



**JAG (UK) GUIDANCE DOCUMENT ON APPLYING THE
NEW S74 REGULATIONS
The Street Works (Charges for Unreasonable
Prolonged Occupation of the Highway) (England)
(Amendment) Regulations 2012
SI 2012 No. 2272**

1/2013

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OBJECTIVE

The objective of this document is to provide Street Authorities with guidance on the new changes to s74 Regulations introduced in October 2012, to provide a consistent approach and to assist in the application of a section 74 charging regime.

The key principles are that Street Authorities should:

- use their best endeavours to utilise this process for street works that have overstayed the “prescribed” or “reasonable” period as defined within the Regulations; and
- that each individual situation for an overstay charge being applied **is** considered on its merit

SCOPE

This guidance document and process has been developed as part of JAG (UK)’s desire to support its members in helping them manage the changes needed as a result of the revised regulations.

The information and details contained in this guidance document do not override any requirements of the New Roads and Street Works Act 1991, Traffic Management Act 2004 or any associated regulations.

The statutory documents can be found on the attached links:

<http://www.legislation.gov.uk/ukpga/1991/22/section/74>

<http://www.legislation.gov.uk/uksi/2012/2272/made>

DURATIONS

Estimated durations are provided by the undertaker and are deemed to be the “reasonable” duration for the works provided that the authority does not challenge this duration. Where duration is challenged, and the challenge is not accepted, then the authority’s view is deemed to be correct unless the

undertaker can prove otherwise. This is particularly important if the overrun is as a result of exceeding the authority's estimate and that the authority has managed durations in accordance with the statutory minimums.

POWER OF DISCRETION TO WAIVE OR REDUCE CHARGES

It should be noted that Section 74 over run charges are avoidable; indeed the initial impact assessment on business that the DfT carried out in 2009 explicitly mentions the fact.

Undertakers should plan and manage their works effectively in line with their statutory duty to avoid unnecessary delay or obstruction on the highway. However, such circumstances may arise where undertakers can demonstrate that they have made genuine errors (and not repeated errors of the same type) and authorities should consider each situation on its own merit and the conclusions reached need to be based on all of the specific circumstances.

The applicable charges for Section 74 overruns are set out in Tables 1 and 2 of the 2012 'amendment' regulations (No 2272). It should be noted these are maximum charges, as the authority has power under regulation 10 to reduce or waive charges as it sees fit and should exercise these powers of discretion reasonably.

Authorities must act reasonably when applying their powers and where they have not, their decisions may be liable to challenge. Therefore, authorities are strongly recommended to develop procedures that will stand up to audit in terms of mitigation.

Key Point

Officers may be vulnerable if they simply agree without recourse to documented evidence and delegated powers to negotiate from their respective authority.

SUPPORTING EVIDENCE

In respect of street works it is considered that the best evidence is that of personal knowledge supported by documentary evidence e.g. photographs and works inspection reports.

Key Point

This is particularly important where an authority is charging the higher rate charge for carriageway as this will need to be supported with evidence, particularly in respect to the category of charge.

Section 60 New Roads and Street Works Act requires undertakers to cooperate with authorities. Where an authority has notified the undertaker of a

failure and provided evidence of the failure, the undertaker should provide evidence that the failure has been addressed.

Key Point

Such evidence should include the time and date that the failure was resolved.

PROCEDURE

The following scenarios are considered appropriate for authorities to incorporate changes within the recent chapter 10 revision. To ease transmission, a “flowchart” has been designed to assist users, which is attached as an appendix to this document

Scenario ONE (Incomplete reinstatements)

Scenario One refers to where the interim or permanent reinstatement has not been completed to the “Specification for the Reinstatement of Openings in Highways” (SROH). A requirement for this scenario is defined within the Code of Practice and standards must be met before the undertaker opens the highway fully to public use.

In these circumstance Ch10.9. states

Where the undertaker gives a works clear or works closed notice when it has manifestly not made proper endeavours to complete the reinstatement (e.g. if no attempt has been made to replace road markings at least with temporary replacement markings in accordance with the Street Works (Reinstatement) Regulations 1992 and the Specification for the Reinstatement of Openings in Highways), then this may be treated as an overrun. However, if the undertaker has endeavoured to complete the reinstatement to performance specification but it is found on subsequent inspection to be defective, this should not be treated as an overrun for section 74 purposes.

Key Point

It is considered good practice to issue a s74 overstay warning notifications where either an interim or permanent reinstatement has not been completed. For example, a reinstatement can be considered incomplete if any of the following are still outstanding:

Road markings (temporary or permanent)

High Friction Coating (unless a Slippery Surface sign: provided by the undertaker, is displayed)

Tactile paving

Kerbing / edgings

No defined surface course applied.

Key Point

Furthermore it is considered good practice for the authority officer to question where these potential overruns sit in terms of the regulatory charge table in relation to the above examples.

Scenario TWO (Physical overstay)

Physical overstay relate to signing, lighting and guarding equipment (SLG) remaining on site and/or works that are still in progress; this scenario relates to where any part of the highway is still occupied.

In most circumstances the overrun would attract the full s74 charges as defined within relevant tables.

However, where an undertaker has completed works and moved their SLG equipment to another part of the Highway for later collection this does not necessarily fall under the mitigated charges but the Street Authority may consider charging less than the maximum charge.

Another situation to consider is when most signing, lighting and guarding equipment has been properly removed from the highway but **more than five items have been left behind in genuine error then**, in these circumstances, it may be reasonable to exercise even-handed discretion and reduce the daily charge.

Scenario THREE (Mitigating charges)

In order to qualify for the £100 mitigated charge under the arrangements of the new regulation 9, the following conditions would all have to be met:

- reinstatement (interim or permanent) has been completed; and
- all spoil, unused materials and other plant removed; and
- the undertaker has endeavoured to remove all signing, lighting and guarding. This means that most of the SLG from the works has been removed, but a few items have been inadvertently left behind (*in error; and*).
- no more than five items remain *Chapter 10 states; authorities and undertakers should exercise common sense in determining what constitutes an "item" for these purposes. As a guiding principle, it is suggested that objects that are intended to be readily separable should be treated as distinct items (e.g. a barrier and two feet may be treated as three individual items; so may a stack of three cones; but a box containing ten lamps should be treated as a single item).*

Key Point

It is strongly recommended that any reduction of a charge should only be considered if the equipment is not left affecting either the carriageway or footway and that reasonable discretion has been exercised.

An example of where the mitigated charge could be appropriate is where a sign has been left as a result of a TTRO i.e. the undertaker has failed to collect a diversion sign placed on the alternative route required in the TTRO and this is shown to be a genuine error. Note that it has been challenged that *signage relating to a TTRO is not chargeable under S74. Consequently the DfT have not accepted the argument and this has not been included in the new code. Therefore any signing and guarding irrespective of whether it is TTRO related or not is part of the charging mechanism, unless they relate to exempt works (see 10.3 in the new code).*

TRANSITIONAL ARRANGEMENTS

Any new works commencing on or after 1st October 2012 will be subject to the new charging regime. For example, these would include a new job to do remedial works, or permanent reinstatement

PROFORMA FOR THE VERIFICATION AND CHARGING

Currently EToN systems are not able to produce charges in line with the new regime. Attached is a proforma which may help a Street Authority verify the charges until such time that systems can produce this automatically.

DISPUTE RESOLUTION

Remember, it is up to the undertaker to provide the necessary evidence to rebut a charge (Leicestershire v Transco case refers). However, in the event that an issue has arisen where the authority is not able to resolve with the undertaker concerned, before following the Chapter 13 Dispute Resolution process, it is considered good practice to check the JAG Community first, either through the regional JAG Chair or the JAG (UK) Manager, whether similar issues have arisen elsewhere or that support can be given to resolve the issue.

END