



CONDUCT OF INQUIRIES AND HEARINGS INTO RIGHTS OF WAY ORDERS WHERE ORDER MAKING AUTHORITIES DO NOT ACTIVELY SUPPORT AN ORDER

Introduction

1. This Advice Note sets out the procedures to be followed where an order making authority (OMA) does not actively support a definitive map or public path order.
2. The booklet '*Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England*' has been prepared by the Planning Inspectorate and is available to the public on our website at www.planningportal.gov.uk/planning/countryside/. Parts 3 and 4 describe what typically happens when a public hearing or inquiry into a rights of way order takes place. However, where an OMA chooses not to support an order, the Inspector will need to consider adopting different procedures from those set out in the booklet. When this happens, the Inspector will explain to the inquiry or hearing why and how the procedure is being changed. The guidance in this Advice Note is intended to assist all concerned in preparing for such circumstances where these can reasonably be foreseen.
3. This Advice Note is publicly available but has no legal force.

Background

4. In most cases, an OMA will not make an order unless it is satisfied that the circumstances justify it. Exceptions to this occur when an OMA declines to make the requested order but the applicant successfully appeals to the Secretary of State. This will result, in the case of definitive map orders, in the OMA being directed to make the order under Schedule 14 of the Wildlife and Countryside Act 1981.
5. In such circumstances, where an OMA has previously assessed the facts of the case and decided the making of an order is not justified, it may opt to oppose confirmation of the order or it may choose to adopt a neutral stance whereby it neither supports nor objects to confirmation.
6. There may also be occasions where the OMA supported the initial making of the order but subsequently found new information, further evidence or valid objections which caused it to conclude that confirmation was not justified. Again, the OMA may opt to oppose confirmation of the order or it may choose to remain neutral as regards confirmation.
7. Sometimes an OMA is content to make the requested order but is not prepared to support it at an inquiry if it is opposed. This often occurs when an order is made under the Town and Country Planning Act 1990 to enable development to proceed, or an order to divert a path is made under the Highways Act 1980 in the interests of a landowner; the developer or the landowner is often asked to make the case for confirmation. The OMA may choose to remain neutral as

regards confirmation of the order, to passively support it or even to oppose it if new information or objections following advertisement cause a change of mind.

8. Similar circumstances may arise where, after having considered the details of a case, the Inspector proposes modifications to an order but advertisement results in objections to these modifications leading to a second or subsequent hearing or inquiry (see paragraphs 28 to 32 below). In this scenario, the parties concerned (including the OMA) may support, oppose or take a neutral position as regards the proposed modifications.

The role of the OMA

9. In normal circumstances, where an OMA supports confirmation of the order at an inquiry, its advocate will present the case in support and call witnesses as required, cross-examine witnesses who oppose the order, and finally draw together the proceedings at the end of the inquiry, summing up the case in support and making any legal submissions as appropriate. At a hearing the OMA's rights of way officer would normally present its case, without introducing witnesses or cross-examining other witnesses.
10. Where an OMA has decided not to support confirmation of the order at a forthcoming hearing or inquiry (or otherwise) the Planning Inspectorate should be informed at the earliest opportunity. A clear statement indicating whether the OMA intends to actively oppose the order or to adopt a neutral stance is required, together with an indication of its reasons for doing so.
11. When this occurs, the Planning Inspectorate will ask the OMA to secure the agreement of the applicant or another supporter of the order to take the lead in presenting the case. Should that not be possible, the Planning Inspectorate will try to secure such agreement. If no-one is prepared to take the lead (and assuming the case cannot instead be determined by exchange of written representations) at the hearing or inquiry the Inspector will summarise the case for the order from the information before him or her, with the applicant or any other supporters being invited to take part in the discussion (at a hearing) or give their own evidence (at an inquiry) in due course. The Planning Inspectorate will ask the OMA to find a venue for the inquiry or hearing, and to provide administrative assistance such as photo-copying at the venue.

At the start of the inquiry or hearing

12. At the start of an inquiry, it is normal practice to hear the case for the order from those who support it before hearing the case against from the objectors. Where the OMA is appearing as a supporter or objector to the order, it will be invited to present its case in accordance with that convention.
13. Where the OMA has given notice that it will take a neutral stance at an inquiry, the Inspector will allow its representative to make an opening statement before both the supporters and objectors. However, this statement should be limited to a summary of the background to the making of the order and the reasons for the OMA choosing to remain neutral as regards its confirmation and should not be necessary if the Inspector has summarised these matters in his or her opening remarks. If the OMA does make a statement in these circumstances, it should not contain submissions for or against the order, but be a factual

account of the history of the order and the key issues which influenced the OMA's conclusions leading to its neutral position.

14. Where the OMA has given notice that it will take a neutral stance at a hearing, the Inspector will allow its representative to contribute to the discussion. However, comments should be limited to a summary of the background to the making of the order and the reasons for the OMA choosing to remain neutral as regards its confirmation.
15. At hearings or inquiries it will be helpful if the OMA makes it known that its representative will be happy to answer factual questions about the background to the order.
16. If circumstances arise immediately prior to the hearing or inquiry that cause the OMA to revise its position so that it no longer intends to remain neutral, the Inspector should be informed at the start of the proceedings so that the OMA can be heard as either a supporter or objector in the usual sequence of events.
17. Should the reverse situation occur, where information comes to light at the last minute causing an OMA to withdraw its support for the order, thereby becoming an objector or taking a neutral stance, the Inspector must be advised at the earliest possible opportunity.
18. Unless arrangements can be made before the event (see paragraph 11) when an OMA takes a neutral position, the Inspector will enquire at the start of the hearing or inquiry whether any of the supporters present are prepared to take the lead in presenting the case in support of the order. A request for an adjournment is unlikely to be refused although the length of any adjournment will depend on the circumstances of the individual case. It may vary from a few minutes to allow the applicant or supporter to gather his or her thoughts, to several days or longer to enable a full case to be prepared.
19. If there is no-one prepared to lead the case in support of the order, the Inspector may decide to adjourn until a suitable volunteer can be found or, alternatively, to summarise the main points in support of the order him- or herself, after which the individual supporters will give their evidence to the inquiry or contribute to the discussion at the hearing. In some cases it may be appropriate to close the hearing or inquiry altogether and make alternative arrangements for determining the order.
20. Any last minute changes which significantly delay matters or affect the smooth running of the hearing or inquiry can put the party responsible at risk of a claim for costs against them unless the issues could not reasonably have been foreseen. However this should not cause any party to withhold late evidence which has a significant bearing on the determination of the order.

During the hearing or inquiry

21. Particularly in the case of definitive map orders, there may be archival or other documentary evidence which is held by (or has been otherwise discovered by) the OMA that needs to be taken into account by the Inspector when determining the order. Where the OMA takes a neutral stance at an inquiry or hearing following a successful Schedule 14 appeal, it is important that the applicant or supporter ensures that this evidence is put before the Inspector

(as the Inspector will not have received copies of the Schedule 14 application evidence unless it is submitted to the Secretary of State with the order). Where the OMA takes a neutral stance for any other reason, for example because it has discovered further evidence following the making of the order, it is incumbent upon the OMA to provide it. Powers exist [Local Government Act 1972, section 250] under which it may be compelled to do so.

22. The Inspector will decide on the appropriate time for any such evidence to be presented to the hearing or inquiry depending on the nature of the case. Whilst neutral OMAs are still obliged to make such documents available for inspection by the Inspector (if necessary by arrangement with local record offices), there is no requirement for these to be presented by professional witnesses. Depending on the complexity of the documents concerned, it may be helpful to the Inspector if the OMA is able to provide an officer to answer any factual questions in relation to the documents.
23. The most frequent reason for an OMA taking a neutral stance is where an applicant has been successful in obtaining a direction from the Secretary of State/Welsh Ministers under Schedule 14 of the Wildlife and Countryside Act 1981. In such cases, it is not appropriate for any of the parties to simply produce the appeal decision as evidence. The evidence that was submitted to the Secretary of State/Welsh Ministers to support the appeal, together with any other relevant information that has been discovered since, must also be presented to the hearing or inquiry so that the Inspector appointed to determine the order has all the available evidence before him or her so as to reach an independent and impartial decision. It should not be assumed that appeal documents will automatically be transferred.
24. The Inspector is not bound by the decision on the appeal. He or she will have the advantage of hearing evidence given in person by witnesses and (at an inquiry) tested under cross-examination, seeing the order route on site and inspecting at first hand any other relevant evidence. There may therefore be many reasons why an Inspector's conclusions following an inquiry or hearing may be different to those identified in an appeal decision.

Closing submissions at inquiries

25. As the promoter (and a supporter) of the order, the OMA is given the opportunity to make the final closing statement after any made on behalf of the objectors. This may include submissions on points of law relevant to the case as well as summarising the evidence leading to the request for confirmation.
26. Where an OMA has opposed an order, the final closing statement should be made by the applicant or any supporters who took the lead in presenting the case for the order. In these circumstances, the OMA has effectively given up the normal "right of final reply" and will present its closing submissions before the supporters.
27. In the case of an OMA which has taken a neutral stance throughout, the Inspector will first hear closing statements from the objectors and then the supporters before finally allowing the OMA to make any closing observations. In line with its neutral position, any that are made must not seek to make the case for or against confirmation but are likely to be limited to clarifying factual

matters, drawing the Inspector's attention to the main issues of the case and highlighting relevant case law that may have been missed by the other parties.

Second or subsequent hearings or inquiries into advertised modifications to orders

28. As noted above, an Inspector's proposed modifications to an order may result in there being no supporters for the proposed changes at the subsequent inquiry or hearing. In most cases, after explaining the purpose of the inquiry or hearing and dealing with the opening formalities, the Inspector will summarise the reasons for these modifications, based on the matters contained in the interim order decision.
29. If, at a second inquiry, the OMA supports the proposed modifications, it will be given the opportunity to open the case for the supporters and will be invited to make the final closing statement. At a hearing it would contribute to the discussion in the usual way.
30. If, however, the OMA intends to make representations against the proposed modifications, its objections will be heard at the same stage as other objectors, that is, after any representations in support of the modifications have been made. If at an inquiry the OMA wishes to make a closing statement, it may do so along with any other objectors but before the closing submissions of the supporters.
31. Where the OMA takes a neutral stance on proposed modifications to an order, it would not be expected to present any evidence either for or against the proposed changes. The Inspector may, nonetheless, ask whether it would be prepared to assist in clarifying matters not concerned with the merits of the order. At the end of an inquiry, the Inspector will allow the OMA to make any final comments after inviting closing statements from the objectors and then the supporters. Again (see paragraph 27 above) these must not be partial, and are likely to be limited to clarifying factual matters, drawing the Inspector's attention to the main issues of the case and highlighting relevant case law that may have been missed by the other parties.
32. Where a second hearing or inquiry is held to consider both the original order and modifications proposed by the Inspector, the sequence in which the parties are heard is a matter to be determined by the Inspector at the start of the proceedings, in consultation with those concerned.

In conclusion

33. Circumstances will differ from one hearing or inquiry to another. This advice note is not therefore intended to be exhaustive; it is only a guide. Inspectors will continue to exercise their judgement and discretion in these matters, based on each individual case.