

Highways Act 1980 – Section 118A

**The Kent County Council (Public Footpaths CW80 &
CWX40, Whitstable)**

**Rail Crossing Extinguishment and Definitive Map and
Statement Modification Order 2018**

KENT COUNTY COUNCIL

**CLOSING STATEMENT FOR THE
PUBLIC INQUIRY**

County Council Reference: PROW/CW80/10/NR
Planning Inspectorate Reference: ROW/3226477

1. To date, Kent County Council has taken a neutral stance at this public inquiry, as explained in my opening statement. Accordingly, there was no intention to submit a closing statement. However, the subject of possible compensation matters has arisen during the course of the inquiry, and this statement addresses the County Council's position on that.

2. Madam Inspector, you will be familiar with the relevant provisions, but for ease of reference, Kent County Council considers the following provisions of the Highways Act 1980 ('the 1980 Act') to be relevant, i.e.:
 - a. section 28 (compensation for loss caused by public path creation orders);
 - b. Section 120 (exercise of powers of making public path extinguishment and diversion orders);
 - c. section 121 (supplementary provisions as to public path extinguishment and diversion orders).

3. I will not read the provisions in full, but they are set out at the end of this statement.

4. As a matter of law, Kent County Council accepts that section 28(2) of the Act provides that any claims for compensation are payable by the authority by whom the order was made. Although section 28(1) of the Act refers to orders made

under section 26 of the Act, by virtue of the section 121(2), section 28 of the Act also applies to rail crossing extinguishment orders as if the reference to section 26(2) were a reference to section 120(3) of the Act.

5. Section 28 provides for compensation to be payable where it can be shown that the value of an interest in land has depreciated as a result of the order, or where a person has suffered damage by being disturbed in his enjoyment of land in consequence of the making of an order.
 6. The term “interest” is defined in section 28(5) of the Act to include rights over land, whether those rights are enjoyed by virtue of an interest in land, by agreement or by licence. However, compensation will only be payable if they own the land, or if they do not own the land, only if they had any other legal basis to sue for the effect the extinguishment would have on them.
 7. However, notably in this case, Network Rail owns the land over which footpath CW80 runs. Glebe Way Property Company Limited owns the land over which the associated footpath CWX40 runs and is supportive of the Order. Kent County Council does not, therefore, consider that there are likely to be any eligible claims for compensation in any event.
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Relevant provisions referred to in the Closing Statement

[118A.— Stopping up of footpaths [, bridleways and restricted byways] crossing railways

(1) This section applies where it appears to a council expedient in the interests of the safety of members of the public using it or likely to use it that a footpath [, bridleway or restricted byway] in their area which crosses a railway, otherwise than by tunnel or bridge, should be stopped up.

(2) Where this section applies, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way—

(a) on the crossing itself, and

(b) for so much of its length as they deem expedient from the crossing to its intersection with another highway over which there subsists a like right of way (whether or not other rights of way also subsist over it).

(3) An order under this section is referred to in this Act as a “rail crossing extinguishment order”.

(4) The Secretary of State shall not confirm a rail crossing extinguishment 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 it is expedient to do so having regard to all the circumstances, and in particular to—

(a) whether it is reasonably practicable to make the crossing safe for use by the public,
and

(b) what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained.

(5) Before determining to make a rail crossing extinguishment order on the representations of the operator of the railway crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards, any expenses which the council may incur in connection with the erection or maintenance of barriers and signs.

(6) A rail crossing extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.

(7) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of rail crossing extinguishment orders.

(8) In this section—

“operator” , in relation to a railway, means any person carrying on an undertaking which includes maintaining the permanent way;

“railway” includes tramway but does not include any part of a system where rails are laid along a carriageway.]

120.— Exercise of powers of making public path extinguishment and diversion orders

(1) Where a footpath [, bridleway or restricted byway] lies partly within and partly outside the area of a council the powers conferred by sections 118 [, 118A, 119 and 119A] above on the council extend, subject to subsection (2) below, to the whole of the path or way as if it lay wholly within their area.

[(1A) Where a council are the highway authority for only part of a highway, the powers conferred on the council by sections 118B, 119B and 119D above are exercisable with respect to the whole of the highway, but subject to subsection (2) and only with the consent of every other council which is a highway authority for any other part with respect to which the powers are exercised.]

(2) The powers of making [orders under sections 118 [to 119D]] above are not exercisable by a council—

(a) with respect to any part of a [highway] which is within their area, without prior consultation with [any] other council in whose area that part of the [highway] is situated;

(b) with respect to any part of a [highway], which is outside their area, without the consent of every council in whose area it is; and

(c) with respect to any part of a [highway] in a National Park, without prior consultation with [Natural England] [(if the National Park is in England) or [the Natural Resources Body for Wales] (if the National Park is in Wales)].

(3) Where it appears to the Secretary of State as respects a footpath [, bridleway or restricted byway] that it is expedient as mentioned in section 118(1) or 118A(1) or 119A(1)] above that the path or way should be stopped up [or diverted] [or where it appears to the Secretary of State as respects a relevant highway as defined by section 118B(2), 119B(2) or 119D(2) that it is expedient as mentioned in section 118B(1)(a) or (b), 119B(1)(a) or (b) or 119D(1)(b) that the highway should be stopped up or diverted], or where an owner, lessee or occupier of land crossed by a footpath [, bridleway or restricted byway] satisfies the Secretary of State that a diversion of it is expedient as mentioned in section 119(1) above, then if—

(a) no council having power to do so have made and submitted to him a public path extinguishment order [a special extinguishment order, a public path diversion order, a rail crossing diversion order, a special diversion order or an SSSI diversion order] or public path diversion order, as the case may be, and

(b) the Secretary of State is satisfied that, if such an order were made and submitted to him, he would have power to confirm the order in accordance with the provisions in that behalf of sections 118 [to 119D] above,

he may himself make the order after consultation [(subject to the following provisions of this section)] with the appropriate authority [and, in the case of an SSSI diversion order, with the appropriate conservation body].

[(3A) Where—

(a) the operator of a railway makes a request to a council to make an order under section 118A or 119A above in respect of a crossing over the railway,

(b) the request is in such form and gives such particulars as are prescribed by regulations made by the Secretary of State, and

(c) the council have neither confirmed the order nor submitted it to the Secretary of State within 6 months of receiving the request,

the power conferred on the Secretary of State by subsection (3) above may be exercised without consultation with the council.]

[(3B) Unless an appeal to the Secretary of State is brought under section 121D(1) below, the power conferred on the Secretary of State by subsection (3) above to make a special extinguishment order or a special diversion order is exercisable only after consultation with the [local policing body] in whose area the highway lies.

(3C) The power conferred on the Secretary of State by subsection (3) above to make an SSSI diversion order may be exercised even though the appropriate conservation body has not made an application under section 119D above to the council who are the highway authority for the highway.

(3D) Where—

(a) the appropriate conservation body has made an application under section 119D above to a council in respect of a highway for which the council are the highway authority, and

(b) the council have neither confirmed the order nor submitted it to the Secretary of State for confirmation within 6 months of receiving the application, the power conferred

on the Secretary of State by subsection (3) above to make an SSSI diversion order may be exercised without consultation with the council.]

(4) A council proposing to make a public path diversion order [, a rail crossing diversion order, a special diversion order or an SSSI diversion order] such that the authority who will be the highway authority for a part of the [highway] after the diversion will be a different body from the authority who before the diversion are the highway authority for it shall, before making the order, notify the first mentioned authority.

[(5) The Secretary of State may, before determining—

(a) under subsection (3) above, to make a public path diversion order,

(b) under subsection (3) above, to make a public path extinguishment order, special extinguishment order, public path diversion order or special diversion order on an appeal under section 121D(1)(a) below,

(c) to confirm a public path extinguishment order, special extinguishment order, public path diversion order or special diversion order in respect of which an appeal under section 121D(1)(b) or (c) below has been brought, or

(d) under subsection (3) above, to make a rail crossing diversion order on the representations of the operator of the railway concerned,

require the appropriate person to enter into such agreement as he may specify with such council as he may specify for that person to defray, or to make such contribution as may be specified in the agreement towards, any such compensation or expenses as

are specified in paragraphs (a), (b) and (c) of section 119(5), or as the case may be, section 118ZA(6), 119A(8) or 119C(3) above.

(6) In subsection (5) above “the appropriate person” means—

(a) in a case falling within paragraph (a) of that subsection—

(i) where an appeal under section 121D(1)(a) below has been brought, the appellant, or

(ii) in any other case, the person on whose representations the Secretary of State is acting,

(b) in a case falling within paragraph (b) or (c) of that subsection, the appellant, and

(c) in a case falling within paragraph (d) of that subsection, the operator of the railway concerned.]

[(7) Where under subsection (3) above the Secretary of State decides to make an SSSI diversion order he may require the appropriate conservation body to enter into an agreement with such council as he may specify for the body to defray, or to make such contribution as may be specified in the agreement towards, any such compensation or expenses as are specified in paragraphs (a), (b) and (c) of section 119D(8) above.

(8) In this section “the appropriate conservation body” has the same meaning as in section 119D above.]

121.— Supplementary provisions as to public path extinguishment and diversion orders

(1) A public path extinguishment order , [a rail crossing extinguishment order, [a special extinguishment order] a public path diversion order [, a rail crossing diversion order, a special diversion order or an SSSI diversion order]] or a public path diversion order affecting in any way the area of more than one council may contain provisions requiring one of the councils to defray, or contribute towards, expenses incurred in consequence of the order by another of the councils; and a public path diversion [, a rail crossing diversion order, a special diversion order or an SSSI diversion order] diverting a part of the line of a [highway] from a site in the area of one local highway authority to a site in the area of another may provide that the first mentioned authority are to continue to be the highway authority for that part of the [highway] after the diversion.

(2) Section 28 above (compensation for loss caused by public path creation order) applies in relation to public path extinguishment orders [, rail crossing extinguishment orders, [special extinguishment orders] public path diversion orders [, rail crossing diversion orders, special diversion orders and SSSI diversion orders]] as it applies in relation to public path creation orders [but as if—

(a) the references in it to section 26(2) above were references to section 120(3) above, and

(b) in relation to special extinguishment orders, special diversion orders and SSSI diversion orders, the reference in section 28(4) to [a footpath, bridleway or restricted byway included a reference to] a highway over which the public have a right of way for vehicular and all other kinds of traffic.]

(3) Section 29 above [(duty to have regard to agriculture, forestry and nature conservation)] applies in relation to the making of public path extinguishment orders [, rail crossing extinguishment orders, [special extinguishment orders] public path diversion orders [, rail crossing diversion orders, special diversion orders and SSSI diversion orders]] as it applies in relation to the making of public path creation agreements and public path creation orders.

(4) The Secretary of State shall not make or confirm a public path extinguishment order [, a rail crossing extinguishment order, [a special extinguishment order] a public path diversion order [, a rail crossing diversion order, a special diversion order or an SSSI diversion order]] and a council shall not confirm such an order as an unopposed order, if the order extinguishes a right of way over land under, in, upon, over, along or across which there is any apparatus belonging to or used by any statutory undertakers for the purpose of their undertaking unless the undertakers have consented to the making or, as the case may be, confirmation of the order.

(5) A consent under subsection (4) may be given subject to the condition that there are included in the order such provisions for the protection of the undertakers as they reasonably require, but a consent under that subsection shall not be unreasonably withheld, and any question whether the withholding of such a consent is unreasonable or whether any requirement is reasonable shall be determined by the appropriate Minister.

[(5A) Before making a determination under subsection (5) above the appropriate Minister may, if he thinks fit, give any person an opportunity to be heard on the question,

and he must either give such an opportunity or cause a local inquiry to be held if a request to be heard with respect to the question to be determined is made—

(a) by the statutory undertakers,

(b) in the case of an order made on an application under section 118ZA, 118C, 119ZA or 119C above, by the person who made the application, and

(c) in the case of an order to be made on an appeal under section 121D(1)(a) below, by the appellant.

(5B) The appropriate Minister may appoint any person to exercise on his behalf, with or without payment, the function of determining a question falling to be determined under subsection (5) above.

(5C) Schedule 12ZA to this Act shall have effect with respect to appointments under subsection (5B) above; and subsection (5A) above has effect subject to the provisions of that Schedule.

(5D) Subsections (2) to (5) of section 250 of the Local Government Act 1972 (giving of evidence at, and defraying of costs of, inquiries) shall apply in relation to hearings or local inquiries which the appropriate Minister causes to be held under subsection (5A) above [in England] as they apply (by virtue of section 302(1) of this Act) to local inquiries which the Secretary of State causes to be held under this Act.

(5E) Section 322A of the Town and Country Planning Act 1990 (orders as to costs where no hearing or inquiry takes place) applies in relation to a hearing or inquiry under subsection (5A) above [in England] as it applies in relation to a hearing or local inquiry

for the purposes referred to in that section, but as if references to the Secretary of State were references to the appropriate Minister.]

[(5F) Section 322C of the Town and Country Planning Act 1990 (costs: Wales) applies in relation to a hearing or inquiry under subsection (5A) above in Wales as it applies in relation to a hearing or inquiry mentioned in that section.]

(6) In [subsections (5) to (5E)] above the “appropriate Minister” means—

(a) in relation to statutory undertakers carrying on an undertaking for the supply of electricity, [...], [...], [or hydraulic power][...], the Secretary of State; and

(b) in relation to any other statutory undertakers, the Minister.