	for each separate landowner, lessee or occupier who the authority consider will be affected by the order (but not applicable in the case of any landowner, lessee or occupier who has given approval or expressed support, in writing, before the application was submitted).	<ul style="list-style-type: none"> <li>- Additional costs arising from having to deal with different landowners, lessees or occupiers</li> </ul>	<b>£80</b>
<b>Further Charge C</b>	for each newspaper notice published, including the notice of certification (part of charge will be refunded where actual costs are less than the charge).	<ul style="list-style-type: none"> <li>- Actual costs of newspaper adverts</li> </ul>	<b>£500</b>
<b>Further Charge D</b>	on certification of a new route.	<ul style="list-style-type: none"> <li>- Costs of certifying the new route</li> </ul>	<b>£100</b>
<b>Further Charge E</b>	if the order is submitted to the Secretary of State	<ul style="list-style-type: none"> <li>- Preparing the papers and statement of support to be sent to the Secretary of State</li> </ul>	<b>£100</b>

**Table 1: Further Charges payable if the authority make an the order (or orders) on application**

6.16 The only proposed charges that an authority may impose in relation to functions carried out following an appeal are Further Charges C and D (to fund the costs of certifying a new route when required).

6.17 It is proposed that no charges should be payable by an applicant where an authority re-makes an order in place of an order which was found to be legally defective (since it would be unfair to expect applicants to pay twice).

**Question 16 Do you agree that the regulations should provide for a standard order-making charge, plus four Further Charges, at the levels proposed ?**

6.18 Charges for newspaper notices vary widely and authorities have limited control over this cost because it depends on commercial advertising rates. Most authorities currently invoice applicants for the actual costs incurred, but this will not be possible given the provisions in the CROW Act. Instead, a charge (Further Charge C) is proposed, at £500 per notice. This should be sufficient to meet the cost in most authority areas and for most orders. In some areas a charge of £500 would be significantly higher than the actual costs, and in order to avoid authorities generating a surplus, it is proposed that the regulations should require authorities to remit or refund the difference between the total charges levied for newspaper notices and the actual costs (see below).

**Question 17 Do you agree that authorities should be required to refund the difference, where the actual cost of placing the newspaper notice is less than Further Charge C ?**

6.19 In some areas a charge of £500 per notice will be insufficient to meet the actual cost of newspaper notices, and authorities risk a shortfall in funding. For areas where this is likely to pose a significant problem, the Secretary of State will consider the possibility of setting the Further Charge C at a higher level. This would need to be prescribed in the regulations and **Authorities are therefore advised to request such consideration (and to provide supporting evidence) by responding to this consultation paper.**

**Question 18 Do you agree that Further Charge C should be set at a higher level in those areas where costs are unavoidably higher ?**

**Question 19 For Order-making authorities only: Do you consider that Further Charge C should be set higher than £500 in your area ? If so, provide evidence to show that costs unavoidably exceed £500, and state what level you consider it should be set at in your area ?**

6.20 The proposals mean that for a typical unopposed diversion order, an applicant might expect to pay the following charges (including newspaper notice costs), before allowing for any refunds:

Application charge x 1	£1000
Standard order-making charge x 1	£400
Supplementary charge B (Newspaper notice) x 2	£1000
Supplementary charge C (certification) x 1	£100

**Total (before allowing for possible refunds - see below) £2500**

### **Charges for special (school security) extinguishment or diversion orders**

6.21 School proprietors who request a special extinguishment or diversion order (for school security) are not currently charged for the administration and advertising costs involved in making an order (although they can be required to meet compensation and groundwork costs). Special orders may be judged to be in the public interest, and the question therefore arises of whether charges should apply to special orders.

6.22 It is appreciated that charges would be a burden on applicants but the possibility of charges was always envisaged by the CROW Act. Views are therefore invited on whether the regulations should prescribe the same level of charges in respect of special orders as for public path orders.

**Question 20 Do you consider that the prescribed charges for public path diversion and extinguishment orders should apply to special orders (for school security) ?**

**Question 21 Do special orders raise any additional issues which the Secretary of State should take into account in making regulations which meet the needs of schools ?**

### **The Secretary of State's expenses (on appeal)**

6.23 Section 121(E) enables the Secretary of State to make regulations which, amongst other things, make provision for the payment by the applicant of expenses incurred by the Secretary of State in (i) in preparing a draft order and (ii) giving any notice required by Schedule 6 of the Highways Act.

6.24 In the case of appeals under section 121D(1)(a) (i.e. against refusal to make an order), it is proposed that the regulations should provide for applicants to meet certain expenses incurred by the Secretary of State. Such expenses would only be incurred by the Secretary of State because the authority has not already made an order, and are listed below:

- (a) costs incurred in preparing a draft order, including liaison with the applicant and local authority over its wording and resolution of any queries etc;
- (b) preparation of the map of accompany the draft order;
- (c) drafting and checking the draft order and map;
- (d) administrative costs in giving notification that an order has been drafted and made (in accordance with Schedule 6 of the Highways Act); and
- (e) postage costs, the cost of erecting/checking site notices and the cost of publishing newspaper notices after drafting/making of an order (in accordance with Schedule 6 of the Highways Act).

6.25 It is proposed that the regulations prescribe a uniform charge of approximately **£150** to cover the costs of items (a) to (d). However, it should be noted that this would be considerably lower than the Further Charges which applicants would pay to the authority if an application is successful, and consequently it might appear that it would be less expensive (for both the authority and the applicant) for the application to proceed via the appeal route. In reality, appeals are unlikely to be more cost effective because of the hidden costs involved, including the time and inconvenience. Nevertheless, there remains a risk that some authorities might refuse a disproportionate number of applications (which might minimise their own costs), thereby forcing applicants to appeal. This risk will need to be considered further in the light of consultation responses.

**Question 22 Do you consider that (a) there is a risk of authorities erring on the side of refusing applications (which will minimise their own costs) thereby forcing applicants to appeal, and if so, (b) what measures would most effectively mitigate the risk ?**

6.26 The costs of item (e) are likely to vary widely depending on local circumstances and it is therefore proposed that applicants are invoiced the **actual amount of the costs incurred under item (e)**, which are likely to amount to approximately £550 when the order is drafted and the same amount again if an order is made.

6.27 For appeals under sections 121D(1)(b) or (c) (i.e. against refusal to confirm an unopposed order or against refusal to submit an order to the Secretary of State), applicants would not be expected to meet the Secretary of State's expenses because an order will already have been made and publicised prior by the authority prior to the appeal (these tasks would not need to be repeated).

6.28 If an appeal leads to a hearing or public inquiry, applicants would normally be expected to meet their own costs. Applicants would not be required to meet the costs for hire of the venue or the costs of publishing details of the hearing/inquiry.

**Question 23** Do you agree that applicants who appeal against an authority's refusal to make an order, should be required to meet the expenses incurred by the Secretary of State in drafting and publicising an order, through payment of a charge of approximately £150 plus the actual cost of erecting site notices and publishing newspaper notices ?

### **Remittance and refunding of charges paid by the applicant**

6.29 It is proposed that the regulations should provide for the remittance or refunding of the prescribed charges in certain other circumstances. The Act requires that these circumstances are prescribed in the regulations.

6.30 It is proposed that authorities should remit or refund the charges paid by the applicant in the following prescribed circumstances:

- (a) Where more than one application is submitted by the applicant on the same date (and within a radius of 500 metres of the first application) then the application charge for each additional application shall be reduced by 50%, or by a higher amount at discretion of the authority.
- (b) Where more than one order is made on behalf of the same applicant (and within a radius of 500 metres of the first application) then Further Charge A (the standard order-making charge) for each additional order to be reduced by 50%, or by a higher amount at discretion of the authority. Further Charges B to D to be remitted or refunded at discretion of the authority.

**Question 24** Do you agree with the proposed circumstances in which authorities should be required to remit or refund charges ?

6.31 Views are sought on whether a partial or full refund of the Application Charge should be made when an authority refuses an application for an order. This would be in line with the approach adopted in the Local Authorities (Recovery of Costs for Public Paths Orders) Regulations 1993. It would reduce costs for unsuccessful applicants and discourage authorities from refusing applications unless they have good grounds for doing so. However, there could also be some potential undesirable consequences: it might increase the volume of (poorer quality) applications and would mean authorities receive less recompense (via the Application Charge) for carrying out their duties. It would also mean that successful applicants pay significantly more for orders made by an authority than those who obtain an order through the appeal route.

**Question 25** Should a partial or full refund of the Application Charge be made when the authority refuses an application for an order ?

6.32 It is proposed to allow applicants to claim a refund of the Application Charge in the following prescribed circumstances, and within a period not exceeding **two months** from the issue of the decision notice. On receipt of a claim the authority should be required to make a partial refund of the Application Charge as follows:

<b>Prescribed circumstances</b>	<b>Amount</b>
(a) Authority fails to determine application within the timescale specified in a direction made by the Secretary of State (unless agreed with the applicant).	Partial refund (50%)
(b) Authority declines to determine application on the grounds provided for by section 121C.	Partial refund (50%)

6.33 It is proposed to allow applicants to claim a refund of the Further Charges paid on making of an order in the following prescribed circumstances, and within a period not exceeding **two months** from the date on which the prescribed circumstances arise. On receipt of a claim the authority should be required to make a partial refund of the Further Charges as follows:

<b>Prescribed circumstances</b>	<b>Amount</b>
(a) Authority fails to confirm an unopposed order within the timescale specified in a direction made by the Secretary of State (unless agreed with the applicant).	Partial refund (80%) of all the 'Further Charges' paid <i>except</i> those relating newspaper notices
(b) Having made an order to which duly made objections have been made (and not withdrawn), an authority decides not submit the order to the Secretary of State within the timescale specified in a direction (unless agreed with the applicant).	Partial refund (20%) of all the 'Further Charges' paid <i>except</i> those relating newspaper notices
(c) An order is not confirmed (by the authority or by the Secretary of State) because it was invalidly made.	The regulations should allow the applicant to chose between receiving a full (100%) refund of all the Further Charges paid (if the order is not to be re-made) <b>or</b> having the authority make a new order at the authority's expense

**Question 26 Do you agree that applicants should be entitled to claim refunds as proposed, and that authorities should be required to make a refund on receiving such a claim ?**

**Question 27 Do you agree with the proposed levels of remittance/refund to be prescribed in the regulations ?**

6.34 Payment of a refund would not absolve an authority of its statutory duties in respect of an application or order. This means, for example, that where an authority fails to comply with a direction from the Secretary of State and accordingly makes a refund, the applicant will still be able to make an application for Judicial Review or complain to the Local Government Ombudsman, etc.

6.33 Where the costs of placing a newspaper notice are lower than the amount of Further Charge C, it is proposed that authorities should be required to refund the difference to the applicant (without the need for a refund to be claimed) (See paragraph 6.19).

6.34 It is considered that the proposed charges and arrangements for remittance and refund of charges will encourage local authorities to carry out their functions efficiently and in a timely fashion, and provide recompense to applicants should the level of service fall short.

6.35 It is proposed that nothing in the regulations should compel a local authority to make a refund where:

- (a) the application is withdrawn, or the applicant asks the authority to cease work on an application or order;
- (b) the authority (or Secretary of State) has reason to believe that the applicant knowingly or recklessly issued a certificate which contained a false or misleading statement (e.g. claiming that the land was being used for agriculture, forestry, or for the breeding or keeping of horses); or
- (c) (subject to consideration of responses to Question 25) the authority refuses an application.

6.36 Views are invited on whether authorities should remit or refund the Application Charge and/or the Further Charges, in any other circumstances (it should be noted that, in the absence of a specific legal duty or power, authorities will be unable to remit or refund any charges).

**Question 28 Do you consider authorities should be given the power and/or should be required to remit or refund the Application Charge and/or the Further Charges, in any other circumstances ?**

6.37 The proposed charging structure set out above is provided for consultation purposes. It will need to be reviewed in the light of consultation responses, and as the statutory provisions and procedures are worked up in more detail.

6.38 After commencement Defra will monitor and review the operation of the new regulations, including the prescribed charges, to ensure that the procedures are operating efficiently and the charges are equitable, fair and reflect the costs of handling applications, making/drafting orders and carrying out notifications. The first review will take place 12 months after commencement.

### **Value Added Tax**

6.39 Following consultation with HM Revenue and Customs it has been confirmed that both the Application Charge and the Further Charges, as well as the Secretary of State's expenses, will be outside the scope of VAT. Consequently VAT would not be applicable to any of the charges being proposed.

### **Other costs which applicants might be required to meet**

6.40 Authorities (and the Secretary of State) already have powers to require an applicant (and appellant) to enter into a legal agreement with the authority to defray the costs (under section 27 of the Highways Act), or make such contribution as may be specified in the agreement, towards any compensation that may be payable to other persons (under section 28) or the expenses incurred in bringing a new route into a fit condition. In line with current practice, it is expected that applicants will normally be required to meet these costs, which will be in addition to the charges set out above. (Note: These powers relate to public path orders and not special orders).

### **Local authority funding**

6.41 The prescribed charges were never intended to meet all of the costs likely to be incurred by authorities. For example, authorities will need to meet the cost of giving pre-application advice and the costs of objecting to appeals. The 'Draft RIA' produced in 2000 estimated that the net cost to authorities (after allowing for prescribed charges) would be in the region of £6.2 million per year (across England and Wales).

6.42 Local authorities should be fully funded for their duties under the CROW Act, including those relating to the right to apply, through a combination of the Revenue Support Grant (RSG) and the proposed charges set out above. Since 2002/3 total annual funding, of between £12 million and £19 million, has been provided to local authorities through the RSG. The funding is included in an unhypothecated funding block (as agreed with representatives of local government) which means that it is not possible to identify provision for particular responsibilities or authorities.

## **7. Assessment of impacts, commencement and other matters**

### **The partial Regulatory Impact Assessment**

7.1 A Regulatory Impact Assessment (RIA) is usually required for new regulatory proposals, setting out the policy objectives and comparing possible options and their impacts. A partial RIA is presented at **Annex F** for consultation purposes. It will be updated in the light of consultation to produce an Impact Assessment (IA) in accordance with the Better Regulation Executive's new approach to measuring costs and benefits.

7.2 It is important to accurately assess the benefits, impacts and costs for applicants, local authorities and other stakeholders, so that the right decisions are taken on the way forward.

7.3 The partial RIA is based on the 'draft RIA' produced in 2000, but has been updated in the light of more recent consultation with stakeholders. However, uncertainties remain and it was therefore necessary to make assumptions. Views are invited on whether the estimates and assumptions used in the partial RIA relating to casework volumes, impacts, costs, risks and benefits are realistically assessed.

**Question 29 Does the partial RIA adequately assess the likely level of uptake, costs, potential impacts, risks, and benefits ?**

**Question 30 Do you consider that the proposals would (a) meet the needs of landowners/lessees/occupiers and (b) take full account of the needs of other stakeholder groups ?**

### **Alternatives to commencing the provisions as set out in the CROW Act**

7.4 The preliminary comparison of costs and benefits in the partial RIA shows that the right to apply will be more expensive than the current arrangements. There might only be a marginal benefit for applicants, and at the national level there could be overall dis-benefits. There are also a number of uncertainties and risks that could impact further on the cost-effectiveness and efficiency of the procedures.

7.5 It is accepted that the right to apply was never likely to generate large financial gains or costs savings - since it is as much about improving equity and ensuring that applicants receive a fair hearing. However, as the benefits, costs and risks appear so finely balanced, the question arises of whether it remains desirable or sensible to commence the provisions in the way Parliament originally intended. If commencement is not going to efficiently meet the needs of applicants, or will have a disproportionate impact on other stakeholders, then amendment or repeal of the legislation might be justified.

7.6 Amending the legislation would allow the procedures to be fine-tuned to improve efficiency, reduce costs or address potential risks. Repealing the legislation would retain the status quo, although it might be accompanied by administrative actions to better meet the needs of land managers.

7.7 In view of the costs and risks which have been identified, views are invited on whether repeal or amendment might be a more appropriate course of action.

**Question 31 Do you consider that the legislation relating to the right to apply and appeal should be (i) commenced in its current form, or (ii) repealed, or (iii) amended ? If you consider it should be amended please say in what ways and give your reasons.**

### **Use of electronic working**

7.8 Electronic communication can save paper, printing and postage costs. It can also be easier and quicker for senders and recipients. Authorities can already send notifications electronically where this is agreed with representative organisations (or others).

7.9 We propose that the regulations should allow applications, notifications and appeals to be made online, as long as the information they contain is made available in all material respects as it would appear in printed form and that the authority or the person receiving the document electronically consents to receiving it in that form.

**Question 32 Do you agree that the regulations should allow applications, notifications and appeals to be made online ?**

### **Commencement date**

7.10 It is proposed to commence the right to apply on the same date as the requirement for authorities to keep a register of applications made under section 118ZA, 118C, 119ZA or 119C.

7.11 It is expected that the regulations will come into force no earlier than 1 October in 2008. The date will be confirmed in Defra's Common Commencement Date Annual Statement, which can be found on the Defra website. However, it is proposed that the coming into force date should be no less than **6 months** from the date on which draft regulations are published (or regulations are made). This is to allow sufficient time for authorities to make the necessary preparations. The regulations will be accompanied by detailed guidance for authorities (and applicants).

**Question 33 Do you agree that a lead in-time of at least 6 months would be sufficient to prepare for the new rights ?**

**Question 34** Are there any other considerations which you think it is important for the Secretary of State to take into account in deciding how or when to introduce the new rights ?

### **Local Access Forums**

7.12 Local access forums would be free to offer generic or specific advice in the case of applications, orders and appeals, and authorities will be encouraged to seek advice of their forum, on specific cases or on the generic issues, where appropriate.

7.13 Views are invited on whether the regulations should require authorities to notify the local access forum of each application received and/or whether the Secretary of State should be required to notify the relevant forum of each appeal. Such requirements could impose a burden on authorities and forums, and many forums are unlikely to have the capacity or time to respond to individual notifications. On the other hand, some forums may wish to comment on specific cases, and receipt of notifications may help forums to appreciate the bigger picture, identify patterns and to formulate generic advice. A decision will be taken on whether the regulations should include notification of local access forums, in the light of responses to this consultation.

**Question 35** Do you consider that (a) authorities should be required to notify their local access forum of each application received, and/or (b) that the Secretary of State should be required to notify the relevant forum of each appeal made ?

## **Annex A: Practical guidance on submitting views**

### **Submitting views**

You do not need to answer all the questions, but **please answer questions strictly numerical sequence and clearly indicate the question number to which each of your answers relates.**

If you are responding as a representative organisation, please include a summary of the people and organisations that you represent.

Responses should be received by **31 August 2007**. Please send your response to the following E-mail address:

[righttoapply@defra.gsi.gov.uk](mailto:righttoapply@defra.gsi.gov.uk)

Alternatively, if you do not have access to E-mail, please send your response by post to the following address:-

Right to Apply consultation  
Department for Environment, Food and Rural Affairs  
Zone 1/02  
2 The Square  
Bristol BS1 6EB  
Fax: 0117 372 8587

### **Confidentiality**

In line with Defra's policy of openness, at the end of the consultation period copies of the responses we receive may be made publicly available through the Defra Library, Lower Ground Floor, Ergon House, 17 Smith Square, London, SW1P 3JR. The information they contain may also be published in a summary of responses.

If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in e-mail responses will not be treated as such a request. You should be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

The Information Resource Centre will supply copies of consultation responses to personal callers or in response to telephone or e-mail requests (telephone: 020 7238 6575, e-mail: [defra.library@defra.gsi.gov.uk](mailto:defra.library@defra.gsi.gov.uk)). Wherever possible, personal callers should give the library at least 24 hours notice of their requirements. An administrative charge will be made to cover photocopying and postage costs.

If you submit comments in response to this consultation, we may keep your name and address on a list that will be used for future consultation exercises on related topics.

## **Enquiries**

Further information, including answers to frequently asked questions (FAQs), is available on the Defra website at <http://www.defra.gov.uk/corporate/consult/row-rights/index.htm>.

Enquiries about the subject of this consultation document should be addressed to:-

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Sponsorship, Landscape & Recreation Division  
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Tel: 0117 372 8339  
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## **Annex B: Extracts from Schedule 6 of the CROW Act 2000 relating to the rights to apply and appeal**

The Following new sections are inserted into the Highways Act 1980:-

### **118ZA Application for a public path extinguishment order**

118ZA. - (1) The owner, lessee or occupier of any land used for agriculture, forestry or the breeding or keeping of horses may apply to a council for the area in which the land is situated for the making of a public path extinguishment order in relation to any footpath or bridleway which crosses the land.

(2) An application under this section shall be in such form as may be prescribed and shall be accompanied by a map, on such scale as may be prescribed, showing the land over which it is proposed that the public right of way should be extinguished, and by such other information as may be prescribed.

(3) Regulations may provide-

(a) that a prescribed charge is payable on the making of an application under this section, and

(b) that further prescribed charges are payable by the applicant if the council make a public path extinguishment order on the application.

(4) An application under this section is not to be taken to be received by the council until the requirements of regulations under section 121A below have been satisfied in relation to it.

(5) A council which receives an application under this section shall determine the application as soon as reasonably practicable.

(6) Before determining to make a public path extinguishment order on an application under this section, the council may require the applicant to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards, any compensation which may become payable under section 28 above as applied by section 121(2) below.

(7) Where-

(a) an application under this section has been made to a council, and

(b) the council have not determined the application within four months of receiving it,

the Secretary of State may, at the request of the applicant and after consulting the council, by direction require the council to determine the application before the end of such period as may be specified in the direction.

(8) As soon as practicable after determining an application under this section, the council shall-

- (a) give to the applicant notice in writing of their decision and the reasons for it, and
- (b) give a copy of the notice to such other persons as may be prescribed.

(9) The council to whom an application under this section has been made may make a public path extinguishment order on the application only if the land over which the public right of way is to be extinguished by the order is that shown for the purposes of subsection (2) above on the map accompanying the application.

(10) Any reference in this Act to the map accompanying an application under this section includes a reference to any revised map submitted by the applicant in prescribed circumstances in substitution for that map.

(11) This section has effect subject to the provisions of sections 121A and 121C below.

(12) In this section-

- "prescribed" means prescribed by regulations;
- "regulations" means regulations made by the Secretary of State."

### **118C Application by proprietor of school for special extinguishment order**

118C. - (1) The proprietor of a school may apply to a council for the making by virtue of section 118B(1)(b) above of a special extinguishment order in relation to any highway for which the council are the highway authority and which-

- (a) crosses land occupied for the purposes of the school, and
- (b) is a relevant highway as defined by section 118B(2) above.

(2) Subsections (2) to (11) of section 118ZA above shall apply to applications under this section as they apply to applications under that section, with the substitution for references to a public path extinguishment order of references to a special extinguishment order; and regulations made under that section by virtue of this subsection may make different provision for the purposes of this section and for the purposes of that section."

### **119ZA Application for a public path diversion order**

119ZA. - (1) Subject to subsection (2) below, the owner, lessee or occupier of

any land used for agriculture, forestry or the breeding or keeping of horses may apply to a council for the area in which the land is situated for the making of a public path diversion order in relation to any footpath or bridleway which crosses the land, on the ground that in his interests it is expedient that the order should be made.

(2) No application may be made under this section for an order which would create a new footpath or bridleway communicating with-

- (a) a classified road,
- (b) a special road,
- (c) a GLA road, or
- (d) any highway not falling within paragraph (a) or (b) above for which the Minister is the highway authority,

unless the application is made with the consent of the highway authority for the way falling within paragraph (a), (b), (c) or (d) above.

(3) No application under this section may propose the creation of a new right of way over land covered by works used by any statutory undertakers for the purposes of their undertaking or the curtilage of such land, unless the application is made with the consent of the statutory undertakers; and in this subsection "statutory undertaker" and "statutory undertaking" have the same meaning as in Schedule 6 to this Act.

(4) An application under this section shall be in such form as may be prescribed and shall be accompanied by a map, on such scale as may be prescribed-

- (a) showing the existing site of so much of the line of the path or way as it is proposed to divert and the new site to which it is proposed to be diverted,
- (b) indicating whether it is proposed to create a new right of way over the whole of the new site or whether some of it is already comprised in a footpath or bridleway, and
- (c) where some part of the new site is already so comprised, defining that part,

and by such other information as may be prescribed.

(5) Regulations may provide-

- (a) that a prescribed charge is payable on the making of an application under this section, and
- (b) that further prescribed charges are payable by the applicant if the council make a public path diversion order on the application.

(6) An application under this section is not to be taken to be received by the council until the requirements of regulations under section 121A below have been satisfied in relation to it.

(7) A council which receives an application under this section shall determine the application as soon as reasonably practicable.

(8) Where-

- (a) an application under this section has been made to a council, and
- (b) the council have not determined the application within four months of receiving it,

the Secretary of State may, at the request of the applicant and after consulting the council, by direction require the council to determine the application before the end of such period as may be specified in the direction.

(9) As soon as practicable after determining an application under this section, the council shall-

- (a) give to the applicant notice in writing of their decision and the reasons for it, and
- (b) give a copy of the notice to such other persons as may be prescribed.

(10) The council to whom an application under this section has been made may make a public path diversion order on the application only if-

- (a) the land over which the public right of way is to be extinguished by the order, and
- (b) the new site to which the path or way is to be diverted,

are those shown for the purposes of subsection (4) above on the map accompanying the application.

(11) Any reference in this Act to the map accompanying an application under this section includes a reference to any revised map submitted by the applicant in prescribed circumstances in substitution for that map.

(12) This section has effect subject to the provisions of sections 121A and 121C below.

(13) In this section-

- "prescribed" means prescribed by regulations;
- "regulations" means regulations made by the Secretary of State."

### **119C Application by proprietor of school for a special diversion order**

119C. - (1) The proprietor of a school may apply to a council for the making by virtue of section 119B(1)(b) above of a special diversion order in relation to any

highway for which the council are the highway authority and which-

- (a) crosses land occupied for the purposes of the school, and
- (b) is a relevant highway as defined by section 119B(2) above.

(2) No application may be made under this section for an order which would create a new highway communicating with-

- (a) a classified road,
- (b) a special road,
- (c) a GLA road, or
- (d) any highway not falling within paragraph (a) or (b) above for which the Minister is the highway authority,

unless the application is made with the consent of the highway authority for the way falling within paragraph (a), (b), (c) or (d) above.

(3) Before determining to make a special diversion order on an application under this section, the council may require the applicant to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards-

- (a) any compensation which may become payable under section 28 above as applied by section 121(2) below, or
- (b) to the extent that the council are the highway authority for the highway in question, any expenses which they may incur in bringing the new site of the highway into fit condition for use by the public, or
- (c) to the extent that the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by section 119B(14) above.

(4) Subsections (3) to (12) of section 119ZA above shall apply to applications under this section as they apply to applications under that section, with the substitution-

- (a) for references to a public path diversion order of references to a special diversion order, and

(b) for references to a footpath or bridleway of references to a highway, and regulations made under that section by virtue of this subsection may make different provision for the purposes of this section and for the purposes of that section.

### **121A Regulations with respect to applications for orders**

121A. - (1) The Secretary of State may by regulations make provision as respects applications under section 118ZA, 118C, 119ZA or 119C above-

- (a) requiring the applicant to issue a certificate as to the interests in, or rights in or over, the land to which the application relates and the purpose for which the land is used,
- (b) requiring the applicant to give notice of the application to such persons as may be prescribed,
- (c) requiring the applicant to certify that any requirement of regulations under this section has been complied with or to provide evidence that any such requirement has been complied with,
- (d) as to the publicising of any application,
- (e) as to the form, content and service of such notices and certificates, and
- (f) as to the remission or refunding in prescribed circumstances of the whole or part of any prescribed charge.

(2) If any person-

- (a) issues a certificate which purports to comply with any requirement imposed by virtue of subsection (1) above and contains a statement which he knows to be false or misleading in a material particular; or
- (b) recklessly issues a certificate which purports to comply with any such requirement and contains a statement which is false or misleading in a material particular,

he shall be guilty of an offence.

(3) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Notwithstanding section 127 of the Magistrates' Courts Act 1980 (limitation of time for taking proceedings) summary proceedings for an offence under this section may be instituted at any time within three years after the commission of the offence.

### **121C Cases where council may decline to determine applications**

121C. - (1) A council may decline to determine an application under section 118ZA, 118C, 119ZA or 119C above if, within the period of three years ending with the date on which the application is received, the Secretary of State-

- (a) has refused to make an order on an appeal under section 121D(1)(a) below in respect of a similar application, or
- (b) has refused to confirm an order which is similar to the order requested.

(2) Before declining under subsection (1) above to determine an application under section 118C or 119C above, the council shall consider whether since the previous decision of the Secretary of State was made the risks referred to in subsection (1)(b)(i) to (iv) of section 118B or of section 119B have substantially increased.

(3) A council may decline to determine an application under section 118ZA, 118C, 119ZA or 119C above if-

(a) in respect of an application previously made to them under that section which is similar to the current application or relates to any of the land to which the current application relates, the council have not yet determined whether to make a public path extinguishment order, special extinguishment order, public path diversion order or special diversion order, or

(b) the council have made a similar order or an order which relates to any of the land to which the current application relates but no final decision as to the confirmation of the order has been taken.

(4) For the purposes of this section an application or order is similar to a later application or order only if they are, in the opinion of the council determining the later application, the same or substantially the same, but an application or order may be the same or substantially the same as a later application or order even though it is made to or by a different council.

#### **121D Right of appeal to Secretary of State in respect of applications for orders**

121D. - (1) Subject to the provisions of this section, where, in relation to an application made under section 118ZA, 118C, 119ZA or 119C above, the council to which the application was made-

(a) refuse to make an order on the application,

(b) refuse to confirm as an unopposed order an order made on the application, or

(c) refuse to submit to the Secretary of State an order which is made on the application and against which any representation or objection has been duly made and not withdrawn,

the applicant may, by giving notice to the Secretary of State, appeal to the Secretary of State.

(2) Subsection (1)(a) above does not confer any right to appeal to the Secretary of State where-

(a) the council have no power to make the order requested without the consent of another person and that consent has not been given, or

(b) the reason, or one of the reasons, for the refusal to make the order is that the applicant has refused to enter into an agreement required by the council-

(i) in the case of a public path extinguishment order, under subsection (6) of section 118ZA above,

(ii) in the case of a special extinguishment order, under that subsection as applied by section 118C(2) above,

(iii) in the case of a public path diversion order, under section 119(5)

above,

(iv) in the case of a special diversion order, under section 119C(3) above.

(3) Paragraph (b) of subsection (1) above does not confer any right to appeal to the Secretary of State in a case where the council has no power to confirm the order without the consent of another person and that consent has not been given; and paragraph (c) of that subsection does not confer any right to appeal to the Secretary of State in a case where, if the order had been unopposed, the council would have had no power to confirm it without the consent of another person and that consent has not been give

### **121E Determination of appeals**

121E. - (1) Where an appeal to the Secretary of State is brought under section 121D(1)(a) above, the Secretary of State shall-

(a) prepare a draft of a public path extinguishment order, special extinguishment order, public path diversion order or special diversion order under section 120(3) above giving effect to the application and containing such other provisions as, after consultation with such persons as he thinks fit, the Secretary of State may determine,

(b) give notice of the draft order in accordance with paragraph 1(2) of Schedule 6 to this Act, and

(c) subject to subsection (6) below and to paragraph 2 of that Schedule, determine whether to make the order (with or without modifications) under section 120(3) above.

(2) Where an appeal to the Secretary of State is brought under section 121D(1)(b) or (c) above, the order made on the application shall be treated as having been submitted to him for confirmation (with or without modifications).

(3) Where an appeal to the Secretary of State is brought under section 121D(1) above, the Secretary of State may not make or confirm a public path diversion order or special diversion order if it appears to him that-

(a) work is necessary to bring the new highway created by the order into a fit condition for use by the public,

(b) if the order were made, the work could not be carried out by the highway authority without-

(i) the consent of another person, or

(ii) any authorisation (however described) which is required by or under any enactment, and

(c) the consent or authorisation has not been obtained.

(4) Where an appeal to the Secretary of State is brought under section 121D(1)

above, the Secretary of State may not-

(a) make a public path diversion order or special diversion order so as to create a public right of way over land covered by works used for the purposes of a statutory undertaking or the curtilage of such land, or

(b) modify such an order so as to create such a public right of way,

unless the statutory undertaker has consented to the making or modification of the order.

(5) In subsection (4) above "statutory undertaker" and "statutory undertaking" have the same meaning as in Schedule 6 to this Act.

(6) Subsection (1)(c) above does not apply where any consent required by section 121(4) above has not been obtained.

(7) The Secretary of State may by regulations make further provision with respect to appeals under section 121D(1) above.

(8) Regulations under subsection (7) above may, in particular, make provision-

(a) as to the manner in which, and time within which, notice of an appeal is to be given,

(b) as to the provision of information to the Secretary of State by the council to which the application to which the appeal relates was made,

(c) for the payment by the applicant of any expenses incurred by the Secretary of State-

(i) in preparing a draft order,

(ii) in giving any notice required by subsection (1)(b) above or Schedule 6 to this Act,

(d) requiring the production by the council to whom the application was made of any certificates required by regulations under section 121A(1)(a) above,

(e) requiring the applicant to give notice of the appeal to such persons as may be prescribed,

(f) requiring the applicant to certify that any requirement of regulations under this section has been complied with or to provide evidence that any such requirement has been complied with,

(g) as to the publicising of any appeal,

(h) as to the form, content and service of such notices and certificates,

(i) modifying the provisions of Schedule 6 to this Act in their application to the procedure on appeals under section 121D(1) above, and

(j) as to the remission or refunding in prescribed circumstances of any prescribed charge.

(9) The Secretary of State may by regulations provide that section 28 above, as

applied by section 121(2) above, is to have effect in cases where a public path extinguishment order, special extinguishment order, public path diversion order or special diversion order is made under section 120(3) above on an appeal under section 121D(1)(a) above, as if the reference to such one of the authorities referred to as may be nominated by the Secretary of State were a reference to such one of those authorities as may be specified in or determined in accordance with, the regulations.

(10) Subsections (2) to (4) of section 121A above shall apply in relation to any certificate purporting to comply with a requirement imposed by virtue of this section as they apply to a certificate purporting to comply with a requirement imposed by virtue of subsection (1) of that section.

(11) For the purposes of this section-

(a) a draft public path extinguishment order or special extinguishment order gives effect to an application under section 118ZA or 118C above only if the land over which the public right of way is to be extinguished by the order is that shown for the purposes of subsection (2) of section 118ZA above (or that subsection as applied by section 118C(2) above) on the map accompanying the application, and

(b) a draft public path diversion order or draft special diversion order gives effect to an application made to a council under section 119ZA or 119C above only if-

(i) the land over which the public right of way is to be extinguished by the order, and

(ii) the new site to which the highway is to be diverted,

are those shown for the purposes of subsection (4) of section 119ZA above (or that subsection as applied by section 119C(4) above) on the map accompanying the application.

(12) In this section "prescribed" means prescribed by regulations made by the Secretary of State."

## **Annex C: Flow Chart for the Rights to Apply and Appeal in respect of public path and special orders**

The flow chart shows the proposed procedures leading to determination of an application (and any appeal) in respect of an extinguishment or diversion order

### **Explanatory Notes**

The procedures are similar for all types of applications and appeal (whether seeking a public path order under sections 118ZA and 119ZA, or a special order under sections 118C or 119C).

(1) The application form will be accompanied by a map and other relevant paperwork, including details of any pre-application consultation carried out by the applicant.

(2) The local authority will assess the application against the criteria set out in the Highways Act 1980 (as amended), namely:

for public path extinguishment orders: whether it appears to the authority to be expedient to extinguish the way or path because it is not needed for public use.

for public path diversion orders: whether (i) it appears to the authority to be expedient to divert the public right of way in the interests of either the public or the owner, lessee or occupier **and** (ii) provided the order will not alter a point of termination except to a point on the same highway way, or a highway connected with it, and which is substantially as convenient to the public.

for special extinguishment or diversion orders: whether (i) it appears to the authority that it is expedient to extinguish or divert the highway in order to protect pupils or staff from violence, or threat of violence; harassment; alarm or distress arising from unlawful activity; or any other risk to their health or safety arising from such activity **and** (for diversion orders only) (ii) provided the order will not alter a point of termination except to a point on the same highway way, or a highway connected with it.

(3) An appeal under section 121D (1) (a) of the Highways Act 1980.

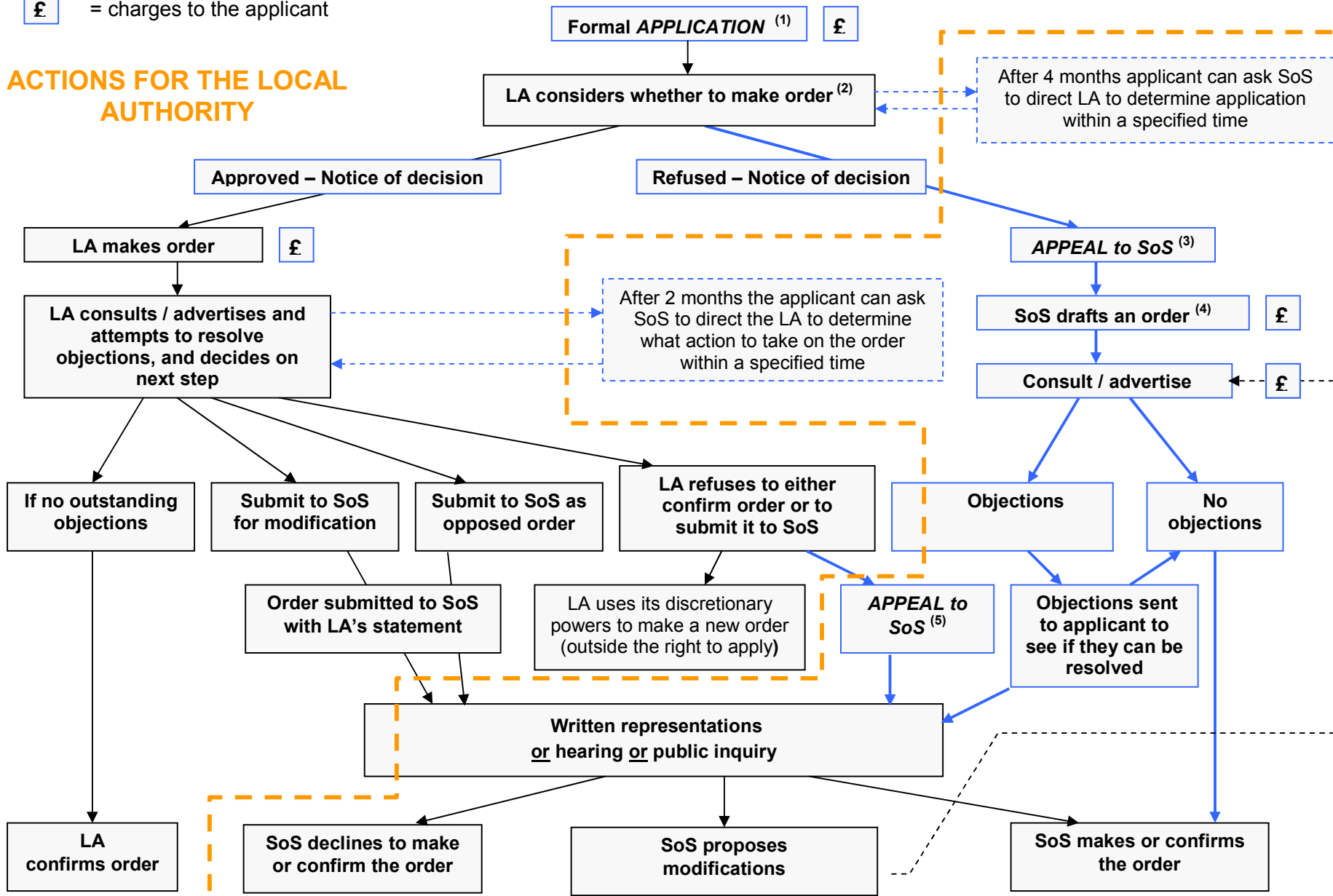
(4) On receipt of a valid appeal under section 121D (1) (a), the Secretary of State will be required to draft an order, and consider it, regardless of whether the order meets the criteria in (2) above.

(5) An appeal under section s212D (1) (b) or (c) of the Highways Act 1980.

# Flowchart for the Right to Apply

£ = charges to the applicant

## ACTIONS FOR THE LOCAL AUTHORITY



## ACTIONS FOR THE SECRETARY OF STATE (i.e. GO-NE and PINS)

## **Annex D: Differences between section 121D appeals and definitive map modification order appeals**

Most local authorities will be familiar with definitive map modification order (DMMO) appeals, made under Schedule 14 of the Wildlife and Countryside Act 1984. However, it should be noted that the procedures involved with a section 121D appeal will be different to those for a DMMO appeal. In particular, when a duly made appeal is made under section 121D:

- the Secretary of State assumes full jurisdiction and will generally have no powers of direction over the local authority;
- in the case of appeals (under section 121D(1)(a)) against refusal to make an order, the Secretary of State will draft the order applied for, and will proceed to carry out a similar function to that normally performed by the authority without regard to the merits of the proposal, before deciding whether not to make the order;<sup>18</sup> and
- in the case of appeals against failure to confirm an order or refusal to submit an order to the Secretary of State (under sections 121D(1)(b) and 121D(1)(c)), the order will be treated as having been submitted for confirmation (with or without modifications).

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<sup>18</sup> The terminology connected with orders can be confusing: Whereas a local authority 'makes' and 'confirms' orders, the Secretary of State 'drafts' and 'makes' orders (and can also 'confirm' or 'modify' orders made by a local authority). However, the Secretary of State never confirms an order which he has drafted and made himself.

## Annex E: List of Questions

**You do not need to answer all the questions, but please answer questions strict numerical sequence and clearly indicate the question number to which each answer relates.**

- Q1. Do you agree that the regulations should (a) require authorities to make available application forms for use by applicants, and (b) that the content of the application form should be for the authorities to determine ?
- Q2. Do you agree that the regulations should require authorities to seek basic information in the application form, as listed in the consultation paper ?
- Q3. Do you agree that the right to apply should allow for the making of applications to extinguish or divert restricted byways ?
- Q4. Do you agree that the scale of the map accompanying an application should be at the scale of 1:2,500 or, where a map of such a scale is not available, at the largest scale readily available ?
- Q5. Do you agree that the maps accompanying an application should only be amended with the agreement of the authority ?
- Q6. Do you agree that the applicant should only be required to notify: other landowners, lessees or occupiers whose land they consider will be affected by the order ?
- Q7. Do you agree that authorities should be required to consult other councils within whose area the right of way lies, and such other persons as the authority considers appropriate, **before** deciding an application ?
- Q8. Do you agree that authorities should be required to notify any persons who made representations on an application, of the outcome ?
- Q9. Do you agree that 56 days is a fair period of time within which appeals should be brought ?
- Q10. Do you agree that appeals should be brought by using a form obtained from the Secretary of State, but that the form of appeal need not be prescribed by regulations ?
- Q11. Do you agree that the authority should be required to provide the Secretary of State with the required information within four weeks of receiving notice from the Secretary of State (or such other date as agreed with the Secretary of State) ?

Q12. Do you agree that the applicant (appellant) should not be required to give notice of the making of an appeal to any other parties.

Q13. In the case of appeals under section 121D(1)(a) do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the application ?

Q14. In the case of appeals under section 121D(1)(b) or section 121D(1)(c), do you agree that the Secretary of State should be required to give notice of an appeal to any person who made representations or objections on the order (and which have not subsequently been withdrawn) ?

Q15. Do you (a) agree that the regulations should prescribe an Application Charge set at £1000 per application, and (b) what impact do you consider this would have on the numbers of applications made ?

Q16. Do you agree that the regulations should provide for a standard order-making charge plus four Further Charges as proposed, at the levels proposed ?

Q17. Do you agree that authorities should be required to refund the difference, where the actual cost of placing the newspaper notice is less than Further Charge C ?

Q18. Do you agree that Further Charge C should be set at a higher level in those areas where costs are unavoidably higher

Q19 (For Order-making authorities only): Do you consider that Further Charge C should be set higher than £500 in your area ? If so, provide evidence to show that costs unavoidably exceed £500, and state what level you consider it should be set at in your area.

Q20. Do you agree that the prescribed charges for public path diversion and extinguishment orders should apply to special orders (for school security) ?

Q21. Do special orders raise any additional issues which the Secretary of State should take into account in making regulations which meet the needs of schools ?

Q22. Do you consider that (a) there is a risk of authorities erring on the side of refusing applications (which will minimise their own costs) thereby forcing applicants to appeal, and if so, (b) what measures would most effectively mitigate the risk ?

Q23. Do you agree that applicants who appeal against an authority's refusal to make an order, should be required to meet the expenses incurred by the Secretary of State in drafting and publicising an order, through payment of a charge of approximately £150 plus the actual cost of erecting site notices and publishing newspaper notices ?

Q24. Do you agree with the proposed circumstances in which authorities should be required to remit or refund charges ?

Q25. Should a partial or full refund of the Application Charge be made when the authority refuses an application for an order ?

Q26. Do you agree that applicants should be entitled to claim refunds as proposed, and that authorities should be required to make a refund on receiving such a claim ?

Q27. Do you agree with the proposed levels of remittance/refund to be prescribed in the regulations ?

Q28. Do you consider authorities should be given the power and/or should be required to remit or refund the Application Charge and/or the Further Charges, in any other circumstances

Q29. Does the partial RIA adequately assess the likely level of uptake, costs, potential impacts, risks, and benefits ?

Q30. Do you consider that the proposals would (a) meet the needs of landowners/lessees/occupiers and (b) take full account of the needs of other stakeholder groups ?

Q31. Do you consider that the legislation relating to the right to apply and appeal should be (i) commenced in its current form, or (ii) repealed, or (iii) amended ? If you consider it should be amended please say in what ways and give your reasons.

Q32. Do you agree that the regulations should allow applications, notifications and appeals to be made online ?

Q33. Do you agree that a lead in-time of at least 6 months would be sufficient to prepare for the new rights?

Q34. Are there any other considerations which you think it is important for the Secretary of State to take into account in deciding how or when to introduce the new rights ?

Q35. Do you consider that (a) authorities should be required to notify their local access forum of each application received, and/or (b) that the Secretary of State should be required to notify the relevant forum of each appeal made ?

## Annex F: The partial Regulatory Impact Assessment

Defra	The implementation of a statutory right of application, and rights of appeal, in respect of orders to extinguish or divert public rights of way.
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<b>Stage:</b> public consultations stage	<b>Version:</b> 2.0	<b>Related Publications:</b> None at present
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Available to view or download at:  
Contact name for enquiries:  
Telephone / E-mail:

<http://www.defra.gov.uk/corporate/consult/row-rights/index.htm>  
Geoff Audcent, Sponsorship, Landscape and Recreation Division  
0117 372 8339 [geoff.audcent@defra.gsi.gov.uk](mailto:geoff.audcent@defra.gsi.gov.uk)

<b>What is the problem under consideration? Why is government intervention necessary?</b>
Land managers often encounter difficulties in persuading local authorities to make extinguishment or diversion orders in respect of public rights of way over their land. Government intervention should make it easier for land managers to obtain orders (provided the statutory criteria are met).

<b>What are the policy objectives and the intended effects?</b>
To introduce effective and cost efficient procedures which facilitate the full and fair consideration of land management interests, so that public rights of way are extinguished or diverted in appropriate circumstances.

<b>What policy options have been considered? Please justify any preferred option.</b>
<p><b>Option 1:</b> Do nothing (this option is the baseline/counterfactual against which the following options are assessed).</p> <p><b>Option 2:</b> Implement the right to apply (and appeal) with prescribed charges payable by the applicant, to cover the costs of handling applications, making/drafting orders and carrying out notifications. This is the preferred option because it is the most cost effective and manageable.</p> <p><b>Option 3:</b> Implement the right to apply (and appeal) with no charges payable by applicants.</p>

<b>When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?</b>	12 months after commencement.
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<b>Ministerial Sign-off</b> For consultation stage Impact Assessments:	<b>Ministerial Sign-off</b> For final proposal/implementation stage Assessments:
<i>I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading option.</i>	<i>I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.</i>
Signed by the responsible Minister:	Signed by the responsible Minister:
	[Not applicable at this stage]
Date: 19 May 2007	Date:

## **1. Title of proposal**

1.1 The implementation in England of a statutory right of application, and associated rights of appeal, in respect of orders to extinguish or divert public rights of way.

## **2. Purpose and intended effect**

### ***Objective***

2.1 To make it easier for owners/lessees/occupiers of land used for agriculture, forestry or the breeding/keeping of horses, and for school proprietors (collectively referred to as land managers in this document) to extinguish or divert a public right of way which crosses their land. This would provide for more consistent treatment across authority areas and ensure that the reasons for seeking an extinguishment or diversion are duly considered by the order-making authority (or, when appropriate, by the Secretary of State).

### ***Background***

2.2 The Government believes that the public rights of way network needs to continue to evolve over time, and in ways which take proper account of the needs of land managers as well as the wider public interest. Land managers might wish to divert or extinguish a public right of way for a variety of reasons. The existence of a right of way may constrain land management practices, thereby increasing costs or reducing income from the land, or there may be concerns about security and safety.

2.3 Order-making authorities already have powers to make extinguishment or diversion orders, but these powers are discretionary. When a local authority refuses to make an order, for whatever reason, there is little that a land manager can do about it, and there is no statutory right of appeal. Some authorities refuse to make orders unless clearly in the public interest, even though a land manager may have very strong reasons for wanting to extinguish or divert a public right of way. Whilst most authorities are prepared to at least consider making orders, there are still significant variations between authorities, in terms of the willingness to make orders, the priority given to this work, in the time taken to process orders and in the level of charges.

### ***Rationale for proposed action***

2.4 It was in response to concerns expressed by land managers that the Countryside and Rights of Way (CROW) Act made provision for new a statutory right to apply, and associated rights to appeal. The Government is now considering how these provisions could be commenced. This would require new regulations to set out how the provisions will operate in detail.

## **3. Consultation**

3.1 Before publishing the consultation paper, Defra consulted a range of government organisations and stakeholder bodies, including the Department for Education and Science, Natural England, the Government Office for the North East (GO-NE), the Planning Inspectorate, the Local Government Association, the County Surveyors Society, as well as the Country Landowners and Business Association, the National Farmers Union and the Ramblers Association.

**3.2 The figures contained in this document are for illustrative purposes and are based on assumptions which may or may not be accurate. Views are invited on whether the assumptions, estimates, impacts and potential risks are realistically assessed, and how they might be made more accurate. The RIA will be revised in the light of any views expressed and further information supplied.**

## **4. Options**

4.1 The primary legislation limits the degree of flexibility in how the new right to apply can be implemented, and the options which can be considered in this RIA. Three options have been identified as follows.

**Option 1:** Do nothing (this option is the baseline/counterfactual against which the following options are assessed).

**Option 2:** Implement the right to apply (and appeal) with prescribed charges payable by the applicant, to cover the costs of handling applications, making/drafting orders and carrying out notifications.

**Option 3:** Implement the right to apply (and appeal) with no charges payable by applicants.

## **5. Costs, benefits and risks**

5.1 The following sectors and groups will be principally affected by Options 2 and 3:

**owners, lessees and occupiers of land used for agriculture, forestry or for the breeding or keeping of horses**, who would have the right to apply and appeal, subject to payment of prescribed charges;

**school Proprietors**, who would have the right to apply and appeal in respect of orders for schools security, subject to payment of any prescribed charges;

**statutory undertakers** (e.g. water, power and telecommunications companies) and **highway authorities**, who would receive and process requests for their consent to the making of some applications (which might affect their interests);

**members of the public, parish councils and voluntary organisations**, who might be consulted on, and submit representations or objections, in respect of applications, orders and/or appeals;

**authorities** with order-making powers, who would determine applications, carry out consultations and make orders; and

**the Secretary of State** (Defra, GO-NE and the Planning Inspectorate) who would make directions, confirm opposed orders and decide appeals.

### ***Analysis of costs and benefits***

#### **Option 1: Do nothing (i.e. repeal the relevant statutory provisions):-**

**Benefits:** Avoids the need for regulation, and allows local authorities freedom to deal with land managers' requests as they think fit and in the context of local priorities and policies.

**Costs:** Authorities already have the powers to make orders and to levy a charge to recover costs, yet some still decline to make orders when requested. Doing nothing would perpetuate the costs of the current system which relate to:

- the uncertainty which applicants face regarding the outcome of applications and/or the inability of applicants to secure orders in some areas (even where the statutory criteria for making/confirming an order are met);
- the uncertainty which applicants face regarding the costs and time involved in obtaining an order (with high costs and considerable delays encountered in some parts of the country); and
- the lack of any right of appeal to an independent tribunal.

#### **Option 2: Implement the right to apply (and appeal) with prescribed charges payable by the applicant:-**

**Benefits:** Certain owners, lessees and occupiers would be able to apply for orders, and appeal, at reasonable cost, and would have more certainty regarding the likely outcome and timing of applications. Prescribed charges would reduce likelihood of frivolous, speculative or marginal applications and ensure that authorities are funded to undertake order-making work.

**Costs:** Applicants would pay prescribed charges to meet most of the authorities' costs, and charges will be (generally) higher than under Options 1 and 3. Increased volume of casework overall (but not as high as for Option 3) plus a new right to appeal would mean higher processing costs for authorities and other interested parties.

#### **Option 3: Implement the right to apply (and appeal) with no administration charges payable by the applicant:-**

**Benefits:** Certain land managers would be able to apply, and appeal, at minimal and subsidised cost (to themselves), and have greater certainty regarding the likely outcome and timing of applications.

**Costs:** Most costs will be borne by the tax payer. Lack of charges likely to lead to more applications overall, as well as to more poor quality, frivolous, speculative or marginal applications. Increased volumes will lead to more consultations, notifications, directions, objections, appeals and inquiries, with associated additional costs for all stakeholder groups.

5.2 Option 2 is the 'preferred' option for the purposes of the public consultation and this RIA.

5.3 A fourth option would be to amend the primary legislation to reduce the impacts and increase the benefits. However, since no such proposals exist on which a cost-benefit analysis could sensibly be based, this option is not included in this partial RIA. However, it might be added at the next stage, depending on the outcome of this public consultation.

### ***Risk Analysis***

5.4 There are a number of risks associated with implementing the right to apply in its present form. Each risk could potentially impact directly or indirectly on every stakeholder group. The identified risks are shown in the Table F1 below.

	<b>Risk</b>	<b>Probability</b>	<b>Impact</b>	<b>Counter-measures</b>
1	Charges are set too high, discouraging applications and generating a financial surplus for authorities ( <i>Option 2 only</i> )	Low (Low)	High (Low)	<ul style="list-style-type: none"> <li>• Consult on proposed charges</li> <li>• Post-commencement: conduct review of charges after 12 months</li> </ul>
2	Charges are set too low, leading to under-funding of authorities, more appeals and adverse impact on service levels ( <i>Option 2 only</i> )	Low (Low)	Medium (Medium)	<ul style="list-style-type: none"> <li>• Consult on proposed charges</li> <li>• Post-commencement: conduct review of charges after 12 months</li> </ul>
3	Prescribed (average) charges fail to meet authority costs in parts of the country where costs are above average. If the authority is unable to reduce its costs then there may be an impact on service levels, more appeals, etc ( <i>Option 2 only</i> ).	Low (Low)	Low (Low)	<ul style="list-style-type: none"> <li>• Consult on proposed charges and keep under review</li> <li>• Consider higher charges in some areas for some functions (e.g. newspaper notices)</li> <li>• Work with authorities to spread good practice on cost-efficiency</li> </ul>
4	Applicants assume that a right of application equates to a right to have an order made, and might therefore sometimes submit technically valid applications which are bound to be refused because an order would not meet the statutory criteria for an extinguishment or diversion. This will lead to wasted effort and costs for all parties, and more appeals ( <i>Option 3 and to a lesser extent Option 2</i> ).	High (Low)	High (Low)	<ul style="list-style-type: none"> <li>• Charges to discourage poorly thought-out applications</li> <li>• Provide guidance and publicity so that potential applicants understand the likelihood of success, and the total costs likely to be incurred</li> <li>• Encourage pre-application discussion between applicants and authorities.</li> </ul>
5	Authorities use their discretion to refuse a higher proportion of applications than expected - e.g. by applying more restrictive policies or because refusal is the least-cost option for the authority (and perhaps for the applicant). This could lead to more appeals with consequential delays, costs and inconvenience	High (Medium)	High (Medium)	<ul style="list-style-type: none"> <li>• Provide guidance to authorities</li> <li>• Consider reducing the financial incentives for authorities to refuse applications (e.g. Secretary of State to meet costs of publicising an appeal and hiring a venue)</li> </ul>

	to the other parties ( <i>Options 2 and 3</i> )			
6	High rate of objections from third parties. Many objections will be legitimate but all objectors (even if the objection is misplaced/minor/vexatious) can exercise a right to be heard a hearing/public inquiry. A high rate of objections will lead to more referrals to the Secretary of State, and increased costs and delays for applicants, authorities and Defra ( <i>Options 2 and 3</i> )	High (Medium)	High (Medium)	<ul style="list-style-type: none"> <li>• Provide guidance to encourage resolution of objections at an early stage, and to promote responsible behaviour by potential objectors</li> </ul>
7	Authorities divert resources into dealing with statutory applications (and appeals), and away from other areas of work (e.g. network management, definitive map work and requests for extinguishments/diversions from landowners with no statutory right to apply) ( <i>Option 3 and to a lesser extent Option 2</i> )	High (Low)	High (Medium)	<ul style="list-style-type: none"> <li>• Authorities to be given adequate lead-in time</li> <li>• Charges set at the right level</li> <li>• Regulations to impose new burdens on authorities only where reasonably necessary</li> <li>• Policy on issuing of directions to take account of the reasonable needs of authorities</li> <li>• Post-commencement: raise awareness of the risk so that all stakeholders are alert to it</li> </ul>
8	The estimates and assumptions used in the RIA to predict number of applications, directions, referrals and appeals are too low (or high), with impact on workloads and service levels for GO-NE and the Planning Inspectorate, and funding by Defra ( <i>Options 2 and 3</i> )	High (Medium)	High (Medium)	<ul style="list-style-type: none"> <li>• Revise RIA in light of public consultation</li> <li>• Post-commencement: monitor number of applications (s121B registers) (as early warning of the likely number of appeals, etc)</li> </ul>

**Table F1: Identified risks, and counter-measures, associated with introducing the rights to apply.**

Probability and Impact assessments are shown before and after application of proposed counter-measures. Impact refers to the impact on all stakeholder groups and on management of the rights of way network

5.5 A series of counter-measures have been identified, and are incorporated into the consultation paper. These are likely to reduce the probability and/or impact of each risk. However, after applying the counter-measures, it should be noted that 3 risks of 'medium' impact are considered to have a 'medium' level of probability. The risks, and the effectiveness of counter-measures, will be reevaluated following the consultation.

### ***Predicting the likely volume of applications and appeals (Option 2)***

5.6 A specific 'right' to apply (and appeal) is likely to have the effect of encouraging more applications and increasing the level of resources devoted to this work. Casework volumes and associated costs will depend on stakeholder attitudes and perceptions as well as on the level of charges. The efficient operation of the application and appeal systems would also depend on rational and reasonable conduct by applicants, authorities and third party objectors. If minded to do so (for whatever reason) each party would be able to act in a way so as to increase the costs and burdens on the other parties, in particular:

- **applicants** could pursue proposals through to a hearing/public inquiry, even where they clearly have no prospect of success, thereby requiring local and central government as well as objectors to commit resources in dealing with a futile appeal;
- **authorities** could attempt to reduce their costs by refusing applications, and thereby transferring the order-making and notification functions to the Secretary of State. This would increase the number of appeals and thereby impose additional costs on applicants, objectors and the Secretary of State; and
- **objectors**, could force every order to go through a hearing or public inquiry (by making even minor objections), thereby increasing the number of hearings/inquiries and imposing costs on applicants, authorities and the Secretary of State.

5.7 The estimates in the partial RIA assume that stakeholders generally act in a rational, responsible and reasonable manner.

### ***The base-figure used in the partial RIA***

5.8 The base-figure used in the partial RIA (for the number of public path and special order applications made per year) is **2,630**. This is derived from the 'Draft RIA' produced by DETR in 2000, which indicated that some 4,300 applications per year might be expected. The predicted annual (net) cost to local authorities was approximately £6.2 million, with an equivalent figure for Central Government of £1 million. These figures were *in addition* to the number of requests currently received (that is beyond the do-nothing option). The figures also covered both England and Wales, and assumed that the right to apply would be available to all land owners, lessees and occupiers. The base figure in the 'draft RIA' has therefore

been scaled down by 25% to arrive at an England-only figure, and by a further 20% to reflect the fact that the new rights will be restricted to certain categories of land manager.

5.9 Under existing arrangements approximately 650 orders per year are made which are wholly or partly in the interests of the owner, lessee or occupier. Recent discussion with stakeholders suggests there would be a modest, rather than a large, increase in the number of applications and orders under a right to apply. We consider that 2,630 applications per year is therefore likely to be at the upper end of the range, and that the lower end of the range is around 650 applicants per year (i.e. in addition to the existing number of successful applications and excluding non-statutory requests and applications).

5.10 Although we consider that the likely number of applications would probably be towards the lower end of the range, the partial RIA uses 2,630 as its base-figure because in assessing costs and impacts it is more prudent to adopt the higher (i.e. 'worst-case') scenario. However, the costs (and benefits) are directly proportional to the number of applications made, meaning that a 75% reduction in applications would result in a 75% reduction in costs (and benefits) for every stakeholder group. The base-figure (and other assumptions) will be reviewed in the light of public consultation. **Views are invited on the likely level of interest amongst owners, lessees and occupiers of land, and school proprietors in applying for orders, so that the likely number of applications and orders can be more accurately predicted.**

***Estimated volume of applications and other casework***

	<b>Casework item (England)</b>	<b>Number (per year)</b>
i	Total number off applications submitted to authorities, consisting of which:	2,630
ii	- applications for public path orders	2,580
iii	- applications for special orders - schools	50
iv	Number of public path orders made by authorities on application at (ii)	900
v	Number of special orders made by authorities on application at (iii)	50
vi	Number of refusal notices issued on (ii) on (iii)	1,680
vii	Number of orders made by authorities which subsequently need to be submitted to the SoS for modification/confirmation (assumed 16% of (iv))	144
viii	Requests for directions made by the SoS	435
ix	Number of appeals submitted to the SoS (assumed 25% of (vi) + 12 appeals under ss121D(1)(b) and 121D(1)(c))	432
x	Orders drafted by SoS (following an appeal)	420
xi	Public inquiries, hearings and exchanges of written representations (assumed 80% of submitted orders at	460

	(vii) + 80% of appeals (ix)	
xii	Number of orders confirmed by authorities (assumed 80% of (iv) + 100 % of (v))	770
xiii	Number of orders made/confirmed by SoS (assumed 50% of (vii) + 50% of (x))	302

**Table F2: Summary of casework estimates used in calculating costs**  
(per year, England only)

**5.11 Estimated volume of public path order applications and orders:** It is assumed that 2,580 applications for public path orders would be made per year, (excluding informal requests and applications).

5.12 If it is assumed that 35% of applications were approved and 65% were refused then 900 orders would be made and 1,680 refusal notices would be issued.

5.13 Currently, around 80% of orders made by authorities are confirmed by the authority as unopposed, and approximately 16% of orders are submitted to the Secretary of State (the remainder are abandoned). It is assumed these ratios will continue to apply.<sup>19</sup> This would mean 270 orders being referred to the Secretary of State, 80% of which are assumed to result in a public inquiry, hearing or exchange of written representations.

**5.14 Estimated volume of directions:** If it is assumed that 645 (25%) of applications are not decided by the local authority within the statutory periods, and that 50% of applicants then seek a direction from the Secretary of State, there would be 322 requests for a direction under sections 118ZA(7) and s119ZA(8). On a similar basis it is estimated that there would be 113 requests for a direction under paragraph 2ZA, per year.

**5.15 Estimated volume of appeals:** It is estimated that 1,680 refusal notices would be issued per year, and that 25% of these would result in appeal - 420 appeals under section 121D(1)(a) plus 12 appeals under sections 121D(1)(b) and 121D(1)(c).<sup>20</sup>

<sup>19</sup> Under the right to apply a higher proportion of orders might be submitted to the Secretary of State, because many authorities currently refuse to make an order if they have reason to believe it will attract objections. An upper-range estimate could see the submission rate double (to 32%), in which case 270 per year will be submitted to the Secretary of State for modification or confirmation.

<sup>20</sup> Note - the 25% appeal rate assumes that authorities give clear and convincing reasons for each refusal which are sufficient to convince 75% of applicants that it would not be worthwhile lodging an appeal. There is a risk that the rate of appeal could be higher where authorities fail to provide convincing reasons for refusals, especially as the extra cost of making an appeal is low in comparison to the application charge already paid

5.16 Of the 432 appeals which are made it is assumed that 80% (345) would involve a public inquiry, hearing or exchange of written representations.<sup>21</sup>

**5.17 Estimated volume of special orders and orders affecting restricted byways:** It is predicted that approximately 250 special orders (for school safety) would be sought in the first five years, settling down to a handful of applications per year thereafter. Given the nature of special orders it is assumed that the number of appeals would be low.

5.18 It is difficult to predict how many applications might be made relating to restricted byways. However, for the purposes of this RIA these applications and orders are regarded as being subsumed within the overall figures given above for public path orders.

### ***Detailed assessment of benefits and costs (under Option 2)***

#### ***Benefits to applicants***

5.19 The benefits would accrue largely to individuals, businesses and schools who obtain extinguishment or diversion orders, where orders would not have obtained under the previous arrangements (because the authority was disinclined to make orders or because it applied more restrictive local policies, or higher charges), or which would have taken longer to obtain. Thus, the benefits derive from the making of extinguishment/diversion orders as well as from speeding up the process. A recent survey suggests that in over half of local authority areas, applicants currently face significant difficulties, delays or high costs in seeking an order.

5.20 Each year the proportion of land managers who seek an extinguishment or diversion order is very small – probably because the benefits are often considered marginal and unlikely to outweigh the costs involved. Generally speaking the existence of historic public rights of way do not cause significant problems for land managers. However, there will always be locations where land managers would like to divert or extinguish a right of way. For example, this might arise from a combination of:

- lower direct land-management costs (e.g. maintenance of fences along the route);
- improved safety for the public (because they can be kept away from livestock or machinery);
- improved security and/or privacy for the land owner/occupier (e.g. reduced likelihood of theft, vandalism, escape of stock, or non-intentional damage to machinery/stock/crops/ walls/gates, etc);

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<sup>21</sup> The other 20% will consist of appeals where no objections are made to a draft order, or objections are withdrawn because the proposal is amended. In these case the secretary of State will be able to make the order with an exchange of written representations, a hearing or an inquiry.

- more effective, flexible, convenient and profitable use of the land (e.g. ability to keep dairy bulls in a field, improved crop yields, no need to keep route clear of obstructions or make good after ploughing, gates can be kept locked);
- greater convenience because the route is no longer defined as a 'public place' in law (e.g. in relation to the use of motor vehicles, the muzzling of certain dangerous dogs, use of fire arms, etc);
- reduced risk of claims under Occupiers' Liability legislation;
- reduced risk of confrontation or disputes with the public; and
- an increase in capital and rental values of land.

5.21 Placing a monetary value on these factors is difficult - many are intangible and not readily measurable in financial terms (e.g. greater peace of mind and reduced disturbance). This was borne out by the fact that the six landowners surveyed in the preparation of the partial RIA were unable to put a precise monetary value on the benefits they expected to gain from the order they had recently obtained (or wished to obtain). Some benefits do have a monetary value, but are difficult to quantify at the national level because the financial benefits may be very modest, accrue over a long period or depend on variables such as the land value, land use and length of the route. Likewise, with special orders (for school security), it is impossible to know whether or not the diversion of a footpath has had the effect of saving a school child from harm.

5.22 Although it is difficult to place a monetary value on the total benefit to landowners and schools, if it is assumed that each of the 1,072 changes to the network per year (as a result of applications/appeals) increases the capital land value by around £3,000 on average, and that there are additional annual benefits of around £300 per year (e.g. reduced management costs, incidence of crime, claims under occupiers liability) then over a ten year period, the average benefit to an individual applicant will amount to some £6,000.

### *Costs to applicants*

5.23 The following costs could be incurred by applicants:

- (a) Making an application. Assuming there are 2,630 applications per year the total cost to applicants (of preparing applications) is estimated at £117,600 per year.<sup>22</sup>
- (b) Payment of the prescribed charges (see public consultation paper). Applicants would be expected to met the cost of considering applications, making/drafting orders and of notification/consultation (whether these costs are incurred by the order-making authority or by the Secretary of State). It is calculated that the proposed charges will on average be in the order of 36% higher than the average charges under the current system for public path orders

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<sup>22</sup> Assumes that each applicant spends 2.5 hours reading the guidance, completing the application form and dealing with any requests for clarification.

(authorities are not currently able to charge in respect of special orders for school security).<sup>23</sup> The Application Charge paid by applicants in submitting 2,630 applications for public path and special orders per year will total £2.6 million per year (at £1,000 per application). The Further Charges paid by applicants in respect of the 770 predicted orders made annually by authorities would total £1.155 million (at an average of £1,500 per order). It should be noted that these figures do not take account of the fact that charges may be remitted or refunded in certain prescribed circumstances.

(c) Post-application consultation and negotiation by the applicant (at their discretion) with any objectors in order to address concerns and seek withdrawal of any objections. Assuming there are 950 public path and special orders per year the total cost to applicants is estimated to be around £90,000 per year.<sup>24</sup>

(d) When an authority decides to submit an opposed order to the Secretary of State, applicants will incur additional costs (at their discretion) in preparing their evidence and presenting their case (through written representations, a hearing or at public inquiry). The costs will depend on the circumstances of the case, including the number/strength of objections and the level of involvement by the authority (which might be minimal if there is no public interest justification). Assuming that 144 referrals per year lead to 115 hearings, inquiries or exchanges of written representations, the total cost to applicants is estimated to be around £70,000.<sup>25</sup>

(e) Where applicants exercise their right of appeal, further costs will be incurred in lodging an appeal, and in submitting evidence to the Secretary of State (at a hearing, inquiry or through written representations). These costs are new costs (because there is currently no right of appeal) but the applicant will only incur them should they exercise their right to appeal. The costs will depend on the particular circumstances of the case, such as the number and strength of objections, and whether the appeal proceeds by written representations, hearing or public inquiry and whether the applicant decides to engage professional representation or expert witnesses. Assuming there are 432 appeals, the appeal preparation and representation costs incurred by applicants (i.e. excluding charges) is estimated to be around £231,000 per year.<sup>26</sup> Appellants will be required to pay charges (to meet some of the authority's and

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<sup>23</sup> This increase is mainly due 4 reasons for the higher charges: (1) there will be a more consistent and speedy service (meaning that average processing cost rises by an estimated 12% compared to the current system), (2) many authorities currently subsidise the cost of making orders (which may no longer be the case under the right to apply), (3) authorities will be under a legal duty to consider and determine every application (with less discretion to reject more controversial or complex proposals, with the result that "average" cost per order will be higher) and (4) applicants will not receive refunds in the way they do now when an authority decides not to make or confirm an order.

<sup>24</sup> This assumes 6 hours work.

<sup>25</sup> This assumes that in 25% of cases the applicant employs a professional advisor/representative.

<sup>26</sup> This is the cost of submitting the appeal, submitting evidence, and appearing at an inquiry or hearing. It assumes that 80% of appeals proceed to an inquiry, hearing or written representations, and that in 25% of cases the applicant employs a professional advisor/representative.

Secretary of State's costs).<sup>27</sup> Assuming there are 432 appeals and that 50% are successful then the charges are likely to amount to £395,000 per year.<sup>28</sup> The total appeal costs for applicants are estimated at £631,000 per year.

5.24 It is already the case (under the Highways Act 1980) that before orders come into effect applicants can be required to meet the costs of paying compensation to other landowners and of bringing a new route into fit condition for public use. Since these costs arise from existing legislation they are excluded from this partial RIA.

<b>Benefits</b>		<b>Annual costs (£m)</b>	
Increased land values and other benefits		Preparation of applications	£0.117
		Application charges	£2.630
		Further charges	£1.155
		Consultation	£0.090
		On submission to SoS	£0.070
		Appeal representation	£0.231
		Appeal charges	£0.395
TOTAL		TOTAL	£4.688

**Table F3: Summary of estimated benefits and costs for applicants**

*Benefits to order-making authorities*

5.25 The new rights are not intended to benefit authorities, although Option 2 has the potential to offer the following benefit:

- (a) authorities will no longer (generally) be required to meet the Secretary of State's costs in relation to erecting site notices, newspaper costs and hire of venue required in connection with holding a public inquiry or hearing into opposed 'right to apply' orders submitted to him for confirmation. Assuming that half of the orders currently submitted fall within this definition, this could save authorities the cost of notices/venue hire for approximately 25 inquiries/hearings per year. At an estimated average cost of £800 per inquiry, the cost saving would be £20,000 per year.

*Costs to order-making authorities*

5.26 It is predicted that Option 2 will have a number of potential costs for order-making authorities, although the impact will vary between authorities. The (net) costs are:-

<sup>27</sup> These charges are to meet the Secretary of State's costs in drafting the order (if not already drafted by the authority) and carrying out notifications required by Schedule 6 of the Act, and also the further charges (up to £600) payable to the authority for certification/notification in respect of any new route (if the appeal is successful).

<sup>28</sup> This assuming 420 appeals under section 121D(1)(a).

- (a) submitting orders to the Secretary of State, and presenting evidence in the case of referred orders. The 'Draft RIA' did not separately identify this cost, but a figure of £1,400 per order is allowed for. This appears reasonable bearing in mind that authorities will seek to minimise any such discretionary costs (e.g. where the authority has no strong opinions for or against, it will probably scale back its involvement to what it considers is a reasonable minimum). Assuming an additional 144 referrals, of which 80% proceed to an inquiry, hearing or written representations involving the authority, this would impose a combined cost to authorities of £0.159 million per year (not recoverable from the applicants);
- (b) less influence in persuading landowners to make compensatory improvements to the right of way network (in return for making an order) thereby reducing the level of resources available for improvements to the network. However, whilst authorities in effect lose their power of veto, they would retain considerable influence over applicants, through the advice they give and by indicating whether they will be likely to support or oppose a proposal. This cost is therefore likely to be minimal - perhaps £100,000 per year; and
- (c) authorities may provide pre-application advice to potential applicants. However, this will be a *discretionary* cost and is likely to be largely matched by consequent improvements to the quality of applications/proposals and reduced costs to the authority at later stages (i.e. by reducing likelihood of an appeal). The net cost is estimated at £350,000 per year.
- (d) It is assumed that 950 orders would be made annually by authorities, and that they would incur costs in considering objections, and in seeking to clarify/resolve these through negotiation with applicants and objectors. There may be associated costs from having to carry out further site visits, reporting to committee, agreeing the specification for any works which need to be carried out, etc. The cost of this is estimated at £800 per order, coming to a total of £0.76m per year.
- (e) It is assumed there would be approximately 432 appeals per year, and that authorities would incur costs in opposing all of these appeals. The draft RIA estimated the representational costs for authorities at £800 per appeal, but consultation with local authorities suggests this figure may be too low, even allowing for inflation, especially as authorities will want to robustly defend their decisions in the case of many or most appeals (where there could be a detrimental impact on public amenity if allowed). £1,500 per appeal is considered a more realistic estimate. The total representational costs for 432 appeals would be £0.6 million per year.

5.27 It should be noted that the above figures do not include the costs of processing and deciding applications, nor the costs involved in making and consulting on orders, because it is assumed that these costs will be met by

applicants through the prescribed charges. Costs to authorities may be higher depending on the prescribed circumstances when refunds should be made to applicants, and the level of those refunds.

5.28 In considering the impact on authorities it should be remembered that funding for the cost of carrying out new duties in connection with the right to apply, has unready been provided via the Revenue Support Grant.

Annual benefits		Annual costs (£m)	
Savings on opposed 'right to apply' orders submitted to him for confirmation	£20,000	Submission of opposed orders and orders requiring modification	£0.159
		Reduction in compensatory improvements	£0.100
		Pre-application advice	£0.350
		Negotiation, consultation and consideration in respect of orders made	£0.760
		Appeal related costs for 442 appeals	£0.648
TOTAL	£20,000	TOTAL	£2.017

**Table F4: Summary of estimated benefits and (net) costs for order-making authorities**

*Benefits to statutory undertakers and highway authorities*

5.29 None identified.

*Costs to statutory undertakers and highway authorities*

5.30 Statutory undertakers (water, sewerage, power and telecommunications companies) would receive requests from land managers seeking consent to the making of any applications which propose the creation of a new right of way over land covered by works used by any statutory undertakers for the purposes of their undertaking or within the curtilage of such land. This would have the following impacts on statutory undertakers:

- (a) costs incurred in receiving and responding to enquires about whether or not a proposed diversion route affects works belonging to the statutory undertaker;
- (b) costs of considering the impact which proposed diversions may have (where the diversion route crosses land used by a statutory undertaker);
- (c) the cost of issuing a written decision (refusal or consent) and stipulating any conditions; and
- (d) risks to reputation, etc, in dealing with land managers where a response is not given as quickly as the land manager would like, or where consent is withheld, etc.

5.31 The above costs would be in addition to informal consultations and statutory notifications which statutory undertakers currently receive from local authorities proposing to make orders to divert a public right of way.

5.32 Assuming that there are 2,580 applications per year (+ 50 special order applications), and assuming that 20% of these might affect a statutory undertaker, then this means that statutory undertakers would receive approximately 500 requests for consent per year. If each request (on average) costs the statutory undertaker no more than £100 to deal with, then this will impose an additional cost of no more than £50,000 per year on the water, power and telecommunications utilities in England.

5.33 Highway authorities may receive requests where a diversion communicates with a highway. Only a small proportion of applications are likely to require such consents and the additional cost to highway authorities should be low - estimated in total at less than £20,000 per year.

Annual benefits		Annual costs (£m)	
None identified	nil	Cost of responding to 500 requests for consent (to make an application) - statutory undertakers	£0.050
		Cost of responding to 500 requests for consent - highway authorities	£0.020
TOTAL	nil	TOTAL	£0.070

**Table F5: Summary of estimated benefits and costs for statutory undertakers and highway authorities**

*Benefits to other stakeholder groups*

5.34 The new rights are not intended to deliver benefits for other stakeholder groups, but there may be benefits for users of rights of way, because the proposals may lead to improvements in the rights of way network which might not otherwise take place (e.g. regularise informal diversions and reduce the number of illegal obstructions). However, any such benefits unlikely to be significant in monetary terms.

*Costs to other stakeholder groups*

5.35 Members of the public, parish councils, local amenity groups and national voluntary organisations (e.g. the Auto-Cycle Union, British Horse Society, Byways and Bridleways Trust, Open Spaces Society, Ramblers Association and the Cyclists Touring Club) could incur additional costs, because an increase in orders would lead to more consultations, inquiries, hearing, etc. The impact on most parish councils and local amenity bodies should be very low because they will only occasionally be consulted on an order. However, the impact on national bodies (which are notified of every order) could be more significant.

5.36 If it is assumed that the average combined cost (to the public, parish councils and voluntary organisations) of considering and responding to each consultation is £30 per order then (with 1370 orders made or drafted) the cost to parish councils and the voluntary sector would be £41,000 per year. In addition, if it is assumed that these stakeholders incur costs of £200 in submitting evidence in respect of 144 referred orders and 432 appeals per year, then the total cost to the parish council and voluntary sectors rises to £115,000 per year.

5.37 Costs to users of an increased number of actual extinguishments or diversions affecting the utility of the rights of way network will be negligible because of the protection afforded to users by the statutory requirements in sections 118, 118B, 119 and 119B of the Act.

Annual benefits		Annual costs (£m)	
None identified	nil	Cost of responding to consultations	£0.040
		Cost of responding to submitting evidence in respect of opposed orders	£0.115
TOTAL	nil	TOTAL	£0.155

**Table F6: Summary of estimated benefits and costs for other stakeholder groups**

*Benefits to Central Government*

5.38 No direct benefits identified, although the new rights will help to achieve the policy objective of ensuring that the rights of way network continues to evolve in ways which take proper account of the needs of land managers (and schools).

*Costs to Central Government*

5.39 The estimated costs to the Secretary of State of making the predicted 435 directions per year is £44,000.

5.40 The (net) cost to the Secretary of State of considering each of the 144 referred orders and 432 appeals is likely to broadly similar, and is estimated to total approximately £1.8 million per year. The costs of processing a case is broadly the same whether it is determined following a public inquiry, hearing or written representations. However, an inquiry/hearing would incur additional costs relating to hire of a venue, and publicising the arrangements (letters to the parties, site notices and newspaper notice). It is assumed that 52% of cases would be dealt with by exchange of written representations. The above costs exclude the costs of drafting orders and carrying out consultation and notification on draft orders (as these costs will be recharged to the applicant).

Annual benefits		Annual costs (£m)	
None identified	nil	Processing 435 directions	£0.044
		Processing 144 referred orders (opposed)	

		orders and order requiring modification)	£0.447
		Appeals against refusal to make an order	£1.294
		Appeals against refusal to confirm or submit	£0.047
TOTAL	nil	TOTAL	£1.832

**Table F7: Summary of estimated benefits and (net) costs for Central Government**

### ***Assessment of the benefits and costs of Option 3***

5.41 Option 3 (a right to apply and appeal - with no charges) would generate many more applications, directions and appeals. It is reasonable to assume that the number of applications might increase by a factor of 3 (to nearly 8,000 applications per year), and the number of appeals by a factor of 4 (to over 10,000 appeals per year). However, the increased benefit to the agricultural, forestry, equine and education sectors will be marginal because many of the applications will either be of marginal economic benefit or will have little prospect of success. Although applicants would pay no charges, any savings to applicants would probably be largely outweighed by the abortive time and effort spent on pursuing more ill-prepared or futile applications which have little prospect of success.

5.42 The costs to local and central government would increase, perhaps by 500% (to £20 million per year) because they will have to absorb more of the costs and also have to process many more applications and appeals.

5.43 The costs to third parties will probably increase by 400% (to £0.5 million per year), as they respond to a larger number of proposals, of which a larger proportion would be controversial or problematic in some way.

### **Summary of costs and benefits**

**Option 1** (Do Nothing). This option would not increase costs but would mean that some land managers will continue to encounter difficulties or delays in seeking extinguishments or diversions. Option 1 would therefore fail to deliver the benefits of Option 2 and 3.

**Option 2** (Right to apply and appeal - with charges). This option is the most cost effective and manageable option of the three. Applicants would bear the cost of processing applications, making/drafting orders and carrying out notifications. Each party would meet their own costs at inquiries. The Secretary of State would meet the cost of making directions and deciding appeals.

**Option 3** (Right to apply and appeal - with no administration charges). This option would maximise the benefits for applicants but will be significantly more costly to all other stakeholders. Overall costs would be very high because the absence of application charges would encourage the making of more poor quality, frivolous, speculative or marginal applications.

## Summary of Costs and Benefits of Option 2

5.44 Table F8 below presents a summary of the costs and the benefits for the different sectors that will be impacted by Option 2. The costs and benefit profile has been presented over 10 years, and has been discounted using the Treasury<sup>29</sup> recommended discount rate of 3.5% and presented in Net Present Value terms, 2007 prices.

<b>Stakeholder Group</b>	<b>Benefits in (£m) NPV over 10 years</b>	<b>Costs in (£m) NPV over 10 years</b>
Applicants	39.3	37.6
Authorities	0.2	16.2
Statutory Undertakers and Highway Authorities	0.0	0.6
Other Stakeholder Groups	0.0	1.2
Central Government	0.0	14.7
<b>Total</b>	<b>39.5</b>	<b>70.4</b>

**Table F8: Summary of the Costs and Benefits of Option 2**

5.45 The profile shows that the estimated total benefits over 10 years would be worth £39 million whilst the total costs of the application and appeals system would be £70 million. Even for applicants, the cost-benefit appears marginal, with the value of the benefits at £39 million, and only slightly ahead of the costs at £37 million. However, this could be due to the fact that many of the benefits to applicants are not readily quantifiable in financial terms (e.g. peace of mind). It is also possible that assumptions used in assessing the value of the benefits have been under-estimated, or that the costs have been over-estimated. The figures are also highly dependent on the level of prescribed charges and refunds. The costs and benefits will be viewed in the light of public consultation.

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<sup>29</sup> The Green Book, Appraisal and Evaluation in Central Government, HM Treasury, 2003.  
<http://greenbook.treasury.gov.uk/>

## **6. Equity and Fairness**

6.1 The proposals would provide a right to apply (and appeal) to each of the categories of landowner as set out in the primary legislation, and in that sense can be deemed to be fair and equitable. The primary legislation does not extend the same rights to other landowners (e.g. householders with a public right of way through their garden).

6.2 Since the orders would meet the private needs of the applicant, who expects to gain a benefit, it is fair that the applicant should meet some of the costs incurred by authorities and the Secretary of State.

6.3 There is not expected to be a differential impact in terms of ethnicity, gender, age or health.

## **7. The Small Firms Impact Test**

7.1 Discussions with business representative organisations lead us to believe that most small businesses in the agricultural, forestry and equine sectors will not be affected by the proposals. There would only be an impact on the small proportion of businesses which seek to divert or extinguish a public right of way. These businesses will be beneficiaries of the new rights, although they will also be required to contribute towards some of the costs incurred by authorities and the Secretary of State.

7.2 The National Farmers Union and the Country Land and Business Association have been consulted in preparing the partial RIA. In addition, 6 landowners who have sought to divert a public right of way were surveyed (4 farmers, one stable proprietor and one land agent with responsibility for 55 tenanted farms).

7.3 None of those surveyed were motivated by a desire to increase land values. The primary motivation related to safety, security and peace of mind. Rights of way near farm buildings were felt to increase the risk of burglary (three farmers reported losses of up to £3,000 through theft over the previous 2-3 years) and public access (particularly through working farm yards) was considered to pose a danger to the public. The majority felt it was only a matter of time before a burglary or accident occurred and when this happens the costs (in terms of time/inconvenience/worry, insurance excess, increased insurance premiums and risk of a prosecution against the landowner in case of an accident) were judged to outweigh the costs of obtaining an order. However, none of those surveyed had carried out a cost-benefit analysis or were able to precisely quantify the benefits in monetary terms.

7.4 The land agent considered that in his experience, the new rights to apply and appeal might increase the volume of casework for local authorities, but not significantly.

## **8. Competition Assessment**

8.1 The proposals are intended to benefit agriculture, the forestry industry, those involved with keeping or breeding horses and school proprietors. No other economic sectors will be affected by the proposals.

## **9. Enforcement and sanctions**

9.1 As the regulations are concerned with giving land managers new discretionary rights, no issues in respect of enforcement or sanctions are considered to arise.

## **10. Implementation and delivery**

10.1 The right to apply would be introduced through the making of regulations, accompanied by guidance for local authorities (and applicants). Local authorities (and National Park authorities) would be responsible for determination of applications, whilst the Secretary of State would be responsible for making directions and deciding appeals. It is expected that the regulations could come into force from October 2008.

## **11. Monitoring and review**

11.1 Defra would monitor and review the operation of any new regulations to ensure that new procedures operate efficiently and deliver the benefits intended. The level of charges would also be kept under regular review to ensure that they are equitable, fair and reflect the costs of handling applications, making/drafting orders and carrying out notifications, etc.

11.2 It is intended that the a first review would take place 12 months after commencement. Effectiveness of the regulations and the level of charges would be assessed through consideration of the number, and progress, of applications, and by consulting stakeholder bodies.

## **12. Summary and recommendation**

12.1 Option 1 would not address the problems identified in *Rights of Way in the 21<sup>st</sup> Century* which led to the inclusion of a right to apply in the CROW Act. Option 3 (commence the right to apply with no charges) would deliver only modest additional benefits (for applicants) but would significantly increase costs.

12.2 Option 2 (commence the right to apply with charges) would deliver a statutory application and appeals system, with more consistent and predictable outcomes. It would enable the rights of way network to develop in ways which take proper account of land management and school safety needs, but will inevitably incur costs for Defra, applicants and other stakeholders. The cost-benefit analysis suggests that the financial benefits for applicants could be relatively low.

Commencing Option 2 is also not without risks, but it is considered that scope may exist to reduce the probability and impact of each risk to some degree.

12.3 Option 2 is the course of action on which this public consultation is based. However, all the potential benefits and impacts, including the risk assessment, will be reevaluated in the light of public consultation.