

From: [Andy Coupe](#)
To: A303SparkfordtoIlchester@pins.gsi.gov.uk
Cc: [A303 Sparkford to Ilchester](#)
Subject: TR010036 A303 Sparkford to Ilchester - SCC's deadline 8 response
Date: 10 June 2019 20:59:50
Attachments: [TR010036 SCC Deadline 8 Cover Letter.pdf](#)
[Appendix 1 - Response to HE Section 278 comments.pdf](#)
[Appendix 2 - Response A303 Action point 18.pdf](#)
[Appendix 3 - Anti social behaviour evidence.pdf](#)
[Appendix 4 - Response A303 Action point 44.pdf](#)
[Appendix 5 - Response A303 Action 49.pdf](#)
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**PLANNING ACT 2008
APPLICATION BY HIGHWAYS ENGLAND FOR AN ORDER GRANTING
DEVELOPMENT CONSENT FOR THE A303 SPARKFORD TO ILCHESTER
DUALLING
SUBMISSION MADE PURSUANT TO DEADLINE 8**

PLANNING INSPECTORATE REFERENCE TR010036

Please find attached relevant documents from Somerset County Council in respect of Examination Deadline 8.

Yours faithfully,

Andy Coupé

Strategic Manager – Infrastructure Programmes Group
Somerset County Council
County Hall, Taunton
Somerset, TA1 4DY
Email: ajcoupe@somerset.gov.uk
Web: www.somerset.gov.uk

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Action Point 18 (from 23 May Issue Specific Hearing): Applicant and SCC to set out position regarding the temporary possession and compulsory acquisition of rights and any reference to case law

1. Context

In its submissions “9.34 Responses to Action Points for Midday 20 May 2019” the Applicant set out in response to Action point 32 a list of the plots in Schedule 5 which will be used for the creation of highway and clarified occupation of local highway under Schedule 7. The DCO powers upon which it relies are set out in section 2.1 of that submission.

These submissions were considered at ISH7 on 23rd May. As the Council explained at that hearing, it is for the Applicant to demonstrate that it has effectively created public highway rights over the sections of new highway it seeks to create by the inclusion of the land in Schedule 5 of the DCO. Without such rights being effectively created, either under the terms of the DCO or by agreement with the landowner, a public highway will not be created and maintenance responsibility will not pass to the County Council under article 13 of the DCO.

It should be noted that the list of plots in Schedule 5 upon which new highway will be created in the Applicant’s response to Action point 32 does not include new public rights of way, of which there are a number. These are plots 3/2a, 4/1f, 4/2a, 4/4g, 4/7a, 5/1b, 7/6a, 7/8b and 8/3a.

The Applicant acknowledged in the ISH7 that the reference in various entries in the table in Schedule 5 to the transfer of responsibility for maintenance of the public highway to Somerset County Council was not appropriate, as it arose neither through the temporary possession nor the acquisition of permanent rights, but rather through the operation of Article 13 of the DCO. Such references should therefore be deleted.

2. The Creation of Public Highway through the acquisition of permanent rights in Schedule 5

The Council submits that the creation of new sections of public highway cannot be achieved through the acquisition of permanent rights and temporary occupation of the land pursuant to Article 26 and Schedule 5 of the DCO for the following reasons:

1. If the undertaker only has temporary possession of the land it does not have the capacity to dedicate the land as public highway.
2. The rights of public passage do not fall within the scope of the rights or interests referred to in section 159 of the Planning Act 2008 and article 26(2) of the DCO

3. Schedule 5 relates to the temporary possession of land. If the land is to be used permanently as public highway, the owner is permanently dispossessed of the surface and subsoil insofar as it is required to form part of the public highway.

The Encyclopaedia of Highway Law (Sweet & Maxwell) records that a highway may be created in the following ways:

- (i) at common law by dedication of land as highway and acceptance by the public
- (ii) by construction pursuant to section 24 of the Highways Act 1980 following a dedication of the land or purchasing the land either compulsorily or by agreement
- (iii) by statutory presumption pursuant to section 31 of the Highways Act 1980 following 20 years' use by the public as of right and without interruption
- (iii) by statutory agreement pursuant to section 25, 35 or 38 of the Highways Act 1980 requiring an agreement with the person with capacity to dedicate (generally the freehold owner)
- (iv) by order under section 26 of the Highways Act 1980 (compulsory powers for the creation of footpaths, bridleways and restricted byways) or diversion orders made pursuant to sections 116 to 119D of the Highways Act 1980
- (v) by declaration pursuant to section 228 or 232 of the Highways Act 1980.

The Applicant asserts that it derives its powers under the DCO to create highway rights despite only acquiring temporary possession of the land pursuant to the compulsory acquisition powers contained in the Planning Act 2008 to acquire land and the definition of land in section 159(2) of that Act which states:

“(2) “Land” includes any interest in or right over land”

There is no case law or guidance of which the County Council is aware that supports the Applicant's position that section 159(2) of the Planning Act 2008 enables the creation of a new public highway through the acquisition by the Applicant of a permanent right of this nature.

The Council has referred the Applicant to the guidance published in February 2018 by the MHCLG which refers to the circumstances in which an acquiring authority can acquire rights over land. An extract of the guidance appears at the end of this note. In para 263 it states that:

“The creation of new rights can only be achieved using a specific statutory power, known as an ‘enabling power’. Powers include (with the bodies by whom they may be exercised) the following:

- (i) Local Government (Miscellaneous Provisions) Act 1976, section 13 (local authorities)*

(ii) Highways Act 1980, section 250 (all highway authorities) - guidance on the use of these powers is given in Department of Transport Local Authority Circular 2/97.....”

The list is not exhaustive, and it is noted that section 159(3) of the Planning Act 2008, which refers specifically to the acquisition of a right over land including the creation of a new right, is not referred to in this paragraph of the guidance. Since there is nothing in the Planning Act 2008 itself or government guidance in relation to the Act which sets out what “rights” can be created, it is necessary to look at other compulsory powers to see how this has been interpreted. Of particular relevance in this regard is section 250 of the Highways Act 1980, given that the A303 scheme is a highways scheme and the rights which the Applicant is seeking to create are highway rights.

Circular 2/97 relates to the compulsory acquisition of rights in relation to highways schemes. An extract of the guidance appears at the end of this note. Paragraph 70 of that Circular states that highway authorities need not compulsorily acquire the land if it is required for works only and not required to form part of the public highway. This is on the basis that the owner will not be deprived of the beneficial use of the land in such circumstances.

Paragraph 71 of the Circular confirms that the rights which may be acquired are in the nature of easements and gives a list of examples. None of the examples relate to the acquisition of public rights of passage. This is because it is not a right in the nature of an easement.

Paragraph 72 confirms that the Department of Transport does not envisage the powers being used by the highway authority to form part of a highway on the basis that the landowner is permanently deprived of beneficial use of that land. It states that in such cases the full title to the land should be acquired, and furthermore, that this principle also applies to public rights of way and for new means of access to premises for third parties.

It is extremely unlikely that the powers under the Planning Act 2008 would be interpreted as broader than the powers under the Highways Act and would allow for the acquisition of public rights of access without acquiring the freehold of the land in question, or that the government would support the use of the powers in such a way given the above guidance.

3. Schedule 7 – Temporary Possession

In relation to Schedule 7 the Applicant confirmed at ISH7 that no new highway was being created and that the highway referred to was within existing highway.

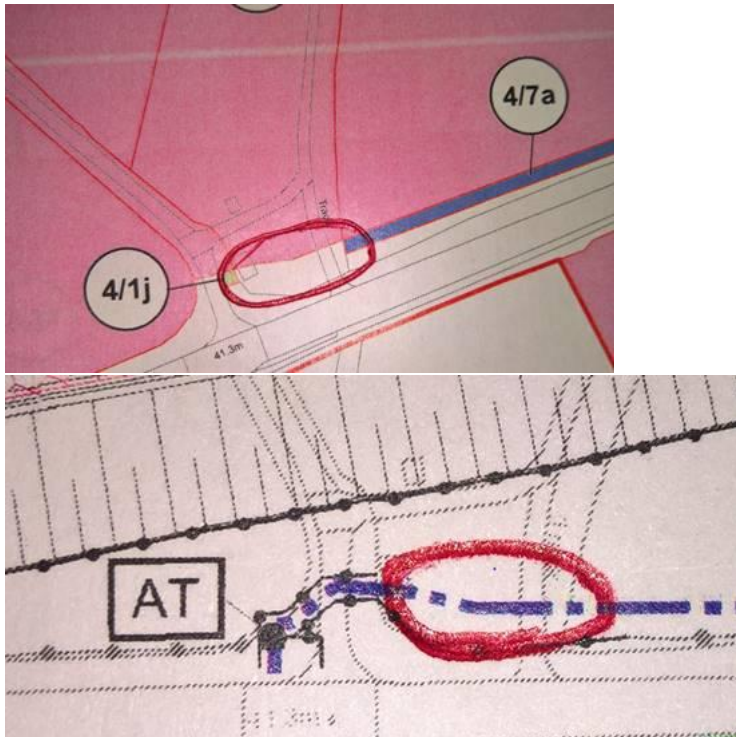
The Council commented at ISH7 that there were some anomalies which it had identified.

Specifically, 4/1i & 4/1j are within highway limits, but parts of the routes AB-AK and AT-AU on RoW & Access Plans fall outside of the Schedule 7 land.

In the case of AB-AK this may not be an issue as these parts fall within permanently acquired land, but there appears to be a gap on the land plans for a section of AT-AU (see extracts of plans below). This may be a minor drafting error on the RoW & Access Plans, but it does raise the question as to whether the Applicant is relying on existing title for this section to create the rights.

In relation to plot 4/1i in Schedule 7, the new bridleway in the verge (AB-AK) is within the existing highway limits but it is not specifically mentioned. It is likely that some works in constructing the (new) lane will entail providing the new bridleway in verge.

In relation to plot 4/1j in Schedule 7, the new bridleway (AT-AU) is within the highway limits. However, on comparing the RoW & Access Plans with the Land Plans there appears to be a gap between 4/1j and 4/7a where there is no acquisition/possession. It is not clear whether the Applicant may already own this land, and clarification is required.



Ministry of Housing Communities and Local Government

Guidance on Compulsory Purchase Process and the Crichel Down Rules – February 2018 (extract)

Section 18: compulsory purchase of new rights and other interests

235. Is it possible to compulsorily acquire rights and other interests over land, without acquiring full land ownership?

There are powers available which provide for the compulsory acquisition of new rights over land where full land ownership is not required eg the compulsory creation of a right of access.

236. How can compulsory acquisition of rights over land be achieved?

The creation of new rights can only be achieved using a specific statutory power, known as an 'enabling power'. Powers include (with the bodies by whom they may be exercised) the following:

- (i) Local Government (Miscellaneous Provisions) Act 1976, section 13 (local authorities)
- (ii) Highways Act 1980, section 250 (all highway authorities) - guidance on the use of these powers is given in Department of Transport Local Authority Circular 2/97
- (iii) Water Industry Act 1991, section 155(2) (water and sewerage undertakers)
- (iv) Water Resources Act 1991, section 154(2) and Environment Act 1995, section 2(1)(a)(iv) (Environment Agency)
- (v) Housing and Regeneration Act 2008, section 9(2) (Homes England)
- (vi) Electricity Act 1989, schedule 3 (electricity undertakings); and
- (vii) Gas Act 1986, schedule 3 (gas transporter undertakings)

The acquiring authority should take into account any special requirements which may apply to the use of any particular power.

Orders solely for new rights (no other interests in land to be purchased outright)

237. What should the order describe?

The order heading should mention the appropriate enabling power, together with the Acquisition of Land Act 1981.

Paragraph 1 of the order should describe the purpose for which the rights are required, eg 'for the purpose of providing an access to a community centre which the council are authorised to provide under section 19 of the Local Government (Miscellaneous Provisions) Act 1976.

Orders for new rights and other interests

238. What should an order describe where it relates to the purchase of new rights and of other interests in land under different powers?

The order heading should refer to the appropriate enabling act, any other act(s), and the Acquisition of Land Act 1981, as required by the regulations. See Note (b) to Forms 1, 2 and 3 in the schedule to the Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004.

Paragraph 1 of the prescribed form of the order should describe all the relevant powers and purposes.

239. What if the purpose is the same for both new rights and other interests?

This should be relatively straightforward. The order should mention, eg:

' the acquiring authority is hereby authorised to compulsorily purchase

(a) under section 121 of the Local Government Act 1972 the land described in paragraph 2(1) below for the purpose of providing a community centre under section 19 of the Local Government (Miscellaneous Provisions) Act 1976; and

(b) under section 13 of the said act of 1976, the new rights which are described in paragraph 2(2) below for the same purpose

[etc, as in Form 1 of the schedule to the regulations.]'

240. What if the purpose is not the same for the new rights and other interests?

Paragraph 1 of the prescribed form of the order should describe all of the relevant powers under, and purposes for which, the order has been made, eg:

' the acquiring authority is hereby authorised to compulsorily purchase

(a) under section 89 of the National Parks and Access to the Countryside Act 1949 the derelict, neglected or unsightly land which is described in paragraph 2(1) below for the purpose of carrying out such works on the land as appear to them expedient for enabling it to be brought into use; and

(b) under section 13 of the Local Government (Miscellaneous Provisions) Act 1976, the new rights which are described in paragraph 2(2) below for the purpose of providing an access to the abovementioned land for [the authority] and persons using the land, being a purpose which it is necessary to achieve in the interests of the proper planning of an area, in accordance with section 226(1)(b) of the Town and Country Planning Act 1990.'

241. What should the acquiring authority's statements of reasons and case explain?

They should explain the need for the new rights, give details of their nature and extent, and provide any further relevant information. Where an order includes new rights, the acquiring authority is also asked to bring that fact to the attention of the confirming authority in the letter covering their submission.

Circular 2/97 Department of Transport (Extract)

Notes on the Preparation, Drafting and Submission of Compulsory Purchase Orders for Highway Schemes and Car Parks for which the Secretary of State for Transport is the Confirming Authority.

x. Acquisition of Rights Over Land

70. There are frequent cases where highway schemes necessitate work on land not required to form part of the highway. So long as the highway authority have power to carry out such work and the landowner can retain beneficial use of the land, the highway authority need not incur the expense of acquiring and maintaining land unnecessarily. Sections 250 to 252 of the 1980 Act (which should be read with Schedule 19) provide for the compulsory acquisition of rights over land by the creation of new rights.

71. The kind of rights for which these provisions are designed are in the nature of easements ancillary or appurtenant to the highway, proposed highway or other facility. Examples of those likely to be required in connection with highway schemes, and which it appears would be dealt with advantageously under these sections, are as follows: (a) the right to construct and maintain a bridge, viaduct, tunnel or other structure to carry a highway over or under land: (b) the right to lay and maintain drains and associated works (e.g. inspection chambers); but see also paragraphs 76 to 7L (c) the right to carry out works on watercourses (e.g. diversions, widening or deepening channels, filling in old watercourse beds etc) (d) the right to place and maintain footings or ground anchors in land (e) the right to reshape or regrade land outside the boundaries of a highway or proposed highway (e.g. placing embankments or shaping cuttings etc) (f) the right to place and maintain snow fences, etc on land (g) the right of access for the construction and maintenance of a retaining wall (i.e. on other land to which title will be acquired).

72. However, it is emphasised that the Department does not envisage that these powers can be used by highway authorities in cases where the land will form part of the highway or proposed highway or where the works they wish to carry out will, to all intents and purposes, deprive the landowner permanently of beneficial use of the land in such cases full title to the land would be appropriate. Similarly, in so far as compulsory acquisition is concerned, full title should be included in the CPO in cases where highway land acquisition powers are exercised to provide for a footpath, bridleway or other highway across land or for a new means of access to premises for

a third party. [NOTE: Sections 250 to 252 do not provide for the compulsory creation of rights for limited periods, though they do not preclude the creation of such rights by agreement. Also sections 242(3) 254 and 255 which are rarely used powers (dealing with the creation of rights) are not affected by these provisions. The general powers in section 13 of the Local Government (Miscellaneous Provisions) Act 1976 under which local authorities may acquire new rights is quite discrete (see section 13(4)) and should not be used in place of powers in the 1980 Act.]

73 CPOs for Compulsory acquisition of new rights under sections 250 to 22 of the Act are subject to provisions similar to sections 16 and 19 of the 1981 Act. In the case of new right over land acquired by statutory undertaker certificate may be required under paragraph 3 of Schedule 3 to the 1981 Act (see also paragraph 17 above). In the case of a new right over common open space or fuel or field garden allotment, the order may be subject to special parliamentary procedure in the same way as orders for acquisition of title are unless in relevant circumstances, a certificate is given under paragraph 6 of Schedule 3 to the Acquisition of Land Act 1981. [In this respect these provisions differ from those in sections 254 and 255]. Specific power to acquire land to be given in exchange for rights which will burden common or other special category land is contained in section 250(2). Rights acquired under these powers (see section 251) are binding upon successors in title to the land concerned, and where highway is transferred from one highway authority to another they are exercisable by the transferee authority. Section 251(5) provides in effect that where registered land is affected, the instrument creating rights must be registered under the Land Registration Acts. Section 252 provides that a landowner can require an acquiring authority to take full title to the land instead of the right authorised in a CPO