

## Imposing a Specification on Gates & Stiles on Public Rights of Way in Diversion & Creation Orders.

When an authority makes a diversion order under s.119 of the Highways Act 1980, or a creation order under s.26 of the same Act, it may well be the case that the order specifies a 'limitation' of a gate or stile. The question then arises: is the order-making authority *able* to specify a particular type of gate or stile and, if it is able, is the authority *required* to make the gate or barrier 'disabled-person-friendly'?

### 1. The recording of limitations and conditions.

2. Gates and stiles, present at the time of 'creation' of a public right of way (creation and dedication are essentially the same here, meaning a 'coming into being') are limitations on the public right. The public right is dedicated subject to a fetter of a right for the landowner to do something that would, in other circumstances, be a nuisance or obstruction to the public's right (see below). Statutes acknowledge the existence of 'limitations and conditions', going right back to the National Parks and Access to the Countryside Act 1949, and the Public Path Order Regulations 1993, SI 1993 No. 11, prescribe sections describing and defining limitations in diversion orders and creation orders. S.53(2)(b) of the Wildlife and Countryside Act 1981 provides that the surveying authority for an area shall "... keep the map and statement under continuous review ... by order make such modifications to the map and statement as appear to them to be requisite ..." and s.4 provides, "the modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to – (b) any limitations or conditions affecting the public right of way thereover." Plainly, the surveying authority is under a duty to keep the definitive statement up to date by means of review, and as part of that shall record limitations and conditions. The Act and regulations with regard to diversions under s.257 of the Town and Country Planning Act are somewhat different, and are dealt with below.

3. So – where gates and stiles are present on a route at the date of creation they are limitations, and limitations *must* properly be recorded in the definitive statement. If they are not so recorded, it is always possible to modify the statement to record them, so that fact places the surveying authority under a burden to record them properly when the first opportunity arises (i.e. diversion or creation), not least by virtue of 'best value'.

### 4. Characteristics of limitations.

5. There are two particular characteristics of limitations that bear upon the specification, installation, and 'control' of gates and stiles:

- A limitation is the 'property' of the landowner, and cannot be taken away from him by the public other than by some sort of 'rededication', either statutorily, or at law. Oxfordshire County Council properly (at least in part) defines a limitation as, e.g., "*the right of the owner of the soil to erect and maintain a pedestrian gate ...*" which correctly reflects that the gate is not the limitation – it is the right of the landowner to 'erect and maintain a gate' that is the limitation.

- The public is only fettered by the extent of the limitation as it was at the time of creation of the right of way. The landowner cannot later intensify the fetter on the public's right.
6. Essentially, anything that is inconsistent with the exercise of a public right of way is a nuisance (more than likely in the form of an obstruction): gates, stiles, external stairs on houses, trapdoors into cellars, the right to plough, the loading of boats across wharves, the towing of barges along navigable rivers, and others. Where such a physical feature, or repeated act or operation, has been going on time out of mind, then the courts will generally rationalise it by holding that the feature, act, or operation was taking place at the time of dedication of the right of way, and that the public accepted its right subject to the existing and continuing right of the grantor to continue doing this 'thing' that was, of itself, inconsistent with the existence of the public right: *Fisher v. Prowse*.
  7. But – in holding that the public takes its grant of a right of way subject to any such limitation in favour of the grantor, the courts balanced this legal fiction by holding that the fetter on the public right was only that in place at the time of dedication and acceptance – the limitation could not be 'ratcheted up' later on. In *Bateman v. Burge*, 6 Car & P., 391, a public footway [sic] had been dedicated subject to the right of the owner to maintain a stile, 'two feet high'. The owner replaced the stile with 'a high five-bar gate, with a step upon it.' Park J: "*If there was no gate there before, the defendant has no right to put up a high five-bar gate to give people the trouble of getting over it.*" Ludlow, Serjt: "*I am in a condition to prove that there were gates before, across other parts of the way.*" Park J: "*If there were twenty gates in other places before, that will not justify you in putting up this gate.*"
- 8. There is no statutory definition of 'limitation and/or condition'.**
9. The phrase 'limitations and conditions' as part of the definitive statement was brought into being by the National Parks and Access to the Countryside Act of 1949, and has been repeated in countless definitive map, and public path, orders ever since. That Act does not define 'limitations and conditions'. Most participants in the process have an idea of what is – and can be – a 'limitation' (for example, a stile on a footpath) but nobody seems to have any handle on 'condition'. Enquiries of *defra* brought the honest answer that they have no idea either and, short of trawling through back copies of *Hansard*, no way of coming up with an answer.
  10. If a limitation is a burden – a fetter – upon the public in favour of the grantor of the right of way, then might it be that a 'condition' is the opposite of this: a burden upon the grantor, and one that is appropriate to be recorded in the definitive statement? The only such that comes to mind as appropriate for the circumstances envisaged by the 1949 Act is the liability to repair a route *ratione tenurae*. This is a burden upon the grantor, and is 'characteristic of the route itself, and in the absence of any sort of 'list of maintenance responsibility' in 1949, its recording would be of benefit to all parties. The problem with this explanation is that research and

enquiry yields no examples of 'burdens upon landowners' being recorded in the definitive statement, although myriad examples of fetters upon the public's right are recorded.

11. There is another – more compelling – construction of 'condition' buried in the text of the 1949 Act. In s.31(1)(d), dealing with the determination of disputes by quarter sessions, "*that the public right of way over the land ... was not unconditional but was subject to limitations or conditions specified ... that the said right was subject to other limitations or conditions specified ...*" Plainly Parliament regarded a 'condition' as something biting upon the public's right – something that fettered the exercise of the public right of way. Given this usage, in the context of 'limitations and/or conditions', both bear upon the public's right, neither upon the grantor's (landowner's) interests. It seems most likely that Parliament regarded 'limitation' and 'condition' as essentially the same thing: a fetter on the exercise of the public's right of way in favour of the grantor (the landowner).

## 12. Constriction or constraint?

13. There are essentially two types of 'limitation' (in a general, not Act-specific sense): 'constrictions' and 'constraints' (my terms – not from statute or case law). A 'constriction' is where the right of way itself is narrow, or narrowed, compared either to the rest of the right of way, or to that type of right of way in general. The classic example is in *R v. Lyon*, 5 Dowl. & Ry. 497-500, where a public carriage road passed under an archway nine feet in width and ten feet in height. This arch prevented carriages and other vehicles, which could otherwise use the highway, from passing along the highway. The arch was a feature of the highway from time immemorial – essentially it could be presumed coeval with the dedication of the highway in the first place. It was argued that the presence of this arch was evidence that the road was not a public carriage road (for the purpose of a particular Act). Abbott CJ observed, "*There are many lanes in the country which are not wide enough for a wagon to pass, but that would not make it the less a public way for all the King's subjects to pass and repass with their carriages; i.e. such carriages as the way will allow of passage.*"

14. A 'constraint' is, or is more likely to be, a 'limitation or condition'. As a general principle, "There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's subjects, are public nuisances at common law" (1 *Russell on Crimes*, by Greaves, at page 347, cited in *Fisher v. Prowse* (1862) 2 B&S 770; the same passage in the original 1819 edition is at page 463). This principle that all interferences are nuisances comes from *R v. Cross*, 3 Campb 227.

## 15. Can a highway authority alter a gate or stile once an order is confirmed and commenced?

16. Essentially, no. Once the order is completed, and the new right comes into being, then the limitations specified in the order are the 'property' of the landowner. The nature of the limitation is the type and size of the gate or stile at the time of creation, and neither the landowner nor the public (the highway authority) can alter the

structure adverse to the interests of the other, without some sort of 'consent'. In effect, once the new right of way comes into being, the limitations are 'fossilised' short of a legal procedure to change them. **Where a local authority installs a gate or stile that is, e.g., to BS 5709 specification, then that 'fact of specification' must be set down in the order so that, in turn, the nature of the limitation is recorded in the definitive statement. The local authority cannot intentionally be 'vague' in specifying in the order – e.g. saying simply 'gate' – purportedly to reserve unto itself the right to enter later and alter the gate to some other design or specification.**

#### 17. How should a highway authority specify a particular type of stile or gate to be a limitation in an order?

18. Any limitation on the new route is a 'clean slate' specification, and simply stating 'gate', or 'stile', is not good enough. There should be a description adequately defining the character and dimensions of each limitation at the date of dedication. This could be done on a case-by-case basis, but the hard work has already been done by the British Standards Institute in: BS 5709:2006, *Gaps, gates and stiles*. If an order, in setting down a new limitation, said, e.g., 'a pedestrian gate in accordance with Figure 3 of BS5709' then the size and scope of the limitation is a matter of precise record and, while BS5709 may well get updated, it is not likely that any significant change to furniture dimensions will be made. Further, BS5709: 2006 will remain 'known', even if it is superseded. BS5709 has specifications for gates, stiles, gaps, and even the 'Kent Carriage Gap'.

#### 19. The function of local authorities in creation and diversion orders.

20. In a creation order made according to s.26HA1980, the authority must be satisfied that there is a need for the route, and per s.26(1)(b), "[that] it is **expedient** that the path or way be created." By subsection 2, where jurisdiction to confirm an order transfers to the Secretary of State, the Secretary must also be satisfied as to need and expediency. By subsection 4, "A right of way created by a public path creation order may be either unconditional or subject to such limitations or conditions as may be specified in the order." [It is interesting to note that, in this subsection, the opposite of having 'limitations or conditions' is 'unconditional', not 'unconditional or unlimited'. This further indicates that limitations and conditions are both fetters on the public right.] Note the 'expediency' test placed upon both the local authority and the Secretary of State.

21. In a diversion order made according to s.119HA1980, the Act provides:

- Subsection 1: "[where] ... it is **expedient** that the line of the path or way across the land ... should be diverted ... the council may ... by order made by them [divert the way]."
- Subsection 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."

- Subsection 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 effected by it is **expedient** as mention 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 effect which –

(a) the diversion would have on **public enjoyment of the path or way as a whole ...**”

[My emphasis in this section].

## 22. The meaning of ‘expedient’.

23. Mr Justice Grigson in *Ashbrook v East Sussex CC and Rarebargain Ltd and SSEF and RA* [2002]. “The Concise Oxford Dictionary give two definitions of expedient: ‘i) convenient and practical although possibly improper or immoral, ii) Suitable and appropriate.’ I think it safe to assume that Parliament had in mind the second ...”

## 24. The meaning of ‘the public.’

25. ‘The community or the people as a whole.’ The ‘public’ envisages all ‘members of the public’ given, of course, the obvious constraints that some people may be, e.g., too frail, young or agoraphobic to use the route. But there is a crucial split in the ‘wider public’ (in numeric terms) between the ‘able bodied’ and those with ‘disabilities’. This raises the question as to whether, when making and confirming diversion and creation orders, and particularly in specifying gates and stiles therein, local authorities (and the Secretary of State) should, or must, take account of people who are not ‘able bodied.’

26. **The Disability Discrimination Act 1995.** (As amended by the Disability Discrimination Act 2005.) [My emphasis].

*I Meaning of “disability” and “disabled person”*

(1) *Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.*

(2) *In this Act “disabled person” means a person who has a disability.*

*Schedule 1.*

*Normal day-to-day activities*

*4 (1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—*

- (a) *mobility;*
- (b) *manual dexterity*
- (c) *physical co-ordination*

21B Discrimination by public authorities

**(1) It is unlawful for a public authority to discriminate against a disabled person in carrying out its functions.**

(2) In this section, and sections 21D and 21E, “public authority”—

- (a) includes any person certain of whose functions are functions of a public nature; but
- (b) does not include any person mentioned in subsection (3).

(3) The persons are—

- (a) either House of Parliament;
- (b) a person exercising functions in connection with proceedings in Parliament;
- (c) the Security Service;
- (d) the Secret Intelligence Service;
- (e) the Government Communications Headquarters; and
- (f) a unit, or part of a unit, of any of the naval, military or air forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

21D Meaning of “discrimination” in section 21B

(1) For the purposes of section 21B(1), a public authority discriminates against a disabled person if—

- (a) for a reason which relates to the disabled person’s disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and**
- (b) it cannot show that the treatment in question is justified under subsection (3), (5) or (7)(c).**

(3) Treatment, or a failure to comply with a duty, is justified under this subsection if—

- (a) in the opinion of the public authority, one or more of the conditions specified in subsection (4) are satisfied; and
- (b) it is reasonable, in all the circumstances of the case, for it to hold that opinion.

(4) *The conditions are—*

(a) *that the treatment, or non-compliance with the duty, is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);*

(b) *that the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment, or non-compliance with the duty, is reasonable in the particular case;*

**(c) *that, in the case of treatment mentioned in subsection (1), treating the disabled person equally favourably would in the particular case involve substantial extra costs and, having regard to resources, the extra costs in that particular case would be too great;***

(d) *that the treatment, or non-compliance with the duty, is necessary for the protection of rights and freedoms of other persons.*

49A *General duty*

**(1) *Every public authority shall in carrying out its functions have due regard to—***

**(a) *the need to eliminate discrimination that is unlawful under this Act;***

(b) *the need to eliminate harassment of disabled persons that is related to their disabilities;*

**(c) *the need to promote equality of opportunity between disabled persons and other persons;***

**(d) *the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;***

(e) *the need to promote positive attitudes towards disabled persons; and*

**(f) *the need to encourage participation by disabled persons in public life.***

*Subsection (1) is without prejudice to any obligation of a public authority to comply with any other provision of this Act.*

49B *Meaning of "public authority" in Part 5A*

(1) *In this Part "public authority"—*

(a) *includes any person certain of whose functions are functions of a public nature; but*

(b) *does not include—*

(i) *any person mentioned in section 21B(3);*

(ii) *the Scottish Parliament; or*

(iii) *a person, other than the Scottish Parliamentary Corporate Body, exercising functions in connection*

*with proceedings in the Scottish Parliament.*

### **27. The Disability Discrimination Act in practice.**

28. Experience suggests that local authorities, in regard to rights of way issues, generally regard 'disability' as meaning only 'mobility impairment' – to render this to a base term, 'people in wheelchairs'. Authorities also 'audit' paths where limitations are an issue and say, 'this path is quite rough – it is unlikely that wheelchair users would use it – therefore we will not make this proposed limitation 'disabled friendly.' These approaches are both contrary to the Act and are therefore unlawful. Disability clearly encompasses the common situation where members of the public are 'mobile', in that they can walk well (or cycle or ride) but cannot cope with badly hung gates, or stiff or fiddly gate catches. The inability to open a gate is (without assistance) as much an impediment to a person afflicted by 'manual dexterity' problems as it is to a person confined to a wheelchair. Similarly, persons with 'physical coordination' problems can find stiles daunting and dangerous, where a gate would hold out no problem at all.

29. The question of the virtue or otherwise of making 'one gate in a line of several gates' disabled-friendly comes down to whether or not there is an applicable exception in the Act. The only exception seems to be in s.21D(4)(c), where **substantial** extra costs can be a legitimate reason. What is 'substantial' must then be balanced against the general duties on public authorities in s.49A, which extend to requiring 'favourable treatment' of persons with disabilities.

### **30. The Disability Discrimination Act applied to diversion and creation orders.**

31. The DDA provides that:

*49A General duty*

(1) **Every public authority shall in carrying out its functions have due regard to—**

(a) **the need to eliminate discrimination that is unlawful under this Act;**

32. Making a diversion order or creation order is a function of a public authority – and that extends to confirmation of such an order, by either the local authority, or by the Secretary of State – the Secretary is also a public authority for the purposes of the DDA. Both diversion and creation orders require for their making and confirmation the satisfaction of an 'expediency test', and diversion orders have the additional requirement that the new route is 'not substantially less convenient for the public', and the 'effect on public enjoyment of the path or way as a whole.' The 'expedient test' is a 'public authority function', and therefore it must be construed to include the interests of disabled persons in accordance with the DDA. The 'public enjoyment as a whole' must encompass disabled persons and, anyway, this is also a 'public authority function' test and must be carried out with regard to the DDA.

33. Essentially, the effect of the Disability Discrimination Act on the 'public authority functions' in making and confirming diversion and creation orders is such that the effect of the orders can lawfully be adverse to disabled persons (as statutorily defined) *only* if one of the *statutory exceptions* in the DDA applies in any case. The effect of the Disability Discrimination Act is not such that the local authority must look to see if it can and should 'cater for the disabled', but to place the authority under a blanket requirement to 'cater for the disabled' unless a statutory exception applies.

**34. Are BS 5709-compliant gates and stiles obligatory in diversion or creation orders?**

35. The British Standard does not, of itself, make adherence to its design specifications obligatory where 'DDA compliant' gates or stiles are to be used. The Secretary of State has not expressly adopted BS 5709 as guidance, but the Secretary's guidance (below) does endorse the British Standard, and advocates its use. A British Standard, by its very nature, is a 'best practice' specification, carefully researched, consulted, and drafted. Since this British Standard sets out a 'hierarchical approach' of 'least restrictive option', and its gates and stiles are proven to be 'disabled friendly', a public authority that specifies a gate or stile to BS 5709 (always assuming that a stile is acceptable, rather than a gate, in any case) would seem to be visibly satisfying its DDA burden. The British Standards Institute, on its website says:

*"What is a standard?"*

*"Put at its simplest, a standard is an agreed, repeatable way of doing something. It is a published document that contains a technical specification or other precise criteria designed to be used consistently as a rule, guideline, or definition. Standards help to make life simpler and to increase the reliability and the effectiveness of many goods and services we use. They are intended to be aspirational – a summary of good and best practice rather than general practice. Standards are created by bringing together the experience and expertise of all interested parties such as the producers, sellers, buyers, users and regulators of a particular material, product, process or service.*

*"Standards are designed for voluntary use and do not impose any regulations. However, laws and regulations may refer to certain standards and make compliance with them compulsory. For example, the physical characteristics and format of credit cards is set out in standard number BS EN ISO/IEC 7810:1996. Adhering to this standard means that the cards can be used worldwide.*

*"Any standard is a collective work. Committees of manufacturers, users, research organizations, government departments and consumers work together to draw up standards that evolve to meet the demands of society and technology. British Standards' staff act as secretaries to these committees and project manage the production of standards. As the world's oldest National Standards Body, BSI British Standards has over 100 years' experience of bringing together these often very varied viewpoints and of facilitating consensus."*

### **36. Guidance issued by the Secretary of State.**

*Rights of Way Improvement Plans*

*Statutory Guidance to Local Highway*

*Authorities in England*

*Department for Environment, Food and Rural Affairs*

*November 2002*

*2.2.17 Relatively few rights of way are suitable for use by those with mobility problems. A major limitation on use is the number of stiles, steps, heavy farm gates and narrow bridges on rights of way. Even those rights of way which are free from such barriers, and which could be part of an easy-to-use circular route or a local network of paths, are not generally managed, promoted or maintained with the needs of people with mobility problems in mind. In many cases, it would be relatively easy and inexpensive to open such ways to everybody. The development of accessible, sturdy and stock-proof gates designed for paths to British Standard 5709, and of well-designed robust powered wheelchairs now enables many more people with mobility problems the potential of better access to the open countryside I I.*

*Local highway authorities should assess the need for works to existing ways and the need for new ways to enable people with mobility problems, including disabled riders, to enjoy a higher proportion of the network than is currently the case. In making these assessments, local highway authorities should work on the principle that the needs of people with mobility problems should always be taken into account in the management, maintenance and improvement of local rights of way. Authorities should also bear in the mind that needs will differ between individuals with varying degrees of mobility. They should also recognise the importance of publicity and information about access to the network so that people with mobility problems are encouraged to make use of public rights of way and can make decisions about which are suitable for their degree of mobility. Further information about understanding the needs of people with mobility problems is contained in Section 3.*

*Other duties with respect to people with mobility problems*

*Section 69 of CROW Act 2000 places (when commenced) a duty on local highway authorities to have regard to the needs of people with mobility problems when authorising the erection of barriers on footpaths or bridleways under section*

*147 of the Highways Act 1980. New section 147ZA will empower them to make agreements with owners, lessees and occupiers of land for works to replace or improve structures (such as gates or stiles) to make them safer or more convenient for people with mobility problems.*

*Making stiles and gates easier for those with mobility problems*

*The Secretary of State has already given guidance to authorities on the needs of people with mobility*

*problems in connection with rights of way improvement plans (ROWIPs). Authorities are reminded of that advice, and of British Standard*

*5709:2006: in addition the Secretary of State wishes to draw authorities' attention to two recent publications.*

- By all reasonable means: inclusive access to the outdoors for disabled people (*Countryside Agency, 2005, CA 215*).
- *Countryside for All Good Practice Guide extended CD edition, published by the Fieldfare Trust in 2005.*

*These two publications, together with the improvement plan guidance and the British Standard, should provide authorities with enough information on how to assess the needs of people with mobility problems, and to determine which routes should have priority for improved access for such people. They also make it clear that tackling physical barriers on rights of way is only a part of providing better access to the countryside for people with disabilities or mobility problems, and that consideration needs also to be given to such things as publicity, parking and other relevant facilities. Many authorities have already, in the course of their work on rights of way improvement plans undertaken consultation on the needs of people with disabilities and mobility problems and developed proposals for improved access to the countryside.*

**37.** Note that this guidance specifically addresses 'mobility problems', and largely ignores other statutory disabilities, including physical dexterity issues. The Countryside Agency's 'By All Reasonable means' does state that poor dexterity and lack of strength constitute statutory disability. **All this guidance as stated by, and endorsed by, the Secretary of State should be taken into account, and followed unless there is a compelling reason to dissent, in every case of the making of, and confirming, a diversion or creation order. This is not an 'opt-in' choice: the guidance informs on compliance with the Disability Discrimination Act requirements, and is therefore the presumptive approach, unless availability of a statutory exception allows the possibility of 'opt out' in any case.**

**38. Interference with landowners' interests.**

39. It is sometimes argued that a local authority cannot 'impose' a disabled-friendly gate or stile upon a landowner because the limitation is the landowner's 'property'. That is certainly true where a path and a limitation thereon already exists (see above), but until the new route is 'created' by confirmation of the order, the making and confirming of the order lie within the 'public authority function' of the local authority and of the Secretary of State, and these two authorities are bound by the Disability Discrimination Acts, and therefore act quite properly in requiring the 'best possible access' for disabled persons, achieved by virtue of the terms of the diversion or creation order.

#### 40. Public policy issues.

41.S.69 of CRoWA – now in force – reads:

*69.—(1) In section 147 of the 1980 Act (power to authorise erection of stiles etc on footpath or bridleway) after subsection (2) there is inserted—*

*“(2A) In exercising their powers under subsection (2) above a competent authority shall have regard to the needs of persons with mobility problems.*

*(2B) The Secretary of State may issue guidance to competent authorities as to matters to be taken into account for the purposes of subsection (2) above; and in exercising their powers under subsection (2) above competent authorities shall have regard to any such guidance issued to them.”*

*(2) In subsection (5) of that section, at the end there is inserted “or for the breeding or keeping of horses.”*

*(3) After that section there is inserted—147ZA.—(1) With respect to any relevant structure, a competent authority may enter into an agreement with the owner, lessee or occupier of the land on which the structure is situated which provides— (a) for the carrying out by the owner, lessee or occupier of any qualifying works and the payment by the competent authority of the whole or any part of the costs incurred by him in carrying out those works, or*

*for the carrying out by the competent authority of any qualifying works at their own expense or subject to the payment by the owner, lessee or occupier of the whole or any part of the costs incurred in carrying out those works.*

*(2) In this section—*

*“competent authority” has the same meaning as in section 147 above,*

*“relevant structure” means a stile, gate or other structure which—*

*is authorised by a condition or limitation subject to which the public right of way over the footpath or bridleway was created, or*

*is authorised under section 147 above, but does not include a structure to which an agreement falling within section 146(5)(b) above relates, and “qualifying works”, in relation to a relevant structure, means works for replacing or improving the structure which will result in a structure that is safer or more convenient for persons with mobility problems.*

*(3) An agreement under this section may include such conditions as the competent authority think fit.*

*(4) Those conditions may in particular include conditions expressed to have enduring effect—*

*for the maintenance of the structure as replaced or improved, and for enabling the public right of way to be*

*exercised without undue inconvenience to the public.*

*(5) Where an agreement under this section has been entered into in relation to any structure—*

*the public right of way is to be deemed to be subject to a condition that the structure as replaced or improved may be erected and maintained in accordance with the agreement so long as any conditions included by virtue of subsection (4) above are complied with, in a case falling within subsection (2)(b)(i) above, as from the effective date the previous condition or limitation relating to the relevant structure shall cease to have effect, and*

*in a case falling within subsection (2)(b)(ii) above, as from the effective date the previous authorisation under section 147 above shall cease to have effect in relation to the relevant structure.*

*(6) In subsection (5) above “the effective date” means—*

*the first anniversary of the day on which the agreement was entered into, or such earlier date as may be specified for the purposes of this subsection in the agreement.*

*(7) For the purposes of section 143 above, any stile, gate or other structure replaced or improved in pursuance of an agreement under this section is to be deemed to be erected under this section only if any conditions included by virtue of subsection (4) above are complied with.*

*(8) A competent authority may not enter into an agreement under this section except with the consent of every owner, lessee or occupier of the land on which the relevant structure is situated who is not a party to the agreement.*

*(9) The Secretary of State may issue guidance to competent authorities as to matters to be taken into account for the purposes of this section; and in exercising their powers under this section competent authorities shall have regard to any such guidance issued to them.”*

*(4) In section 146 of the 1980 Act (duty to maintain stiles etc. on footpaths and bridleways) in subsection (5), before the word “or” at the end of paragraph (a) there is inserted—*

*“(aa) if any conditions for the maintenance of the structure imposed by virtue of subsection (4) of section 147ZA below are for the time being in force under that section,”.*

42. Clearly, Parliament intends that all stock control barriers authorised under s.147HA 1980 should be made more suitable for persons with ‘mobility problems’. Suiting the needs of the ‘mobility impaired’ disabled also suits the needs of those with manual dexterity, and physical coordination, impairments. Parliament also intends that ‘existing limitations’ should be made more disabled-friendly, short of derogating the landowners’ existing rights in their limitations. **It would surely be contrary to the will of Parliament to hold that a public authority, in making or confirming a diversion or creation order, is**

not also bound, by the provisions of the DDA, to achieve the best possible facilities for the disabled by the wording of the order, whilst the order is within their jurisdiction.

**43. Diversion orders made under s.257 of the Town & Country Planning Act 1990.**

44. S.257, which provides for the diversion of a right of way, or for the creation of an 'alternative route', is silent as to 'limitations and conditions'. The Town and Country Planning (Public Path Orders) Regulations 1993, SI 1993 No. 10, set out a form of order for s.257. This contains no reference to 'limitations and conditions.' But it is a fact that s.257 diversions do often embrace the need for gates or stiles on the new route and, if these go in before confirmation, or as a 'condition of confirmation', then such gates or stiles are limitations and, per ss.53(2) and 53(4) (see above) must be properly recorded in the definitive statement. If the s.257 order is silent as to 'resulting limitations', but such exist, then the order-making authority for the purposes of WCA81 must make a concurrent, or immediately subsequent, definitive map modification order to add the 'resulting limitations' to the definitive statement.

**45. Summary.**

46. Once in force, a 'limitation' is the property of the landowner and the public cannot force upon the landowner any 'lessening' of the fetter on the public right. When a diversion order or a creation order is made, and also in the confirmation stage, the local authority and the Secretary of State, as public authorities, must construe the 'expediency' and 'public interest' tests in accordance with the requirements of the Disability Discrimination Act 1995 (as amended). In essence, these two public authorities must word (either by drafting, or by modification) the order so as to 'get the best possible deal' for persons with statutory disabilities, whilst the opportunity exists – i.e. before confirmation of the order. This is not an opt-in facility: it is the default situation, and opt-out is only within the limited statutory exceptions within the DDA. Whether a 'disabled-friendly structure' must be BS 5709 compliant is not stated as such in either legislation or guidance, but both the Secretary of State, and the Countryside Agency (now Natural England) give a strong indication that complying with BS 5709 generally answers the needs of the 'whole public' (i.e. including disabled persons), and therefore compliance with BS 5709 is the 'best option' unless there is sufficient evidence to the contrary in any case. Whatever type of gate or stile is to be installed, it must be adequately specified in the order, so that it is, in turn, adequately specified in the definitive statement.

Ends.