

## ALTERATION TO PUBLIC RIGHTS OF WAY TO ENABLE DEVELOPMENT TO BE CARRIED OUT

Stephen Morgan

### THE PROBLEM



- Planning permission granted on 2 April 2015 for “**Erection of three storey building comprising 22 No. retirement living apartments with communal facilities landscaping and parking**” in Upminster
- However **FP198** passes through the site
- PP does **not override** PROW





## THE STATUTORY POWERS (1)



- Planning permission does not override public rights of way – such rights need to be **diverted or extinguished**
- There are general powers in the Highways Act 1980 – see **PINS RoW Section Advice Note No 9** (9<sup>th</sup> Revision January 2018) “General Guidance on Public Rights of Way Matters” at paras. 16-38
- However, the powers specifically relevant to enable development to be carried out are found within **Part X of the TCPA 1990** and in particular **sections 247 and 257** (PINS Advice Note No. 9 at paras. 39-45). An order under these provisions can only be made, or in the case of s.257 confirmed, before the development is substantially complete (see *Ashby v SEnv* [1980] 1 WLR 673).

## THE STATUTORY POWERS (2)



- **S. 247 of the TCPA 1990** empowers the SoS to authorise by order the stopping up or diversion of **any highway outside Greater London**, if he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with certain planning permissions or by a government department. No confirmation process.
- **Section 253** of the 1990 Act enables the SoS to make and advertise a draft order where an application for planning permission has been made to him by a local authority, statutory undertaker, or a national park authority; or the application stands referred to him in pursuance of a direction under s.77, or the applicant has appealed under section 78.
- **S.257** is, unlike s. 247, **limited to footpaths, bridleways and restricted byways**. Other than that difference, this section mirrors the powers of the SoS under s.247. S.257 Orders can (since 25 June 2013 – **s.257(1A)**) be made in advance of the actual grant of planning permission but **cannot be confirmed until planning permission is granted (s.259(1A))**.

## OVERLAP OF THE TWO REGIMES (1): RoW Circular 1/09 – Section 7



7.1 Proposals for the development of land affecting public rights of way give rise to **two matters of particular concern**: the need for adequate consideration of the rights of way before the decision on the planning application is taken and the need, once planning permission has been granted, for the right of way to be kept open and unobstructed **until the statutory procedures authorising closure or diversion have been completed**.

7.2 The effect of development on a public right of way **is a material consideration** in the determination of applications for planning permission and local planning authorities should ensure that **the potential consequences are taken into account** whenever such applications are considered.

7.3 Most **outline planning applications** do not contain sufficient information to enable the effect on any right of way to be assessed (and are not required to do so) and consequently such matters are **usually dealt with during consideration of the matters reserved** under the planning permission for subsequent approval.

## OVERLAP OF THE TWO REGIMES (2): RoW Circular 1/09



7.11 The grant of planning permission does not entitle developers to obstruct a public right of way. **It cannot be assumed that because planning permission has been granted that an order under section 247 or 257 of the 1990 Act, for the diversion or extinguishment of the right of way, will invariably be made or confirmed.** Development, in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order has come into effect..... Authorities have on occasion granted planning permission on the **condition that an order to stop-up or divert a right of way is obtained before the development commences.** The view is taken that such a condition **is unnecessary** in that it duplicates the separate statutory procedure that exists for diverting or stopping-up the right of way, and would require the developer to do something **outside his or her control.**

## OVERLAP OF THE TWO REGIMES(3) RoW Circular 1/09



7.15 The local planning authority **should not question the merits of planning permission** when considering whether to make or confirm an order, **but nor should they make an order purely on the grounds that planning permission has been granted.** That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. **Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order.** The **disadvantages or loss** likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the **advantages of the proposed order.** The need for older persons housing was a feature in the Upminster  
Cf. **6.48 of RoW Booklet** which refers to 7.15 of the Circular in the footnote: *“The Inspector does **not consider the need for the development.** However, account must be taken of the effect of the order on those entitled to the rights which would be extinguished.”*

## OVERLAP OF THE TWO POWERS (3)



- There are therefore two separate regimes – planning and RoW. However, as demonstrated by *Vasilou v SST* [1991] 2 All ER 77, there is an inherent overlap between the two.
- The Inspector had been influenced by evidence that the reduction of passing trade consequent upon the making of an order would have severe economic effects on a local restaurant, for which there is no provision in the legislation for compensation.
- The SST disagreed however on the basis that the economic effects of making the order were not a relevant consideration and made the order.
- The CA quashed the order on the basis that the SST was entitled to and should take into account the adverse effects his order would have on the trade of an owner of a business being carried on on land adjoining the highway and that such a consideration would not subvert the planning procedures already followed as an individual financial loss was not a matter to be considered at the planning stage (relying on *Great Portland Estates Plc v Westminster City Council* [1984] 3 All E.R. 744).

## London Borough of Havering (Public Footpath 198) Stopping Up and Diversion Order 2015



- Order made on 8 December 2015 after the PP granted in April 2015. The Committee Report for the planning application stated: *“The development could not be carried out without affecting the right of way. This impact is material to the consideration of the application and could amount to a material objection if it cannot be diverted along a suitable route. ....A suitable route around the site would be possible utilising the existing surfaced path that has recently been widened to accommodate the Sustrans cycle route. ....The formal diversion route would addressed separately ....”*
- The Order sought to divert FP198 onto the existing NCR136 which was constructed in the late 1980s when FP198 in was impeded by the car park on the development land. However, the Council overlooked to recognise this on the Definitive Map and Statement.



## THE PROCEDURE FOR S.257 (1)



- The form for orders made under sections 257 and 258 of the TTCPA 1990 is in the **Town and Country Planning (Public Path Orders) Regulations 1993** (SI 1993 No 10 amended by SI 1995/451).
- The procedure for Confirmation of the Order is found in **Schedule 14 to the TCPA 1990**: this requires the giving of notice in the prescribed form which must specify the time (at least 28 days from the date of first publication of the notice) within which, and the manner in which, any representations or objections must be made
- RoW Booklet (2018 Revision at para. 1.4) sets out the **documents required** with the draft Order. This includes a 'statement of reasons'. In this the local authority must explain why it considers that the order should be confirmed and how the order meets all the relevant criteria that will need to be considered by the Inspector, even if these have not been disputed by the objector(s). The local authority must also provide its **comments** on the representations and objections made to the order.

## PROCEDURE (2)



- If there are no objections, the draft Order may be **confirmed without modification**
- If an objection is made by a local authority or NPA, a **local inquiry** must be held (see the RoW Booklet at paras. 1.7-1.14)
- If a duly made objection by another party, **either an inquiry or a hearing** is held by an Inspector
- **Statements of Case** and, for Inquiries, **proofs** of evidence required
- The **Rights of Way (Hearing and Inquiry Procedure)(England) Rules 2007** (Annex A to the RoW Booklet) sets out the procedure for hearing and inquiries

## PROCEDURE IN THE UPMINSTER CASE



- Objections were made
- These included objections to the proposed development itself, the impact on Upminster Park and the loss of car parking
- Some related to the implications of diverting PF198 onto NCR136 and in particular concern about conflict between pedestrians and cyclists including complaints about Sustrans
- The Inspector considered the documentation and written representations and by his interim decision dated 25 July 2016 proposed to confirm the Order with two minor modifications – he did so on the basis that the provisions do not provide any further criteria and the power is clearly discretionary involving the balancing the overall public interest in interfering with an established PROW

## INTERIM DECISION



- The Inspector rejected the objector's contention that the diversion would result in the use of NCR132 being unsafe
- Indeed the Inspector acknowledged the advantages of NCR136 over FP198, with the former being surfaced and unlit
- The Inspector observed the use of the paths during school exiting times
- However, the Inspector confirmed the Order subject to two minor descriptive matters
- These had to be consulted on and resulted in further objections, although these in substance related to the original order and not the modifications. The main issues were the claim that FP198 was heavily used and diversion of the users would conflict with cycles using the NCR and cause inconvenience and danger to its users especially children.

## RoW Booklet



- The procedure when there are modifications is not prescribed in the legislation
- Guidance is provided in paras. 7.5 to 7.11 of the RoW Booklet
- If in response to the notice of the modifications to be published in a local newspaper and sent to everyone who received a copy of the Inspector's letter. If objections or representations are received, PINS may arrange a hearing, inquiry or exchange of written representations.
- It is said that *"The Inspector will only be able to consider evidence which relates to their proposed modifications."* However, the Booklet also (at para. 7.10) *"If...we receive representations and objections which relate only to those parts of the Order that it is not proposed to modify, we may, exceptionally, decide to re-open the original hearing or inquiry or invite written representations....."*
- *It is also advised that the Inspector will only be able consider new evidence which relates to the unmodified part of the order*



## EVIDENCE IN THE UPMINSTER CASE



- We ended up with a long delay and a new Inquiry with a new Inspector, as the first Inspector had in the interim retired.
- So we provide further evidence which in reality related to the unmodified part of the order on a without prejudice basis.
- We carried out surveys of the use of the two paths because of the objections.
- We also realised that the “wear” signs in the proximity of FP198 were not wear signs at all but the consequence of underground foundation left after the surface of the previous access was removed in the late 1980s. So we carried out aerial photography surveys post 1940 and a geotechnical survey of the ground in the locality of the “worn” area.
- At the Inquiry the Order as a whole was considered, with the safety and convenience of the NCR and the planning merits of the development being the main issues considered.

## FINAL OUTCOME



- The Order decision confirming the Order as modified was made on 4 July 2017
- The Inspector’s decision covered:
  - Whether it was **necessary** to stop up and divert the footpath to enable development to be carried out
  - Whether the development is **substantially complete**
  - The effect of the Order on those **whose rights would be extinguished** by it
  - The **advantages** conferred by the Order
  - Other matters

# ORDER CONFIRMED: PROBLEM SOLVED



## FINALLY ...one to watch out for



- In *Network Rail Infrastructure Ltd v SFEFA* [2017] EWHC 2259 (Admin) planning permission was granted subject to a *Grampian* condition limiting the number of houses (32 out of the permitted 142) that could be constructed before a FP diversion order had been confirmed.
- The order was made and objected to and an Inquiry held. Following as.73 application by the developer the phasing condition had been amended prior to the Inquiry to state housing restriction increase to 64 houses, and the lifting of the restriction if either of two exceptions were satisfied, namely (i) that the **stopping up order was made and confirmed**; or (ii) the **secretary of state decided that the order should not be confirmed**.
- Two objectors contended that the order was no longer necessary. The inspector decided that that issue should be determined **at the outset of the inquiry**. Following submissions, he concluded that the revised condition permitted the whole development, irrespective of whether the order was confirmed, and was therefore ineffective. He rejected the suggestion that he should consider all the evidence before making such a decision.

*Network Rail Infrastructure Ltd v Secretary of State  
for the Environment, Food and Rural Affairs*  
[2017] EWHC 2259 (Admin) (2)



- Holgate J held that the Inspector had erred in his application of the merits and necessity tests in *Vasiliou* . The decision was accordingly quashed – but appeal to CA .
- The language of the condition did not purport to render the order incapable of confirmation. The inspector erred in concluding that the necessity test could not be satisfied. “Necessary” does not mean “essential” or “indispensable” but “required in the circumstances of the case”.
- Both exceptions envisaged that the embargo on carrying out the residual part of the development necessitated the making and consideration of a s.257 order to divert the footpath as described.
- The necessity test was therefore satisfied in both cases. Both exceptions then dealt with the effect of the decision as to whether the order should be confirmed, which involved the application of the merits test.