

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 11 June 2012
Report of: Public Rights of Way Manager
Subject/Title: DEFRA Consultation, "Improvements to the Policy and Legal Framework for Public Rights of Way".

1.0 Report Summary

- .1 A Consultation Paper has been issued by DEFRA about a range of issues and proposals relating to changes to Rights of Way administrative processes. The full document is available at <http://www.defra.gov.uk/consult/open>. The closing date for comments is 6th August 2012.

2.0 Recommendation

- 2.1 Members approve a response to the consultation that takes into account the comments in the "Details and Comments" column in the table set out below.

3.0 Reasons for Recommendations

- 3.1 It is the view of officers that the proposals as set out in the consultation are largely positive. However it should be borne in mind that they are very much a set of aspirational objectives and the necessary changes to primary legislation and regulation to put them in place will take a considerable amount of detailed work.
- 3.2 The consultation response will support the proposals as set out in detail below with the additional rider that DEFRA should ensure that the necessary work, preferably including stakeholder working groups including representatives from users, landowners, practitioners and local authorities, is undertaken before the changes are implemented.
- 3.3 The report has been discussed with Councillor R Menlove, Portfolio Holder for Environment and his views will be relayed to the Committee verbally due to the tight time constraints involved.

3.0 Wards Affected

- 4.1 All

5.0 Local Ward Members

- 5.1 All wards.

6.0 Policy Implications including – Carbon Reduction - Health

6.1 Not applicable

7.0 Financial Implications

7.1 Not applicable

8.0 Legal Implications (Authorised by the Borough Solicitor)

8.1 Not applicable

9.0 Risk Management

9.1 Not applicable

10.0 Background and Options

10.1 These proposals affect three areas of Rights of Way work. Definitive Map Modification Orders and the Definitive Map, Public Path Orders and lastly the relationship between planning consents affecting rights of way and any necessary consequential Public Path Orders to allow development to proceed.

10.2 The principal proposals deal with measures to bring the Definitive Map up to date and effectively “close it” to the addition of new routes based on historical evidence. To achieve this, the Countryside and Rights of Way Act 2000 introduced a cut-off date, whereby after 25 years (i.e. in 2026) all rights of way already in existence in 1949 and not recorded on the definitive map and statement by 2026 would be extinguished, subject to the exceptions already provided for in the Act. In practice this means that a right of way that could be shown to have existed before 1 January 1949 could not be added to the Definitive Map and Statement (the local authority's legal record of public rights of way) and would cease to exist. The intention was that this would:

- remove uncertainty for landowners, who might otherwise have a ‘lost’ right of way discovered on their land at any point in the future;
- provide an incentive to complete the definitive map and statement before the 2026 deadline.

10.3 However, during efforts to expedite completion of the historical record and close the Definitive Map to such routes, it has become clear that neither a volunteer-led, nor a centralised, systematic approach to gathering evidence and making applications, has been shown capable of delivering the required number of applications within the required timeframe within the current legislative framework. Therefore completion of the definitive map and statement by 2026 would not be a viable proposition unless a streamlined approach to recording public rights of way was adopted. In order to develop such an approach Natural England established an independently-chaired

Stakeholder Working Group to develop a consensus among stakeholders, representing landowners, rights of way users and local authorities, about the best way forward.

10.4 The Stakeholder Working Group reported in March 2010 and published a report entitled, “Stepping Forward” which contained a package of 32 proposals designed to improve the various processes associated with identifying and recording historical public rights of way. This consultation document sets out how the Government intends to implement the group’s report.

10.5 Additionally the consultation sets out proposals for a wider package of improvements, including whether changes should be made to the procedures for extinguishing and diverting public rights of way and looking at barriers to growth which result from planning consents, as highlighted in the 2010 Penfold Report.

The Proposals

Summary of Proposal	Details and Comments
<p><i>1 The 2026 “cut off” date should be implemented with protection for potentially useful rights of way.</i></p> <ul style="list-style-type: none"> • Routes should be exempted if; they are identified on the list of streets or private streets carrying public rights, routes that can be shown to be in regular continuous use at the cut off date and routes that are already subject to DMMO applications. • LAs should have the power to make their own applications for routes they believe carry public rights. 	<ul style="list-style-type: none"> • These are positive proposals that will contribute significantly to safeguarding routes that are clearly public but would otherwise be at risk of being extinguished. • This will allow potentially useful routes that can contribute to access development to be protected.
<p><i>2 Proposals to improve the process for identifying and recording rights of way on the Definitive Map in order to speed up the process using less resources.</i></p> <ul style="list-style-type: none"> • Transfer of ownership of applications, due to old age, infirmity etc. • Reduction in requirements for applicants to provide copies of common documents. 	<ul style="list-style-type: none"> • Many applicants come from the user groups, a significant number of whom are retired. This would therefore be a sensible change. • This would significantly reduce the workload placed on applicants.

<ul style="list-style-type: none"> • Authority rather than applicant responsible for approaching landowners and then only after passing a basic evidential test. • Minimising the requirement for newspaper advertising. • Orders successfully challenged at the High Court should remain the Secretary of State's allowing the original order to remain and be re-determined. • If parts of orders are opposed then PINs should have the ability to split orders. • Orders should be published in draft to allow minor technical corrections. • Objections that are made on the basis of new evidence which, if it comes to light was wilfully withheld should result in costs against the objector. • Reviews of cases based on documentary evidence should normally be by written representations rather than by a hearing. • Authorities should be able to reject applications that do not meet a basic evidential test. • Authorities should have powers 	<ul style="list-style-type: none"> • This proposal will reduce potential conflict between applicant and landowner, allowing the LA to act as an objective middleman. • This will significantly reduce costs but could be discriminatory against those who do not have internet. A simplified advert with order details and location and advice where further information can be found may be preferable. • This will allow challenged orders to continue to a conclusion rather than having to start cases again from scratch. • Examining only the opposed element of an order will speed work flow and reduce timescales for PINs to deal with cases. • This will provide for a more flexible response, rather than having to re-make orders from scratch. • This will prevent tactical manoeuvring by objectors and promote a much more open analysis of all available evidence. • This will both reduce costs and improve timescales if hearings can be avoided. • This would allow LAs to reduce potential backlogs by dismissing at an early stage cases that are "no hoppers". • This is something that
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<p>to discount irrelevant objections.</p> <ul style="list-style-type: none"> • There should be provisions for basic factual corrections to the Definitive Map. • Landowners should be able to apply to erect new gates on restricted byways and byways open to all traffic. • Natural England should become a prescribed body on the list of consultees for DMMOs. 	<p>practitioners have long felt was needed to remove spoiling objections that often have nothing to do with the merits of a case but more to do with neighbour relationships or in the case of PPOs attitudes to permitted development.</p> <ul style="list-style-type: none"> • This will allow simple changes to be made without the need for a full DMMO investigation. • The limitations on the installation of gates are currently very restrictive and this will allow more flexibility. • A sensible addition.
<p><i>3 Persons can apply to the Secretary of State if their application has not been determined in 12 months. The order can subsequently be sent to the Secretary of State if there are objections. Thus a case may be sent to the S of S a number of times and it would speed the process if this could be limited to once.</i></p> <ul style="list-style-type: none"> • In cases where an authority refuses to make an order no right of appeal at this stage would leave applicants with no means of redress. An alternative would be to require authorities to make an exhaustive assessment immediately, including landowner views and decide whether or not to determine the case on the balance of probability rather than the reasonably alleged test. There would be a right of appeal at this stage but if directed to make an order there would be no subsequent right of appeal. Alternately the S of S could 	<ul style="list-style-type: none"> • Reducing the potential number of times that opposed orders can return to the S of S will be a positive change to speed up and reduce the costs of processing such cases. However the current system was developed to ensure that checks and balances were put in place to provide applicants with a reasonable means of redress. Work will need to be done to ensure that this is not lost. Requiring LAs to determine cases on the balance of probabilities rather than the weaker reasonably alleged test should reduce the number of cases going forward that are

<p>make an order on appeal and re-charge the authority where it was judged that the authority should have made the order.</p> <ul style="list-style-type: none"> • Applicants should be able to appeal to Magistrates Court against authorities who do not determine cases in a reasonable timescale in a similar way that members of the public can appeal to Magistrates Court for an order to direct the authority to remove obstructions. 	<p>opposed and have to be determined by PINs. However the notion of undertaking this work to this level immediately is unrealistic as this evidential test is best made after a thorough investigation to tease out witness and documentary evidence. The consideration that PINs may re-charge LAs if it was believed the LA avoided determining an order would introduce too much uncertainty in budget management.</p> <ul style="list-style-type: none"> • This would bring the order making process into line with the current provisions for the protection of the network. However it would create greater workloads for LAs defending themselves at court.
<p><i>5 It is proposed to introduce a single set of guidance relevant to all parties in order to help make the processes work.</i></p> <ul style="list-style-type: none"> • It is proposed to set up a further stakeholder working group to develop the guidance rather than imposing it from government downwards. 	<ul style="list-style-type: none"> • This would be a very positive measure increasing the potential to work from a consensus position.
<p><i>6 The Stakeholder Working Group proposed that a similar group be constituted to monitor progress towards the cut off date.</i></p> <ul style="list-style-type: none"> • It is intended to implement a review group with an initial reporting date of 2015. • A baseline survey of authority back logs should be completed. • Close monitoring of authority 	<ul style="list-style-type: none"> • As above this would be a positive step forward. • Performance monitoring in any way is positive and should be encouraged. • This is already available under

<p>performance leading up to the implementation of the cut off date should be introduced.</p>	<p>CROW Act 2000 S 71 whereby the S of S can require authorities to report on any aspect of their functions.</p>
<p><i>7 Minor additional suggestions.</i></p> <ul style="list-style-type: none"> • Consideration be given to a national data management system for DMMO admin work. • DEFRA and DfT should work with stakeholders to review greater integration of the management and administration of the highway network. • Review how routes for cyclists could best fit into the network hierarchy. 	<ul style="list-style-type: none"> • It is felt that it is best that individual LAs develop their own data management systems that they feel serves them best. Additionally, implementing a new system could cause a high degree of redundancy in existing systems. • This is already happening through a stakeholder working group discussing how best to modify changes to the way the List of Streets is maintained. • This would be positive because at the moment whilst a Cycle Track Order can be made it cannot be added to the Definitive Map.
<p><i>8 Extending some of the proposals to Public Path Order processes.</i></p> <ul style="list-style-type: none"> • Minimising the requirement for newspaper advertisements. • LAs should be able to discount irrelevant objections. • Review of cases based on documentary evidence should be by written representations. • The S of S should be able to split cases, reviewing only the objected aspect of the case. • Orders should be published in draft allowing the flexibility to make minor technical alterations. 	<ul style="list-style-type: none"> • This is a positive cost and time saving proposal but see above at 2. • This will allow staff to progress cases when spoiling objections are made that would normally have to be sent to PINs. • This is ambiguous as PPO objections are invariably not based on documentary evidence. • This will become an additional administrative burden and should be discounted..

<ul style="list-style-type: none"> • Where an order is successfully challenged in the High Court it is the S of S's decision that is quashed leaving the original to be re-examined. 	<ul style="list-style-type: none"> • This will allow a more rapid conclusion of cases without having to re start cases from the beginning.
<p><i>9 There is currently no duty placed on LAs to make Public Path Orders, similarly there is no right to apply for a PPO and as a consequence no right of appeal if an LA refuses to make a PPO. The CROW Act 2000 made provision for a right to apply and a right of appeal however the process had flaws and was not implemented. That is now being reconsidered to bring PPO processes closer to DMMO processes.</i></p> <ul style="list-style-type: none"> • Provide for LAs to recover all costs including dealing with opposed orders as an incentive to process PPOs. • Charges to cover but not exceed the LA costs. • The cost structure to be publically available. • A publicly available framework of service standards including timescales. • Splitting charges into stages. • A requirement to waive costs for orders in the public interest. • If this set of proposals were adopted then a right of appeal to the S of S for non determination would be introduced. 	<p>This set of proposals does not apply to CEC as we have an effective system in place for dealing with PPO applications. However some of the proposed provisions can be of benefit to CEC and we should support them.</p> <ul style="list-style-type: none"> • This would be beneficial as at the moment we cannot recover costs for dealing with opposed orders. • CEC has systems in place to do this and they are currently under review to ensure that we recover full cost. • This is made available to potential applicants. • Timescales are discussed with applicants but we could add to this. • CEC already do this. • CEC already do this. • This would be a sensible addition.
<p><i>10 The Penfold Review of non-planning consents examined the impact of consents, other than planning permission, on a proposed development. It found that some,</i></p>	

<p><i>specifically consent to extinguish or move rights of way added considerable risk and time to the process of development.</i></p> <ul style="list-style-type: none"> • Retain the existing legislation but encourage wider adherence to existing guidance. • Retain the existing ROW order making process but allow it to run concurrently with the planning process. • Create a new integrated process that allows the Planning Authority to decide upon development proposals and changes to ROW as a single package. • The second two options would allow applicants to include proposed changes to ROW in a single application through the Planning Portal website. 	<ul style="list-style-type: none"> • The existing guidance should already be followed comprehensively and implemented. That it is not suggests that encouragement alone will not succeed. • This would significantly speed up the process, especially if the provision to dismiss irrelevant objections is introduced, (discussed above at 8). However there would be in increased risk to developers because they would be paying for a diversion order before they receive planning consent. • This could work in unitary authorities such as CEC where specialist PROW advice is available but it would be less successful in two tier authorities where the functions are in separate authorities. • Again this would work in unitary authorities but there would be considerable risk in separate authorities that the need for a PPO was not passed to the Highway Authority.
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12.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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