

CONDUCT OF INQUIRIES AND HEARINGS INTO RIGHTS OF WAY ORDERS WHERE ORDER MAKING AUTHORITIES DO NOT ACTIVELY SUPPORT AN ORDER

Introduction

1. This Advice Note sets out the procedures to be followed where an order making authority (OMA) does not actively support a definitive map or public path order.
2. The booklet '*Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England*' has been prepared by the Planning Inspectorate and is available to the public on our website at www.planningportal.gov.uk/planning/countryside/. Parts 3 and 4 describe what typically happens when a public hearing or inquiry into a rights of way order takes place. However, where an OMA chooses not to support an order, the Inspector will need to consider adopting different procedures from those set out in the booklets. When this happens, the Inspector will explain to the inquiry or hearing why and how the procedure is being changed. The guidance in this Advice Note is intended to assist all concerned in preparing for such circumstances where these can reasonably be foreseen.
3. This Advice Note is publicly available but has no legal force.

Background

4. In most cases, an OMA will not make an order unless it is satisfied that the circumstances justify it. Exceptions to this occur when an OMA declines to make the requested order but the applicant successfully appeals to the Secretary of State.
5. In the case of a definitive map order, this may result in the OMA being directed to make the order under Schedule 14 of the Wildlife and Countryside Act 1981. In the case of a public path order, the Secretary of State may decide to make an order using powers under Sections 26 or 120 of the Highways Act 1980, or Section 247 of the Town and Country Planning Act 1990, although these powers are very rarely used.
6. In such circumstances, where an OMA has previously assessed the facts of the case and decided the making of an order is not justified, it may opt to actively oppose confirmation of the order or it may choose to adopt a neutral stance whereby it neither supports nor objects to confirmation.
7. There may also be occasions where the OMA supported the initial making of the order but advertisement brought to light new information, further evidence or valid objections which caused the OMA to conclude that confirmation was not justified. Again, the OMA may opt to actively oppose confirmation of the order or it may choose to remain neutral as regards confirmation.
8. Sometimes an OMA is content to make the requested order but is not prepared

to actively support it at an inquiry if it is opposed. Such examples are usually where an order is made under the Town and Country Planning Act 1990 to enable development to proceed or the Highways Act 1980 in the interests of a landowner. OMAs may choose to remain neutral as regards confirmation of the order, to passively support it or even to oppose it if new information or objections following advertisement cause a change of mind.

9. Similar circumstances may arise where, after having considered the details of a case, the Inspector proposes modifications to an order but advertisement results in objections to these modifications leading to a second or subsequent hearing or inquiry (see paragraphs 29 to 33 below). In this scenario, the parties concerned (including the OMA) may support, oppose or take a neutral position as regards the proposed modifications.

The role of the OMA

10. In normal circumstances, where an OMA actively supports confirmation of the order at an inquiry, its advocate will present the case in support and call witnesses as required, cross-examine witnesses who oppose the order, and finally will draw together the proceedings at the end of the inquiry, summing up the case in support and making any legal submissions as appropriate. At a hearing the OMA's rights of way officer would normally present its case, without introducing witnesses or cross-examining other witnesses.
11. Where an OMA has decided not to support confirmation of the order at a forthcoming hearing or inquiry (or otherwise) the Planning Inspectorate should be informed at the earliest opportunity. A clear statement indicating whether the OMA intends to actively oppose the order or to adopt a neutral stance is required, together with an indication of its reasons for doing so.
12. When this occurs, the OMA will still remain responsible for the order and therefore will be required to secure the agreement of the applicant or another supporter of the order to take the lead in presenting the case. If no-one is prepared to take the lead (and assuming the case cannot instead be determined by exchange of written representations) at the hearing or inquiry the Inspector will summarise the case for the order from the information before him or her, with the applicant or any other supporters being invited to take part in the discussion (at a hearing) or give their own evidence (at an inquiry) in due course.
13. Aside from the case for (or against) the order, it is usual for the OMA, if represented by a law professional, to offer assistance to the Inspector on points of law or procedure, should any arise during the course of the hearing or inquiry. Where the OMA has made clear that it will not be appearing in support of the order, it would be helpful to the Inspector to know at an early stage whether or not the OMA's representative can, and is willing to, offer such assistance at the hearing or inquiry if required.

At the start of the inquiry or hearing

14. At the start of an inquiry, it is normal practice to hear the case for the order from those who support it before hearing the case against from the objectors.

Where the OMA is appearing as a supporter or objector to the order, it will be invited to present its case in accordance with that convention.

15. Where the OMA has given notice that it will take a neutral stance at an inquiry, the Inspector will invite its representative to make an opening statement before both the supporters and objectors. However, this statement should be limited to a summary of the background to the making of the order and the reasons for the OMA choosing to remain neutral as regards its confirmation. It should not contain submissions for or against the order (which should more properly be given by the OMA in the role of supporter or objector) but be a factual account of the history of the order and the key issues which influenced the OMA's conclusions leading to its neutral position.
16. Where the OMA has given notice that it will take a neutral stance at a hearing, the Inspector will invite its representative to contribute to the discussion. However, comments should be limited to a summary of the background to the making of the order and the reasons for the OMA choosing to remain neutral as regards its confirmation.
17. If circumstances arise immediately prior to the hearing or inquiry that cause the OMA to revise its position so that it no longer intends to remain neutral, the Inspector should be informed at the start of the proceedings so that the OMA can be heard as either a supporter or objector in the usual sequence of events.
18. Should the reverse situation occur, where information comes to light at the last minute causing an OMA to withdraw its support for the order, thereby becoming an objector or taking a neutral stance, the Inspector must be advised at the earliest possible opportunity.
19. Unless arrangements can be made before the event (see paragraph 12) the Inspector will enquire whether any of the supporters present at the inquiry or hearing are prepared to take the lead in presenting the case in support of the order. A request for an adjournment is unlikely to be refused although the length of any adjournment will depend on the circumstances of the individual case. It may vary from a few minutes to allow the applicant or supporter to gather his or her thoughts, to several days or longer to enable a full case to be prepared.
20. If there is no-one prepared to lead the case in support of the order, the Inspector may decide to adjourn until a suitable volunteer can be found or, alternatively to summarise the main points in support of the order him or herself, after which the individual supporters will give their evidence to the inquiry or contribute to the discussion at the hearing. In some cases it may be appropriate to close the hearing or inquiry altogether and make alternative arrangements for determining the order.
21. Any last minute changes which significantly delay matters or affect the smooth running of the hearing or inquiry can put the party responsible at risk of a claim for costs against them unless the issues could not reasonably have been foreseen. However this should not cause any party to withhold late evidence which has a significant bearing on the determination of the order.

During the hearing or inquiry

22. Particularly in the case of definitive map orders, there may be archival or other documentary evidence which is held by (or has been otherwise discovered by) the OMA that needs to be taken into account by the Inspector when determining the order. Where the OMA takes a neutral stance at an inquiry or hearing following a successful Schedule 14 appeal, it is important that the applicant or supporter ensures that this evidence is put before the Inspector (as the Inspector will not have received copies of the Schedule 14 application evidence unless it is submitted as part of the Order itself). Where the OMA takes a neutral stance for any other reason, for example because they have discovered further evidence following the making of the order, it is incumbent upon the OMA to provide it.
23. The Inspector will decide on the appropriate time for any such evidence to be presented to the hearing or inquiry depending on the nature of the case. Whilst neutral OMAs are still obliged to make such documents available for inspection by the Inspector (if necessary by arrangement with local record offices), there is no requirement for these to be presented by professional witnesses. Depending on the complexity of the documents concerned, it may be helpful to the Inspector if the OMA is able to provide an officer to answer any factual questions in relation to the documents. However, if interpretation of the evidence is at issue, the OMA may decide whether or not to proffer a professional witness to present the OMA's interpretation (bearing in mind its neutral status in relation to the Order) and consequently accept any cross-examination from supporters and objectors. In such circumstances the hearing procedure is unlikely to be appropriate.
24. The most frequent reason for an OMA taking a neutral stance is where an applicant has been successful in obtaining a direction from the Secretary of State/Welsh Ministers under Schedule 14 of the Wildlife and Countryside Act 1981. In such cases, it is not appropriate for any of the parties to simply produce the appeal decision, or an Inspector's report on which this may have relied, as evidence. The evidence that was submitted to the Secretary of State/Welsh Ministers to support the appeal, together with any other relevant information that has been discovered since, must also be presented to the hearing or inquiry so that the Inspector appointed to determine the order has all the available evidence before him or her so as to reach an independent and impartial decision. It should not be assumed that appeal documents will automatically be transferred.
25. The Inspector is not bound by the Secretary of State/Welsh Ministers' decision on the appeal. He or she will have the advantage of hearing evidence given in person by witnesses and (at an inquiry) tested under cross-examination, seeing the order route on site and inspecting at first hand any other relevant evidence. There may therefore be many reasons why an Inspector's conclusions following an inquiry or hearing may be different to those identified in an appeal decision.

Closing submissions at inquiries

26. As the promoter (and a supporter) of the order, the OMA is given the

opportunity to make the final closing statement after any made on behalf of the objectors. This may include submissions on points of law relevant to the case as well as summarising the evidence leading to the request for confirmation.

27. Where an OMA has actively opposed an order, the final closing statement should be made by the applicant or any supporters who took the lead in presenting the case for the order. In these circumstances, the OMA has effectively given up the normal "right of final reply" and will present its closing submissions before the supporters.
28. In the case of an OMA that has taken a neutral stance throughout, the Inspector will first hear closing statements from the objectors and then the supporters before finally inviting the OMA to make any closing observations. In line with its neutral position, these will not seek to make the case for or against confirmation but are likely to be limited to clarifying factual matters, drawing the Inspector's attention to the main issues of the case and highlighting relevant case law that may have been missed by the other parties.

Second or subsequent hearings or inquiries into advertised modifications to orders

29. As noted above, an Inspector's proposed modifications to an order may result in there being no supporters for the proposed changes at the subsequent inquiry or hearing. In most cases, after explaining the purpose of the inquiry or hearing and dealing with the opening formalities, the Inspector will summarise the reasons for these modifications, based on the matters contained in the interim order decision.
30. If, at a second inquiry, the OMA supports the proposed modifications, it will be given the opportunity to open the case for the supporters and will be invited to make the final closing statement. At a hearing it would contribute to the discussion in the usual way.
31. If, however, the OMA intends to make representations against the proposed modifications, its objections will be heard at the same stage as other objectors, that is, after any representations in support of the modifications have been made. If at an inquiry the OMA wishes to make a closing statement, it may do so along with any other objectors but before the closing submissions of the supporters.
32. Where the OMA takes a neutral stance on proposed modifications to an order, it would not be expected to present any evidence either for or against the proposed changes. The Inspector may, nonetheless, ask whether they would be prepared to assist in clarifying matters not concerned with the merits of the order. At the end of an inquiry, the Inspector will ask the OMA if they have any final comments to make after inviting closing statements from the objectors and then the supporters.
33. Where a second hearing or inquiry is held to consider both the original order and modifications proposed by the Inspector, the sequence in which the parties

are heard is a matter to be determined by the Inspector at the start of the proceedings, in consultation with those concerned.

In conclusion

34. Circumstances will differ from one hearing or inquiry to another. This advice note is not therefore intended to be exhaustive; it is only a guide. Inspectors will continue to exercise their judgement and discretion in these matters, based on each individual case.