

**Appendix 10**

**Planning Inspectorate's Advice Note 20**

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Guidance

# Rights of Way Section Advice Note No 20 - Inspectors' Power to Modify Definitive Map

# Modification Orders

Updated 14 October 2021

**Applies to England**



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# 1. Introduction

1.1. This advice is for Inspectors dealing with orders made under s53(2) of the Wildlife and Countryside Act 1981 (the ‘**1981 Act**’) where, in respect of an order, either: (i) no event has been specified, (ii) the wrong event has been specified, (iii) more than one event should have been specified but was not, (iv) more than one event has been specified, but one or more of them is redundant, or (v) the order is specified to have been made under section 53(2)(a) of the 1981 Act, when the reference should have been to section 53(2)(b), or vice versa. ‘**Event**’ has the same meaning as in s53(3) of the 1981 Act.

1.2. This Advice Note is publicly available. It has no legal force and is not itself an authoritative interpretation of the law.

# 2. Background

2.1. All of the above scenarios have occurred in the past, prompting the need to consider what, if any, powers are available to Inspectors to modify such orders. The following advice sets out the Planning Inspectorate’s view on each scenario.

# 3. General

3.1. Section 57(1) of the 1981 Act provides that: “An order under the foregoing provisions of this Part [which includes an order made under section 53(2) of the 1981 Act] shall be in such form as may be prescribed by regulations made by the Secretary of State .....

3.2. Regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12; the ‘**Regulations**’) provides that: “A modification order shall be in the form set out in Schedule 2 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.” “A form substantially to the like effect” is to be regarded in the

colloquial sense of “a substantially similar form”; i.e. the form must make clear the effect of the order and must also contain a statement of the event(s) giving rise to the order. Schedule 2 to the Regulations provides, amongst other things, for the following form of wording to be used when a modification order is made: “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2)(b)....) of the [1981 Act] because it appears to that authority that the (insert title of (definitive) map and statement) require modification in consequence of the occurrence of an event specified in section 53(3) (specify the relevant paragraph and sub-paragraph), namely (specify event).....”.

3.3. Before going on to consider the scenarios in paragraph 1.1 above, it is important to note the guidance set out in paragraph 10.12 of DEFRA Circular 1/09, which points out that substantive errors may result in the rejection of an order by the Secretary of State.

3.4. It should be borne in mind that a modification order is published to allow the public: (i) to consider the reasons for the order and the effect of the order, and (ii) to raise objections if they wish. The prescribed form of order ensures that the public has sufficient information to enable an informed decision to be made about whether or not to object to the order.

3.5. Thus, if an order contains an error that does not (i) prejudice the interests of any person, (ii) render the order misleading in its purpose, or (iii) appear to result in incorrect information being recorded on the definitive map (hereafter a ‘**minor**’ error), it may be corrected by modification. However, if the error is ‘substantive’, the correct approach is for the order to be rejected and returned to the relevant surveying authority with a written explanation as to why the order was rejected, together with a written recommendation that the surveying authority should notify all relevant parties of such rejection and of the reasons for such rejection.

3.6. Of course, paragraph 8(1) of Schedule 15 to the 1981 Act provides that the Secretary of State shall not confirm an order with modifications so as: (a) to affect land not affected by the order; (b) not to show any way shown in the order or to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2). Paragraph 8(2) requires the Secretary of State to give such notice as appears to him

requisite of his proposal so to modify the order; there is then an opportunity (the minimum period being 28 days from the date of the first publication of the notice) for representations and objections to be made and, in certain circumstances, a local inquiry may be held. In such circumstances, there is clearly no question of a person's interests being prejudiced, of the order being misleading in its purposes, or of incorrect information being recorded on the definitive map.

3.7. As Lord Phillips made clear in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266 “the scheme of the procedure under Sch 15 to the 1981 Act is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry.” Of course, the facts which come to light may, subject to the relevant test(s) being fulfilled, require the relevant ‘event’ or ‘events’ to be modified on the order (e.g. an order may be made relying on the ‘event’ in section 53(3)(c)(ii) to “upgrade” a way, but during the course of the inquiry facts emerge which suggest that the line of the “upgraded” way differs from the line of the existing way, such that section 53(3)(c)(i) is also relevant). Where the required modification, which may or may not involve a change in the relevant ‘event’, falls within paragraph 8(1) of Schedule 15 to the WCA 1981, the correct approach is for the procedure set out in paragraph 8(2) to be followed prior to the confirmation of the order with modifications. However, where the proposed modification does not fall within paragraph 8(1) of Schedule 15 to the 1981 Act, there may not be the same opportunity for representations/objections to be made or for a local inquiry to be held in relation to the proposed modification. In such circumstances, the considerations set out in paragraphs 3.3 and 3.5 above will be relevant.

## **4. No event specified**

4.1. An order that does not specify any event is clearly not in the form set out at Schedule 2 to the Regulations: it (i) is not “in a form substantially to the like effect”; (ii) cannot be

regarded as containing the type of “necessary” omission contemplated by regulation 4 of the Regulations; and (iii) contains an error of substance.

4.2. Omitting the relevant event cannot be regarded as a necessary omission and clearly has the potential to prejudice an interested party’s interests, since the basis on which the order was made will not be known. Such an omission cannot be regarded as a minor error.

4.3. Where no event has been specified on an order, the correct approach is that which is set out in paragraph 3.5 above: the order should be rejected and returned to the relevant surveying authority with a written explanation as to why the order was rejected, together with a written recommendation that the surveying authority should notify all interested parties of such rejection and of the reasons for such rejection.

4.4. An example of a difficult case in this area would be an order that did not refer to an event, but instead stated that the order was made “in accordance with a direction made to the authority by the Secretary of State under paragraph 4(2) of Schedule 14 to the 1981 Act”. This situation could arise in the context of an application for an order under s53(5) of the 1981 Act.

4.5. By virtue of s53(5) of the 1981 Act, “Any person may apply to the authority for an order under [section 53(2) of the 1981 Act] which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within [section 53(3)(b) or (c) of the 1981 Act]”. Where an authority decides not to make an order, the applicant may serve notice of appeal against that decision on the Secretary of State and on the authority (paragraph 4(1) of Schedule 14 to the 1981 Act). If on considering the appeal the Secretary of State considers that an order should be made, paragraph 4(2) of Schedule 14 to the Act provides that “he shall give to the authority such directions as appear to him necessary for the purpose”.

4.6. Whilst the Secretary of State directs the authority to make an order, the order itself should nevertheless state, in accordance with Schedule 2 to the Regulations, the event which has given rise to the order (regardless of whether it is the authority or the Secretary of State that considers that an order should be made).



4.7. The difficulty in this area is perhaps caused by the words italicised in the following extract from the prescribed form (Schedule 2 to the Regulations): “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2) (b)....) of the [1981 Act] because it appears to that authority... [that a modification order should be made in consequence of an event]”. Where the decision that an order should be made originates from the Secretary of State, rather than from the particular authority in question, an argument could perhaps be made that the order should read: “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2) (b)....) of the [1981 Act] because it appears to the Secretary of State (who has directed the authority to that effect)....”. Such an amendment would be regarded as the sort of “insertion[.] or omission[.] as [is] necessary in [the] particular case” (regulation 2 of the Regulations) and the form would be regarded as “substantially to the like effect” as the prescribed form.

4.8. Whilst we are of the opinion that it would be acceptable to amend the name of the party that considers that an order should be made, the surveying authority must make the order, and the order must specify the event on which the order is based.

## 5. Wrong event specified

5.1. Where the wrong event has been specified, an Inspector may use his or her powers of modification only where the error is minor (see paragraph 3.5 above).

5.2. An example of an error of substance is where it is evident that the order making authority (**OMA**) has cited the wrong event and so has applied the wrong criteria in making the order. For example, an order is made to reclassify a footpath as a byway but the event specified is s53(3)(c)(i) (which is for adding a way to the map where no right is recorded) rather than s53(3)(c)(ii) (which is for modifying rights already recorded). As the tests to be satisfied for these two subsections are different, they are not interchangeable.

5.3. On the other hand, a slip of the hand will not necessarily render an order invalid. Where it is evident from the remainder of the order and the surrounding circumstances that the requirements of the 1981 Act have been applied correctly, even though the wrong event has been stated, there seems to be no reason why an Inspector could not use his or her powers of modification. For example, an OMA cites s53(3)(c)(i) as the relevant event, yet it is apparent that what the OMA had in mind from the remainder of the order and the notice was that there is no public right of way over land shown in the map and statement as a highway of any description (s53(3)(c)(iii)).

5.4. The public has an interest in understanding the reasons that lie behind an order; if such reasons are mis-stated, the decision whether or not to challenge an order may be affected. Therefore, where the wrong event is specified, modification will rarely be appropriate.

5.5. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant 'event' or 'events' being amended), see paragraphs 3.6 and 3.7 above.

5.6. As a separate scenario, where an order has been made under s53(3)(b) of the 1981 Act, and the user evidence does not point towards the expiration of a sufficient period of time to raise a presumption that the way has been dedicated as a public right of way, but the accompanying documentary evidence does support dedication, the Inspector may modify the event to s53(3)(c)(i) provided that he or she is satisfied that the error is not substantive.

## **6. More than one 'event' should have been specified but was not**

6.1. The question here is whether the error is minor or substantive. The public has an interest in understanding the reasons that lie behind an order; if such reasons are mis-stated, the decision whether or not to make a representation

with respect to an order may be affected. Therefore, where more than one event should have been but was not specified, modification will rarely be appropriate.

6.2. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant 'event' or 'events' being amended), see paragraphs 3.6 and 3.7 above.

## **7. Order specifies more than one 'event', but one or more is redundant**

7.1. Leading the public to believe that there are multiple reasons for the making of an order, when one or more of such reasons are (or later turn out to be) redundant, has the potential to prejudice the interests of the public, since the grounds for making an order may thereby appear stronger than they are, with a resultant effect on the public's willingness to object. Therefore, where an order specifies more than one event, but one or more is (or turns out to be) redundant, modification will rarely be appropriate.

7.2. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant 'event' or 'events' being amended), see paragraphs 3.6 and 3.7 above.

## **8. Order cites section 53(2)(a) of the 1981 Act, when it should have cited section 53(2)(b), or vice versa**

8.1. Very occasionally an order cites s53(2)(a) of the 1981 Act instead of s53(2)(b) or s53(2)(b) instead of s53(2)(a). This is not necessarily wrong. The correct subsection is determined by the date of the event giving rise to the order. If the wrong subsection has been cited, Inspectors will have to decide whether to modify the order in the light of the principles set out in paragraph 3.5 above.

## 9. Modifying the order map

9.1. Inspectors could use their powers of modification to modify order maps, however they cannot be replaced and modifications cannot be made which could not be shown on the order map i.e. if the path went off the map.

9.2. In Wildlife and Countryside Act cases, the orders effectively modify the definitive map and statement upon confirmation. Whilst it is true that the schedule takes precedence over the order map, paragraph 2 of Schedule 2 of the regulations (SI 1993/12) provides that the definitive map ‘..shall be modified as described in [Part I] [and] [Part II] of the schedule and shown on the map attached to the order’. The regulations are therefore quite clear on this point – the definitive map may only be modified to show that information in the schedule and on the order map.

9.3. Inspectors cannot propose modifications where those modifications cannot be shown completely on the order map.

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