



### Private improvements on public rights of way

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Richard Manyon considers the challenges facing landowners wishing to carry out works affecting public footpaths, together with issues arising from having a privately owned roadway constructed, adopted and maintained at public expense.

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If a landowner wishes to carry out works to areas which are subject to public rights, he will need consent from the highway authority or risk incurring penalties. The position when a landowner wishes to carry out works affecting the public highway, or have a privately owned roadway constructed, adopted and maintained at public expense may involve making an agreement under Highways Act 1980 s 278 which may be a complex document and the project may incur substantial costs..

#### Works to Public Footpaths

Where a public right of way crosses private property the landowner may wish to carry out works to improve it, for example by introducing a metalled surface to allow farm equipment or road traffic to use the path.

In this situation the landowner must bear in mind that his right to carry out such work may be restricted, or liability may attach to any actions which are carried out in contravention of public obligations. He will therefore need to obtain permission from the competent authority. References in this article to the authority normally apply to the highway authority although in some cases powers are delegated to the local authority and for a unitary authority they will be the same. In rare cases affecting the strategic road network the Highways Agency on behalf of the Department of Transport may be involved.

The starting point is that under s 263(1) of the Highways Act 1980 ("the Act") the surface of any public right of way vests in the highway authority if it is maintainable at public expense as provided in s 36(2) of the Act. This will encompass most rights of way although the surface of some paths, for example those dedicated under common law presumption since 1949, may still vest in the landowner. As a general rule however the authority is likely to be responsible for maintaining the surface of the right of way, and the landowner is likely to be responsible under s 146 of the Act for maintaining any gates and stiles which appear along its route.

Regardless of who is responsible for maintenance however, the landowner needs the permission of the authority to carry out any works to the surface of the right of way. This is a result of s 131A of the Act which makes it an offence for anyone, without lawful excuse or authority, to disturb the surface of a footpath or bridleway or of any other highway which is not made up in such a manner as to render it inconvenient for the exercise of a public right of way. The Act contains various other offences in

relation to obstructing a public footpath without the permission of the authority.

If permission for works is sought, the authority is likely to insist upon certain matters as conditions of its consent. Firstly the authority is likely to demand full details of the location of the work, its nature and details of the contractor engaged. If the proposed works will create a hazard to members of the public it is likely that an application for a temporary footpath diversion or closure order will be required under s 119 of the Act or ss 247 and 257 of the Town and Country Planning Act 1990. This will involve the landowner incurring expenses with the authority. He may also be required to undertake to reinstate the surface of the public footpath to a useable condition. Finally, the authority may require confirmation that the works will be carried out with the benefit of public liability insurance, that the landowner will be responsible for the costs of maintenance of any improved road surface and that all works will be carried out in line with all applicable health and safety legislation. It is unlikely that permission will be given to carry out the works until all these matters have been dealt with. The landowner also needs to consider whether planning permission, consent from the Environment Agency, or consent from organisations such as Natural England may be required depending on the circumstances.

These requirements make improvement works to any public footpath an unwieldy and potentially complex business. Some landowners might seek to offset this inconvenience against the possibility of extracting a contribution from the authority in respect of any improvement works as a result of the authority's obligation under s 41 of the Act to maintain the highway. In current economic conditions however the prospect of extracting any significant payment must be seen as small. The authority are likely to argue that the existing condition of the footpath is sufficient for them to discharge their obligations under section 41 and that therefore the full costs of any improvements must be met by the landowner.

A landowner may therefore not wish to go through the required application process and, particularly for small repair works, might choose to carry out works without permission. This will be an offence and either the highway authority or the local authority will have the ability to prosecute him and also to remove any obstructions placed on the route of the footpath.

The landowner might nevertheless decide that he is comfortable with these risks and carry out the works anyway on the basis that, in many cases, the chances of the authority becoming aware and taking action to abate them prior to their completion may be small. This course of action involves further risks. Firstly, the authority might argue that a trespass had taken place over the surface of the roadway vested in them by virtue of s 263(1) of the Act. Under these circumstances it is possible that an injunction might be sought seeking the removal of the unauthorised works. Furthermore there could be public liability issues if a member of the public were injured as a result of the unauthorised works leading to substantial damages. It is likely that the authority would try to pass on any liability for a failure maintain the public highway to the landowner on the basis that it should not be responsible for problems arising out of unauthorised works where the landowner is in breach of their statutory duties. Equally significantly, a landowner could find that any insurer who might otherwise be responsible for public liability matters would seek to avoid the relevant policy on the basis that the works carried out were illegal.

The best course therefore will be to try to require the highway authority to carry out any standard type of maintenance works to public footpaths in line with its obligations under s 41 of the Act. If improvement works are to be carried out, the safest course must be to go through the process of applying for any relevant permission and, if necessary, diversion orders. Failure to do this may expose the landowner to significant liability in the event of an accident, a civil claim or even criminal prosecution.

### **Section 278 Agreements**

The counterpoint to the matters discussed above is a situation where a landowner, most often a developer, wishes its land to be subject to works which affect an existing vehicular public highway and to have the way adopted by the authority and subsequently maintained at public expense. In these

circumstances it may be unlikely that the authority will simply give permission to carry out works in the way outlined above. This can often be related to a planning condition.

The procedure is for the developer to enter into an agreement with the authority under s 278 of the Act. This provides that a highway authority may, if it is satisfied it will be of benefit to the public, enter into an agreement with any person for the execution by the authority of any works which the authority are or may be authorised to execute, or for the execution by the authority of such works incorporating particular modifications, additions or features, or at a particular time or in a particular manner, on terms that the landowner pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement. Such agreements are often required pursuant to obligations in an agreement with the local planning authority under Town and Country Planning Act 1990 s 106 in connection with the development of land and may also be made with the highway authority under s 38 of the Act for the new way to be adopted.

If it can persuade the authority that the works are of public benefit, the landowner or developer is likely to be required to pay the costs of such works and may also be required by the authority to pay other costs such as those relating to the agreement, those of obtaining any required permission(s) relating to the works and those of acquiring any additional land required to allow the works to be carried out. The authority may also recover from the landowner a sum in respect of general administrative expenses and internal staff overheads. Such sum may be expressed to be a percentage of the costs of the proposed works.

Furthermore s 278 provides for the authority to require payment of a commuted sum in respect of future required maintenance works, and also of a bond which may be released following the expiry of an inspection period. The Act provides that any sum payable to the authority by way of a commuted sum must relate to "the maintenance of the works to which the agreement relates". This is not therefore a mechanism by which an authority can obtain funds to be used in relation to other rights of way management areas. The landowner or developer should examine carefully the justification of any commuted sum to ensure it is reasonable and does not include any matters not directly related to the works being carried out.

The purpose of such an agreement therefore is to ensure that the work to be carried out on the highway is completed to the standards and satisfaction of the authority. The usual way in which an agreement under s 278 is dealt with is that the draft formal document is prepared by the solicitor to the highway authority (or sometimes the local planning authority on its behalf) and issued to the landowner's solicitor, sometimes annexed to a s 106 agreement. The details of the agreement are then resolved before the final document is completed and signed by both parties before the commencement of any work.

A typical S 278 Agreement may include such matters as planning permission (if the agreement is with a unitary council), a schedule detailing the works to be done and shown on appropriate plans, the extent of any land to be conveyed to the highway authority or dedicated, details of any bond, and of commuted sums for the future maintenance of the improvement works. The agreement may also specify who will design or project manage the works. This can either be the authority or a consultant Highway Engineer working on behalf of the landowner and will include details of the full costs of the works to be paid by the landowner and the authority's administrative, legal, design checks and inspection costs. The typical agreement with the highway authority is therefore a complex document. It is likely that the authority will insist on this level of detail in most cases however there is no requirement in the Act as to the form of agreement to be entered into.

If the extent of the works is minor, such as building a single new access from the adopted highway to a newly constructed site, it might be said that the long form agreement usually relied on by an authority is unnecessary. For example, rather than providing that the authority will carry out the works it might be appropriate for the landowner's engineer to prepare the specification of the works and to carry them out subject to inspection by the authority. Nonetheless, such specifications are likely to have to include such matters as the extent of site works, site clearance, fencing, drainage, earthworks, carriageway

and footway construction details, kerbing, edging and channel, traffic signs and road markings, road lighting, illuminated signs and illuminated street furniture positions, electrical works, cross sections and longitudinal sections showing existing and proposed levels, drawings showing critical dimensions of the design that require technical approval, standard construction details., There will also be plans showing swept turning paths and vehicular movements of various sizes of vehicle around the vehicular routes of the proposed highway scheme, probably a coloured plan showing full limits of Section 278 Agreement Works, including suitable working space and land to be dedicated for highway purposes, land transfer drawings and schedules and landscaping proposals.

A domestic landowner is likely to view this type of arrangement as unacceptably complex and expensive. In these circumstances he could attempt to agree with the authority that the works can be carried out by permission and at his own cost. The amount of information required may be more limited in these circumstances and this may be appropriate where the authority is not being asked to adopt any new land and thereby take on additional liability for maintenance. In the alternative it may be possible to persuade an authority to adopt a short form bespoke type of agreement, perhaps even by letter, dealing with only the relevant matters in a given situation.

In either case the landowner is likely to have to give an indemnity to the authority in respect of any public liability attaching to the proposed works. It will also be necessary to define the exact scope and nature of the works which are to be the subject of any agreement, and the standard to which they need to be carried out together with provisions as to the proposed costs and commuted payments to be made by the landowner and their timing.

As a landowner is not authorised to proceed with works within the limits of the public highway before the section 278 agreement has been completed or permission has been obtained to carry out works on the public right of way, if he proceeds prior to this, the authority is likely to use its powers under the Act to stop the works and make the highway safe, and recover from him all its reasonable costs incurred in doing so.

Overall however, where works affect the public highway used by vehicles, as opposed to public footpaths, it is likely that authorities will insist on their existing precedent section 278 agreements and any landowner wishing to carry out relevant development will have to go through this process and incur the costs of so doing.

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