

**Joint response by Cumbria County Council and Cumbria Local
Access Forum to the
DEFRA consultation on
Statutory Right to Apply for Orders**

Cover Note

Thank you for the opportunity to comment on the consultation on implementation of the right to apply for orders to extinguish and divert public rights of way, and associated right of appeal.

The enclosed is a joint response by Cumbria County Council, the statutory highway authority in Cumbria, and the Cumbria Local Access Forum, its statutory adviser on countryside access.

We understand that the consultation refers specifically to the implementation of rights established under the CROW Act which apply to farming, forestry/woodland and equestrian land management interests, and have responded accordingly to the questions set out in the consultation within this frame of reference.

We would however like to comment on the likely wider effects of implementing the legislation upon both local authorities and other applicants.

- Meeting the new statutory requirement and timetable for dealing with right to apply orders will take up additional local authority time; to deal with the legal case work involved and take orders through committee. Without a commensurate increase in resources to legal services departments to progress such cases, this is likely to result in a greater backlog of PROW modification order casework.
- Prioritising right to apply cases may have the effect of reducing the Authorities' ability to give adequate consideration to other types of applicant for modification orders; such as tourism and no agricultural land related businesses and residential occupiers, because of the limited resources available to deal with these cases.

Response Submission Guidance

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

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

Answers to questions set out in the DEFRA consultation

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?

A1. (a) Yes. (b) No. We believe that the forms should be of uniform design and content across the country. Allowing no variation would be to everyone's benefit. It would increase the understanding of the process and present less risk of challenge to local authorities.

Q2. Do you agree that the regulations should require authorities to seek basic information in the application form, as listed in the consultation paper ?

A2. Yes. The applicant should be required to supply details (e.g. names and addresses) of all other owners and occupiers. Experience of doing modification orders tends to show that applicants often do not give the required notices or bother to find out the names and addresses of other owner/occupiers.

Q3. Do you agree that the right to apply should allow for the making of applications to extinguish or divert restricted byways ?

A3. Yes.

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 ?

A4. Yes.

Q5. Do you agree that the maps accompanying an application should only be amended with the agreement of the authority ?

A5. Yes. This will help to ensure the application proceeds smoothly

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 ?

A6. Yes. However the applicant should also inform the relevant Parish Council.

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 ?

A7. Yes this is essential, including Parish Councils whose local knowledge may help inform the decision.

Q8. Do you agree that authorities should be required to notify any persons who made representations on an application, of the outcome ?

A8. This is desirable but not essential and should be left to the discretion of the Local Authority as to the most cost effective way to communicate. The outcome of an application could for example be posted via an electronic register of applicants on a Local Authority website.

Q9. Do you agree that 56 days is a fair period of time within which appeals should be brought ?

A9. No. We believe that this period should be extended to 84 days (12 weeks). The applicant has to receive the decision, consider the options available and take professional advice. At certain periods in the year (e.g. lambing, silage, harvesting) the applicant may be tied up with land management operations, and some leeway should be allowed for this.

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 ?

A10. Again, on the basis of uniformity, we agree that appeals should be brought using a form obtained from the Secretary of State but that the form of the appeal should 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) ?

A11. Yes.

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.

A12. Yes, but the applicant should also inform the relevant Parish Council.

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 ?

A13. Yes.

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) ?

A14. Yes.

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 ?

A15. (a) Yes, where the application is simple to administer and unchallenged. However where applications prove complex and contentious we advise a set charging structure on the basis of costs incurred, with the proviso that the applicant be kept fully informed as to the likely level of charges. The local authority should also reserve the right to show discretion on the level of charging where significant user benefit can be demonstrated.

A15. (b) Negligible at this level, however any higher costs above this are likely to dictate the number of applications coming forward.

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 ?

A16. Yes.

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?

A17. Yes.

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

A18. No. Charges should be uniform everywhere. A uniform service should be provided at uniform cost.

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.

A19. N/A.

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

A20. No.

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 ?

A21. There may be individual circumstances where the safety and security of pupils and staff in relation to public access is an issue, and it is reasonable that this be an additional consideration when determining an application. In such cases an assessment would need to be made of the health and safety or security risk, and proper consideration given to alternative options – including separation by fencing etc – to control that risk. In determining

the most appropriate solution there should be a mechanism for Governors of the school to liaise with the local authority when applying.

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 ?

A22. (a) Under current arrangements within Cumbria County Council, where an application is contested, the decision rests with a committee (there is no delegated power to officers). Determining an application on the basis of cost may indeed be unlawful.

A22. (b) For the benefit of transparency and open government we recommend that a prescribed audit system be put in place to monitor decisions and the reasons given for them. This would help mitigate against the risk outlined. Again for the sake of uniformity the Secretary of State could provide set guidelines for making decisions. These would help both the applicant and local authority.

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 ?

A23. Yes. These expenses would only be incurred if the appeal by the applicant to the Secretary of State succeeds and he has to make and advertise an order. In such cases we believe these costs should be refunded. The number of appeals lost by individual local authorities should also be a monitored parameter.

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

A24. Yes.

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

A25. Again for uniformity there should be 'Applicants Guidelines'. If these have been followed there should be a partial refund on refusal.

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 ?

A26. Yes.

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

A27. No. Where the local authority has failed to discharge its statutory obligations there should be a 100% refund.

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

A28. The authority should have the discretion to remit/refund charges in appropriate circumstances

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

A29. Yes.

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 ?

A30. Yes. We have consulted with landowning interests in preparing this response and believe it would meet the needs of the landowners/lessees/occupiers prescribed in the CROW Act.

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.

A31. On the basis of considering the introduction of this legislation alone and whether it is fit for purpose, we agree it should be implemented subject to taking into account the various amendments set out in this response. We refer however to its potential wider effect, (set out at the start of this response), in that it may impact in processing other orders from private residential occupiers due to the limited resources of local authorities.

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

A32. Yes, but not exclusively.

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

A33. Yes.

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 ?

A34. Refer to comments in our response to question 31 above. There should be adequate communication with Local Authorities and all interested parties, including Local Access Forums on implementation.

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 ?

A35. (a) In principle yes, however this presents a practical problem of work load:

- we are concerned that the Local Access Forum (LAF) could become overwhelmed if the number of applications is significant.

- It equally raises the question of whether the LAF should then be consulted about every other type of application for a Public Right of Way (PRoW) order.

We therefore advise that the LAF only be consulted on those applications which are judged to be contentious, and where an independent view would be helpful to the local authority in determining such cases. In order to help decide whether an application is contentious we recommend:

- (i) that the substance of all such applications be summarised by the local authority (one para plus map)
- (ii) the LAF be circulated with the summary, giving the LAF the opportunity to “call in” those applications which they wish to look at closer
- (iii) the local authority should expressly be required to consult the LAF in every case in which, in its reasonable judgment, it considers that an access issue might be considered to arise

A35. (b) Yes.

Joint response CLAF / CCC July 2007