

# *Bushey and District Footpaths Association*

Incorporating Watford Fieldpath Association (Founded 1899)

REGISTERED CHARITY No 1014684

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CONSULTATION ON JOINT ORDERS	RIGHTS OF WAY
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## **Your response:**

Preliminary. BADFA is a registered charity involved in all aspects of rights of way. We are a Parish Path Partner. We do definitive map work, lost ways work, field work such as stile to gap conversions and erection of benches; we run a walks programme. We have close on 300 members and a web site at [www.badfa.org.uk](http://www.badfa.org.uk).

*Please note that we have left questions 1 & 2 blank, this does not indicate any kind of view on them.*

First a matter that does not fall under your list of questions and relates to your paras 4.5 and 4.6.. We agree with your para 4.5 about paths not on the definitive map. We would have thought that most of it goes without saying, and welcome it anyway. But we find your para 4.6 astonishing and completely unacceptable. Unless we have misunderstood it, it appears to create a new class of right of way "A Disputed Right of Way". That effect is not, we think, within the remit of this part of the legislation. Even if it were, then you would have to explain what was meant by 'disputed', and by 'acknowledged'. Non definitive public rights of way are an irritant to many, to be swept under the carpet. We believe that the right way to deal with them is via the Lost Ways work, not these regulations. So **we request that you proceed no further with your para 4.6.** If you feel it helpful, we would be pleased to discuss this issue further.

## **Question: 1**

**Do you agree with our proposed list of orders?** (*in table 1*)

## **Question: 2**

**Are there other orders which you think should be included?** (*in addition to those in table 1*)

contd...

### **Question: 3**

#### **Do you agree with our proposed approach to the relevant date?**

Not entirely. We agree generally that the effective date should be at the expiry of the explicit right to challenge. But your 3.8 causes us some difficulty. You say that under s53A the relevant date could be confirmation date or ground completion date, yes it could, but it could be anything else:

“(3A) Every order to which section 53A applies which includes provision made by virtue of subsection (2) of that section shall specify, as the relevant date for the purposes of the order, such date as the authority may in accordance with regulations made by the Secretary of State determine.” We think that making it the date of local authority certification of it being in effect on the ground risks undue confusion where that authority is not timely in such certification. There may be (though we know of none explicit) a duty on the authority to certify, but in any case authorities do not always fulfil their duties. And if a party to say a diversion fails to implement on the ground, preventing certification, should that be allowed to hold up a lawful diversion order? **We would prefer the relevant date to be:**

- a) 43 days from confirmation or**
- b) such later date as is specified in the order or**
- c) the date of certification where that is between dates a) and b).**

Your 3.8 mentions the retrospective matter. We question this generally in Question 4.

### **Question: 4**

#### **Do you agree with our proposed approach to the relevant date where the order is challenged?**

We see no reason to give an unsuccessful challenger any advantage by reason of that challenge (and the challenger may of course be user, landowner or even local authority). You seem to recognise this at your para 3.14 but then reject it for the retrospective effect.

We think you are overstating both the nature and effect of ‘retrospectiveness’. In 3.3 you fail to distinguish orders based on usage and those based on events. Taking your example of 1980, had that been an event, such as a dedication or creation agreement then people may well unknowingly have committed an offence by obstructing it but there would have been no retrospectiveness at all since it had always been a highway (and generally ignorance of committing an offence is only mitigation, not excuse). But if based on 20 years usage the matter would be different because there the highway status over those 20 years could not be determined until the end of the period and there would be some retrospectiveness. But in neither case would there have been full retrospectiveness as in increasing the tax rate for income earned three years ago.

Section 56(3) of the 1981 Act did indeed do what you say at the end of your 3.4 but that Act rather naively assumed that modification orders based on explicit creations would be processed speedily. Or have we misread something?

**So we believe that in the case of an unsuccessful challenge the relevant date should revert to a date which would have happened had there been no challenge.**

contd..

### Question: 5

**Do you agree that we should adapt the current prescribed form of modification order as a schedule to the section 53A orders? And that regulations should provide for the schedule to be modified if this is necessary as a consequence of modifications to the main order. But there should be no provision for representations or objections to the schedule.**

We have found on several, even many, definitive map orders that they fail, especially in changes to the Statement, to reflect correctly the detail of the original order. Examples are failure to mention a formal limitation as to certain trees as a limitation on a route, and descriptions as to route that are only a crude summary of the actual legal event's specification.

**We strongly urge you to make provision for challenge by anyone where a discrepancy is believed to exist.**

### Question: 6

**Do you agree that the scale of section 53A maps should be in line with current regulations? (i.e. 1:2500 or, where a map of such a scale is not available, at the largest scale readily available)**

Yes.

But we see two issues and a small glitch.

One that the concept of a map being 'attached' to an order is somewhat strange. We take the view, and we believe our local Highway Authority takes the view, that **the map/plan forms an integral part of the order and is no more 'attached' to it than is the schedule. We would like that recognised in the words of the regulations by referring to the map/plan "forming part of the order"**.

The other issue is that **"other maps having legal effect or clarifying the way may [but not shall in your text] also form part of the order"**. For instance an original map forming part of a dedication under s106 of TCPA or a schedule of widths along a path. It may be that this is already covered, one could say "As per the plans [plural] forming part of this order" but it would still be worth highlighting it perhaps as a note. Some of these, but not all, will fall under your 4.9.

In addition to the above there seems to be a small drafting glitch in the proposed words in that if 1:2500 is not available and a 1:500 is, then that 1:500 would be the largest scale readily available and thus mandatory to use. We think that might not have actually been the intention of these words.

End of BADFA submission on joint orders.