

From: Simon Jones, Corporate Director of Growth, Environment and Transport

To: Clair Bell, Cabinet Member for Community and Regulatory Services

Subject: Amendments to the Highways Act 1980 – sections 118ZA & 119ZA

Decision No: 24/00080

Classification: Unrestricted

Electoral Division: All

Summary: Amendments to the Highways Act 1980 to provide a right for landowners to apply for public path diversion and extinguishment orders were included in the Countryside and Rights of Way Act 2000. After a considerable delay, the Department for Environment, Food and Rural Affairs (DEFRA) has been progressing the statutory instruments required to implement the amendments. The amended provisions, and administrative obligations that stem from them, apply to both the County Council and District Councils. In order to ensure a consistent approach to delivery and decision making relating to the provisions and the determination of applications, agreement is sought to accept the delegation of this function by district councils, should they wish to, to the County Council.

Recommendation(s):

The Cabinet Member for Community and Regulatory Services is asked to agree acceptance by Kent County Council of the delegation by Kent District Councils of their functions in respect of public path orders and applications made under the Highways Act 1980 sections 118ZA and 119ZA as shown at Appendix A.

1. Introduction and background

- 1.1 The Kent Public Rights of Way (PRoW) network extends to 4,375 miles (6,910 km) and, with a small number of exceptions, is publicly maintainable highway. Every year a number of applications are made by landowners/ occupiers to divert public paths in their interest. The County Council has, for several decades, accepted such applications and where the legal tests are met, made Orders, which if successful divert or extinguish public rights. This work is discretionary and largely funded by recharging the costs, as far as the County Council is permitted, to the applicant.
- 1.2 At the time of the introduction of the Countryside and Rights of Way Act 2000, proposals emerged to amend the Highways Act 1980 sections 118 (extinguishment of public paths) and 119 (diversion of public paths) to provide landowners with a “right to apply” for a public path extinguishment or diversion order. This was in response to frustrations expressed in other areas of the country that authorities, unlike Kent, were not willing to accept or consider such

applications. Amendments were consequently made to the Highways Act 1980 (Highways Act 118ZA and 119ZA) to provide landowners with a “right to apply” for public path diversion and extinguishment orders. Implementation has been significantly delayed; however, we have been informed by the Department of Environment Food and Rural Affairs (DEFRA) that the secondary legislation required to bring the provisions into effect is being prepared.

- 1.3 For the purposes of clarity, where a district council is the planning authority it is responsible for the making of Orders under the Town and Country Planning Act 1990 in cases where the diversion or extinguishment of a public path is required in order for development to lawfully progress. Eleven planning authorities in Kent have entered service level agreements with the Kent Public Rights of Way and Access Service for the processing of such Orders. The new provisions have no bearing on those existing arrangements or the TCPA 1990 powers exercised by the districts.
- 1.4 The power to make Orders under the Highways Act 1980 sits with both county and district councils. It is technical, highly regulated work and subject to significant scrutiny. In amending the provisions within the Highways Act 1980, the new obligations to determine applications currently apply to both the county and district councils.
- 1.5 In practice the districts have not exercised the power to make public path orders under the Highways Act 1980 since the ending of the PRow management agency agreements in 1991 and 2000. Since this time, all applications have been made to the County Council. This is the situation in many of the two-tier local government areas. DEFRA expected, on the introduction of the new provisions, that applications would be made to county councils in two tier areas. While that may be the case, it would be open to an applicant to choose to make their application to a district and there may be advantages in doing so; for example, where a county council has previously rejected a proposal or where the applicant believes that a county council may actively oppose a proposal. It seems that a district council will not be able to refuse an application where a similar application is pending with the county council or vice versa.
- 1.6 Under the “right to apply” amendments, a district council (in common with the county council), that receives such an application will have a number of obligations. A district will be required to:
 - a) determine the application as soon as reasonably practicable and in any event within four months of receipt;
 - b) appoint a scale of charges for dealing with such applications; and
 - c) keep and publish a register of such applications.
- 1.7 In addition, it will be necessary for district councils to have consultants or officers appropriately trained and experienced to determine the applications and to make available guidance and an application form.
- 1.8 It is clear that there has been little or no engagement by DEFRA with districts concerning the new provisions. One option suggested by DEFRA for dealing

with applications in two tier areas is that the new obligations are delegated to the county council. We have been proactive in engaging with district Chief Executives through the Joint Kent Chiefs Group. The initial indication is that districts will wish to delegate the function. This would be possible utilising the provision contained in the Local Government Act 1972 section 101. A key decision is required to enable the County Council Public Rights of Way and Access Service to accept such a delegation from a district.

2. Financial Implications

- 2.1 It is intended that authorities will be able to recover the full costs incurred in processing applications under the new provisions and further cost recovery regulations are intended to be laid before Parliament to this end. Our schedule of charges will be updated when the necessary regulations are implemented to ensure that the financial impact to the County Council is fully mitigated. However, while it is intended that the regulations will enable full cost recovery in accepting and determining correctly made applications, it is clear that the full potential financial impacts of the new provisions have not been considered. Examples of where the County Council's costs would not be met include:
- a. Considering consultations where applications are made to, or determined by, a district council;
 - b. Correcting a draft Order, Order plan or associated notices where drafted by a district council; and
 - c. Objecting to a proposal or Order made by a district council, the Secretary of State, or even by the County Council on direction of the Secretary of State, in cases where a proposal or Order is not considered to be in the interests of the public or Kent County Council. For example, a diversion proposal does not meet the legal tests as set out in the Act or it involves a bridge that would become maintainable at the County Council's expense.
- 2.2 The acceptance of the delegation of the new obligations by a district would be cost neutral in respect of the determination/ processing of applications. It would secure economies of scale in terms of expertise, knowledge and meeting the ancillary requirements of the new provisions (see paragraph 1.6 a-c). It may mitigate potentially adverse financial/ resource impacts resulting from poor proposals or poorly drafted Orders as set out at paragraph 2.1 a-c.

3. Policy Framework

- 3.1 The proposed decision seeks to deliver this work in the most efficient, economic and effective way by maximising existing economies of scale, expertise and knowledge and meeting the ancillary requirements of the new provisions, prioritising the Council's best value duty. It seeks to minimise unrecoverable costs and long term costs to the County Council and in that respect it is well aligned with Securing Kent's Future.
- 3.2 The proposed decision supports a number of identified policies within the adopted [Public Rights of Way Improvement Plan for Kent – 2018-2028](#) (Appendix B). The plan was produced following wide ranging public

consultation and engagement. Specifically, the decision will support identified objectives relating to:

- a) the enjoyment of rights with responsibilities; in which working with the landowning community to improve the network including progressing public path orders and reducing conflict are specific actions; and
- b) efficient service delivery in which seek to strengthen working arrangements with local authorities to deliver a well maintained, safe and pleasant environment.

3.2 The recommended decision contributes to meeting the 'Environmental step change' priority in Framing Kent's Future and the second commitment:

"Improve access for our residents to green and natural spaces especially in urban and deprived areas and through our Public Rights of Way network to improve health and wellbeing outcomes."

4. Legal Implications

4.1 The statutory instruments necessary to commence amendments to the Highways Act 1980 sections 118ZA and 119ZA are in preparation. Once commenced, the County Council and district councils will have a number of new obligations in respect to the administration of the new provisions and the determination of applications made under them. There will only be a short period in which to prepare for the new provisions.

4.2 The legal advice received is that the new provisions are non-executive functions and that a district council may formally arrange for their, anticipated, responsibilities under sections 118ZA and 119ZA of the Highways Act 1980 to be carried out by Kent County Council. Delegation would be under the Local Government Act 1972. It would be for the relevant district to conclude its own governance requirements in respect of the delegation of the function. However, in order to accept the delegation of this function, a key decision is required by the County Council.

5. Conclusions

5.1 Amendments are to be made to the Highways Act 1980 in consequence of the Countryside and Rights of Way Act 2000. The introduction of the new provisions (Highways Act 1980 sections 118ZA and 119ZA) apply equally to county and district councils. There are benefits to both Kent County Council and the district councils in districts delegating the functions to the County Council, principally it would:

- a. secure economies of scale in terms of expertise, knowledge and meeting the ancillary requirements of the new provisions;
- b. remove the burden the function would place on districts;
- c. ensure greater consistency in the delivery of the function; and
- d. it may mitigate potentially adverse financial/ resource impacts resulting from poor proposals or poorly drafted Orders as set out at paragraph 2.1.

