

‘Diversion by means of creation orders’: why Circular 1/09 is wrong.

Background.

1. It is now quite common – and increasingly so – for highway authorities to seek to effect what are *de facto* diversions of routes by means of concurrent creation orders under s.26 of the Highways Act 1980 (sometimes creation agreements, s.25) and extinguishment orders (s.118).
2. This practice seems valid in two circumstances, firstly where there is a need to divert the terminus of an existing path, which terminus is not on another highway; and secondly, where the process brings a right that did not exist before – e.g. a bridleway in place of a footpath. There may be other valid circumstances.
3. Current government guidance, in Circular 1/09, and in Advice Note 9, sets out issues to be considered and requirements to be satisfied in the confirmation of ‘concurrent orders’. In respect of concurrent orders that seek to give effect to the diversion of an existing route, case law suggests that this guidance is wrong, and that such concurrent orders cannot properly be used. This is why:

The Law.

The emphasis below, in the statutory and case law extracts, is mine.

4. S.26 of the Highways Act 1980 provides:
“(1) Where it appears to a local authority that there is need for a footpath or bridleway over land and their area and they are satisfied that, having regard to-
 - (a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and
 - (b) the effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation contained in section 28 below, it is expedient that the path or way should be created, the authority may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, create a footpath or bridleway over the land.

“An order under this section is referred to in this Act as a ‘public path creation order’...”

5. S.118 provides:

“(1) Where it appears to a council as respects a footpath or bridleway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.

“An order under this section is referred to in this Act as a ‘public path extinguishment order’

“(2) The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

“(5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering-

under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or

under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public, the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.

“(6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.”

6. S.119 provides:

“(1) Where it appears to a council as respects of a footpath or bridleway in their area (other than one that is a trunk road or a special road) that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order-

create, as from such date as may be specified in the order, any such new footpath or bridleway as appears to the council requisite for effecting the diversion, and

extinguish as from such date as may be specified in the order or determined in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the council requisite as aforesaid.

“An order under this section is referred to in this Act as a ‘public path diversion order’.

“(2) A public path diversion order shall not alter a point of termination of the path or way-

if that point is not on a highway, or

(where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.

“(4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.

“(6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be affected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the affect which-

the diversion would have on public enjoyment of the path or way as a whole,

the coming into operation of the order would have as respects other land served by

the existing public right of way, and

any new public right of way created by the order would have as respects the other land over which the right is so created and any land held with it ...

7. Circular 1/09 provides:

“Concurrent orders

“5.54 The extent to which a creation or diversion order (but not a public path creation agreement) or rail crossing diversion order, made in association with an extinguishment order would, if confirmed, provide an alternative way to that proposed for extinguishment may be taken into consideration in determining whether or not to confirm the extinguishment order. Account should be taken of the convenience of the alternative path compared to that which is to be extinguished and if this is significantly less than that enjoyed by users of the existing path, authorities will need to consider whether the criteria set out in section 118(1) of the 1980 Act have been met. Care should also be taken to ensure that full consideration is given to all of the matters set out in both section 26 (or 119 or 119A in the case of diversion orders) and section 118. Where related extinguishment and creation or diversion orders have been made concurrently and representations or objections have been made to one but not the other, authorities are advised to submit both orders to the Secretary of State for confirmation. There is no provision for combining both creation and extinguishment in one order. Further information is available in the Planning Inspectorate’s Advice Note 9 (s31&32).”

8. Advice Note 9 (5 February 2008) provides:

“31. Express provision is made in section 118(5) of HA 80 for public path extinguishment orders to be dealt with concurrently with creation and diversion orders (both public path and rail crossing). When considering the confirmation of a public path extinguishment order, in particular the extent to which the highway would be likely to be used by the public apart from the order, regard should be had to the extent that the creation or diversion would provide an alternative to the way being extinguished (HA 80, section 118(5)).

“32. When dealing with such orders concurrently, each order should be considered separately on its own merits and decisions made in each case. Consequently, a decision letter should specifically cover for each order those matters relevant to the consideration of whether it should be confirmed.”

9. Taking Circular 1/09 at face value, where a creation order is made concurrent with an extinguishment order, such that an adequate new path replaces the old path, confirmation of the orders would be almost inevitable.
10. In reading paragraphs 31 and 32 of Advice Note 9, there is a clear conflict of advice. Paragraph 31 is consistent with the *prima facie* advice in Circular 1/09, while paragraph 32 indicates that each order is 'on its own merits'.
11. Neither Circular 1/09 or Advice Note 9 seems to be consistent with current case law. Circular 1/09 states, "1.6. This advice and guidance sets out *defra's* policy on public rights of way and its view of the law. It does not take the place of the legislation, but seeks to give an overview of it within a policy context." Neither does Circular 1/09 take the place of, or outweigh, the decisions of appellate courts.
12. *R oao Hertfordshire County Council v. Department of Environment, Food and Rural Affairs* [2005] EWHC 2363 (Admin), Mr Justice Sullivan. This decision was appealed to the Court of Appeal in [2006] EWCA Civ 1718. The extracts below are from the judgment of Sullivan J.
13. This case deals with an appeal against the decision of an Inspector in an order seeking to make and confirm concurrent extinguishments (s.118) and creation agreements (s.25). Although not concerning creation orders (s.26) directly, Sullivan J deals with these, in context, in detail. The order dealt with concurrent extinguishments and creations (which the Inspector rightly held could not be 'connected'), and non-concurrent creations (which the Inspector rightly held could be confirmed). The exposition of the law on concurrent s.118 and s.26 orders is part of Sullivan J's reasoning as to the law directly bearing on the facts of the case and is therefore part of the *ratio*, not merely *obiter*. Even if it were *obiter*, given the detail and strong view of the Judge, it is enough to outweigh government advice. The emphasis below is mine.
14. "(45) There are therefore powerful policy reasons for requiring section 119 to be used where what is proposed is not in reality the creation of a wholly new path, but the re-routeing of an existing path."
15. "(47) Section 26 is concerned with the creation of new ways which add to the network, not with the diversion of existing ways. I do not therefore accept that it would have been appropriate for the claimant to proceed by way of a creation order under section 26, in respect of the majority of the "diversions" that are listed to schedule 2 to the agreement."
16. "(48) I do accept that some of the new paths listed as "diversions" in column C of schedule 2 to the agreement are not direct replacements for the corresponding paths listed in column B;

for example, the new footpath L-F, which does not start on a highway. However, most of the paths listed under the heading of “diversions” are just that, diversions of existing footpaths which could, and upon a proper interpretation of section 118 should, have been effected by the making of an order or orders under section 119.”

17. “(53) The Act contains a very detailed code for the extinguishment and diversion of existing paths and the creation of new paths. The procedures in the Act cannot be ignored on the basis that they are “unmeritorious technicalities”. They are there for a purpose, to ensure that the public interest in our extensive network of public rights of way rightly described in Circular 2/93, Public Rights of Way, “as a unique legacy”, are fully protected. To a significant extent the mechanism adopted by the claimant side-stepped the procedural provisions intended to protect this public interest.”
18. This above, in Sullivan J’s paragraph 53, is clear statutory interpretation, with a view on the attendant public policy, by a senior judge, experienced in rights of way cases. Neither Circular 1/09 or Advice Note 9 address this point and, on Sullivan J’s view, both are plainly wrong as regards concurrent orders that expressly, or in effect, merely seek to divert existing routes.
19. “(54) Looking at the statutory scheme as a whole, there are therefore powerful policy reasons, quite apart from the need to give the words of section 118 their ordinary and natural meaning (paras 26-39 above), why the section should not be interpreted so as to facilitate the claimant’s scheme, whatever its merits may be.”
20. As regards the decision of the Court of Appeal, Sullivan J’s approach to the ‘public policy’ issue of creation v. diversion, and to the impropriety of using creation where the purpose is to divert an existing path, is addressed at paragraphs 49, 57, and (particularly) 63 *et seq.* Sullivan J’s view is adopted at paragraph 81 by Richards, LJ: “Secondly, the way in which the council has sought to combine section 25 and section 118 for the purpose of re-routeing existing footpaths runs counter to the statutory framework and avoids the specific criteria laid down in section 119 for the protection of the public interest.”

Summary.

Curiously, Advice Note 9 does refer to the Appeal Court decision (paragraph 36) but only as regards the narrow issue (as determined by the CoA) that creation agreements may be 'conditional'. The fundamental recital of the law by Sullivan J, as approved by the CoA, is not touched upon. It may be that the guidance in paragraphs 31 & 32 of Advice Note 9 were simply overlooked when that Advice Note was updated, consequent on the CoA decision; and then Circular 1/09 was founded upon Advice Note 9, without sufficient check back to the authorities? Whatever, unless Sullivan J's decision, and that of the Court of Appeal, has been overtaken by a later, superior, decision, both Circular 1/09 and Advice Note 9 would appear to be wrong.

Alan Kind, 21 May 2009.