

Bushey and District Footpaths Association

Incorporating Watford Fieldpath Association (Founded 1899)

REGISTERED CHARITY No 1014684

12 Woodlands Road, Bushey, WD23 2LR. Tel: 01923 211113

e.mail chrisbeney@aol.com Web: www.badfa.org.uk

Right to Apply consultation

Defra

2 The Square

BRISTOL

BY EMAIL

31 August 2007

RESPONSE BY BADFA TO THE RIGHT TO APPLY CONSULTATION

I write on behalf of the Bushey And District Footpaths Association (BADFA), a registered charity. We have some 250 members at present. We cover at least five boroughs/districts in Hertfordshire and sometimes further afield. Despite the 'Footpaths' in our name we represent all users of public rights of way: walker, cyclist, horserider, pushchair and wheel chair user. Our activity includes negotiating diversion orders with landowners as well as definitive map work and direct path work (we are Parish Path Partners).

Before addressing your specific questions we would draw to your attention some explicit matters which while touched on in the specific answers below seem to us to warrant some kind of overall headline status as well:

1. **The incidental loss to the public of existing constraints on the nature of orders.**

(note we also touch on the validity of this in Question 29, our answer 5.)

The proposals on the face of them are concerned with the right of certain landowners to have a request for closure or diversion of a public path considered by an authority in a reasonable time. We have no quarrel with that. But actually the legislation and the tenor of the consultation goes much further than that. It purports to remove almost entirely the current and longstanding ability of authorities to tie their power (not duty) to make landowner orders in with their local policies and priorities. They now can, and many do, normally decline to make orders if there is overall public disbenefit. That sits comfortably with their HA80S130 duties of acting to protect the public rights. That was the counterbalance for the otherwise one-sided idea that private persons or companies should be able to get parts of the public highway (normally owned by the local authority on behalf of the public under HA80S263) moved for their personal benefit. The legislation and the interpretation in the consultation brush away that counterbalance leaving the statutory criteria as almost the only parameters, without providing for any compensating changes. Such changes might have been to

raise the hurdles so as to require overall public gain by the landholders say providing extra or better paths on the same locality, or to formalize some of current practice by allowing authorities more discretion in taking up requests for orders. Alternatively or additionally to enable the public to apply for diversion orders when it is in their interest to do so, or for creation orders. Some primary legislative changes are contemplated in the consultation, it is not too late to bring in some rebalance for fairness, and fairness is purported to be relevant: your Para 6.

2. **The inequitable reimbursement of costs for all but landholder and authority.** The costs and benefits to both the landholders and the authorities are addressed but there is little if any consideration of the costs that will be incurred by the user groups as representatives of the public or by directly affected members of the public. Where are the proposals to pay users and user group costs involved in assessing, influencing, improving and sometimes opposing these orders?
3. **The need for the existing route to be in good order.** Perhaps we missed something, but the legislation seems sometimes to reward obstructers of existing paths (normally a criminal offence) by allowing the obstruction to continue and the path to be moved or stopped up.

There is thus a pervading sense of unfairness and imbalance toward the public at large. Our preferred method to resolve this is to require that orders would only be contemplated if there was some overall public gain (not necessarily from the proposed change, but nearby, as for Commons where nearby exchange land may be substituted). Then we might well have welcomed the proposal, though it could still have been a distraction from getting paths fully recorded and in good order.

And if some overall public gain was made a requirement it would encourage user groups to support landholder applications in many cases, allowing many orders to go through unopposed to the benefit of all.

Failing this we strongly urge that the whole part be repealed.

Our answers to your specific questions presuppose that balancing changes as requested above are not in fact implemented (worst case).

Here follows our specific responses to your questions:

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 ?

(a) We agree that forms should be made available.

(b) We think some central guidance should be given as to the minimum of information required on the form, but that beyond that local authorities should be free to include any other appropriate material. Whether HA80 S118ZA(2) allows unprescribed information to be demanded is not clear, if so fine, if not then it should be made clear that is not mandatory.

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 ?

Yes.

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

That would truly be a step too far. These ways have a long and complex physical and legal history. The presumption should be strongly against moving them. Many are ancient routes.

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 ?

We see no reason why at least 1:2,500 should not always be used, and even larger scales encouraged. If commercial maps are not readily available then estate maps could be used or a survey undertaken. The authority will always have to verify such maps (even if they are Ordnance Survey) against their latest information in any case. And the public need to know as precisely as possible what is being proposed. For open country diversion this might not be an issue, but we anticipate many of the users of this legislation will be concerned with farmyards and routes close to buildings.

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

Yes.

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 ?

We agree with your comment at 4.15 that early consultation reduces the likelihood of objections later on. Logically therefore there should not only be the widest practicable consultation at this stage but wide consultation **before the application is made** so that feedback can influence the application itself, reducing the disadvantages and difficulties of making subsequent changes.

At the very least there should be the obligation to notify the current Statutory Consultees (which you appear to list at footnote 15, to para 5.13). But also to notify these more local groups and individuals that Highway Authorities often keep lists of. The latter could be advisory rather than mandatory but the Statutory Consultees must be mandatory. The requirement to notify other landowners etc. is very subjective as it stands. You should add 'or whose land might reasonably be assumed to be affected by it'. That difference may sometimes be important at inquiry stages.

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 ?

Yes, but it should read *‘other councils within whose area the right of way lies, the Statutory Consultees, and such other persons as the authority considers appropriate.’*

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

Of course. And, unless they are to be included at any appeal stage (see below) the Statutory Consultees should also be notified; they may not always have made representations since many comprise in effect local volunteers with limited time but a decision either way may require their involvement. It is too early to rely on section 121B. That may suffice in a few years time.

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

56 days is quite a long time. We are astonished that you cite support for this comparing it against DMMO appeals and referring to the time and money invested by the applicant. Are you not aware of the sometimes very substantial time and costs which are borne by DMMO applicants, many of whom are less financially secure than the average landholder? There should be no difference between these appeal times, whatever value they are set at. We think 28 days is probably long enough in both cases.

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 ?

If a standard form is needed then it should be provided for in regulations whether or not additional (non regulatory) advice etc. is included. If it is not needed then it should not be provided. Certification that the regulation’s requirements have been complied with might usefully be on a mandatory form which details them clearly.

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) ?

We have not taken a view on this.

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 ?

‘This is because there will be other mechanisms...’. We do not think it reasonable to rely on those other mechanisms just yet. It may make sense in a few years time. Searching *‘an appropriate website’* on a regular basis for such a time dependent matter is currently both novel and time consuming. Tools and skills to do it will doubtless be commonplace in a few years time, that is not true now. That coupled with a question mark as to whether interested

parties should have to 'find out' for themselves drives us to the conclusion that for now applicants should indeed have to notify interested parties.

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 ?

Yes

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) ?

Yes

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 ?

(a) The applicant should pay the full cost of the process. That should not only be the costs incurred by the authority applied to, but other stakeholder (other authorities, statutory Consultees, user groups, individuals with a recognized interest).

In working out the full cost, account should be made for the hidden costs of disruption and delay to most authorities' core work of asserting and protecting all public paths.

The figure of £1000 seems small, and suspiciously rounded.

(b) The number of applications likely to be made is pure speculation. They may be legion or they may in fact turn out to be few. Ever if they are few they are likely to come from landholders not well inclined to public paths on their land and will inevitably attract objections and inquiries and so cost.

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

The Table 1 figures seem rather low.

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 ?

No. If the authorities do gain on one case, they may lose on another.

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

Yes, the principal requires it.

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 ?

(not relevant to us)

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

We see no reason at all to treat these specially. If it is an ability-to-pay issue, there are plenty of landholders who could plead poverty. We question why you say such orders may be judged to be in the public interest. In the school's interest very likely, but not necessarily in the public interest; that is a matter of balancing the loss with the gain.

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 ?

We cannot think of any.

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 ?

In your Para 6.24 (a) you fail to mention liaison with statutory Consultees or local users. We hope that is not because you believe they cannot have a constructive role at this stage. That would result in far more opposed orders and greater overall cost (and it seems inquiry costs are not to be borne by the applicant).

In answer to the question:

(a) There is of course such a risk if risk it be. Authorities should quite properly err in marginal cases towards refusal; this seems to us in line with their other duties. In clear cut cases they are very unlikely to err towards refusals. We suggest time alone will tell here.

(b) Merely keeping alert for signs of it in the first instance.

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 publicizing an order, through payment of a charge of approximately £150 plus the actual cost of erecting site notices and publishing newspaper notices ?

Yes, and £150 sounds modest.

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

We see no logic in reducing multiple applications' cost based on proximity. Each seperable diversion or stopping up should be treated separately. Where two sections of one path link are involved one order will normally suffice anyway and will give opportunities for some public gain to offset any losses. Are press costs significantly less for two notices?

We see no logic in reducing such costs based on orders made. There is no certainty of significantly reduced costs. Is there to be an extra charge if orders cost more to administer?

We are unhappy at any local-discretion reductions. It may raise more issues than it solves and not be worth the effort. A clear local policy would be needed as many Council Members in rural areas are landowners. Preferably nothing but perhaps 25% as in HA80 S146, but capped as a maximum.

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

For the reasons that you put forward and to discourage both feeler and scattergun applications, no.

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 ?

No, the principle is wrong and the percentages generally too generous. They should only be made if the authority has erred.

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

See answer to above question.

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 ?

No. Except for serious error on their part.

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

We find the RIA unsatisfactory.

1. The 'objective' on the first page is for full and fair consideration of land management interests. By the second page the 'objective' has become to make it easier for a certain category of person to close or move a right of way. That may sometimes be part of fairness to land management interests but it equally may not. For example a stopping up or diversion for personal privacy.

2. RIA para 3.1. Consultation. The examples of consultation is heavily biased away from the path users. Despite their merits, the Ramblers, the only group mentioned, only represents one category of user, the user on foot.

3. RIA para 5.3 A fourth option. You do not say whose impacts are to be reduced or whose benefits are to be increased. We think you may mean that the option would reduce impacts on landowners and authorities and increase the benefits to them, but forgive us if we have read that wrongly. If we read it as meaning to reduce the impact on path users and user groups as well the if you legislated for a requirement that there must also be some significant overall

public gain (if necessary involving other routes in the same general vicinity) then both impacts and benefits might well be improved for the public and, as we stated at the start of this response, we might then welcome the process. So we commend that option to your attention.

4. Risk 3 refers to a possible impact on service levels. We think that risk is high, indeed certain. For despite being paid for this work it will undoubtedly be a distraction from the main authority duties and take significant management time.

5. The risk assessment doesn't take account of the possibility that authorities will continue largely to apply their more restrictive local 'policies'. It is not clear to us why that will not be lawful. They are not allowed now to do anything not authorized by statute, so we must take it that their current stance is so authorised (that is that the stance follows from the statute as a whole although not explicitly authorised). This seems to us to have been implicitly accepted by the courts, if not then decisions like those in the Hoogstraten case would have been different. If our understanding is correct, then central government could not properly press authorities to desist.

6. Para 5.21. Only six landowners consulted? Well it was better than the number of user groups it seems.

7. Para 5.34. We agree that other stakeholder benefits are likely to be minimal, but we remind you of our request that significant user gain should be made a prerequisite.

8. Para 5.36. Where on earth did you get the £30 figure from? Two or three voluntary bodies, a couple of individuals and a parish: visiting the site, telephoning, writing, checking maps and details, with record office or land registry. Discussing, sometimes leafleting. Even ignoring cost of time by volunteers it is far too low. And surely volunteer's time has value and so must be costed in.

9. Para 5.37. Are you saying stoppings up won't affect us because the paths would have to have been shown not to be needed, and diversions won't affect us because they must be not substantially less convenient? We do not share your apparent confidence in the inspectorate interpreting 'not substantially' correctly.

10. Para 7.3. We presume you meant to say 'none **said** that they were motivated by a desire to increase land values'.

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 ?

No, the user and user groups need their Highway Authorities to get on with identifying all public paths, and getting them in good order despite the unlawful damage caused by many landholders. The proposals would hinder that. Purely personally, I walked about 2miles in Shenley Parish yesterday and met two illegal electric fences, two fields not compliant with cropping rules, five stiles very far from BS5709 compliance and one almost certainly illegal. Anything that decreases the officers' time to deal with these things cannot be said to take full account of the needs of other stakeholder groups.

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.

We would prefer that it were simply repealed, but if a requirement were added that there should always be some overall public gain (even if by means of nearby improvements) then that change of viewpoint might well allow us to welcome it and it might have significant wider based advantages if introduced into other legislation in due course.

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

We see no reason why not.

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

We do not feel competent to comment.

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 ?

No. Assuming the SofS has noted the suggestion at the start of this response (and elsewhere) about writing-in public gain.

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 ?

We don't see individual cases being matters for such a forum to routinely discuss or to be informed on.

Thank you for reading our response to your consultation we hope it proves useful to you.

On behalf of BADFA,

Chris Beney, *chairman*.