

**Improvements to the Policy and Legal Framework for Public Rights of Way:
Defra Public Consultation**

Report by Senior Waterways and Recreation Officer

<p>Summary: This report provides members with a summary of the recently published Defra consultation regarding potential improvements to the policy and legal framework for recording and making changes to public rights of way. The report deals with a series of recommendations which arise from proposals put forward by Natural England's stakeholder working group on unrecorded rights of way and asks for members' comments on some of the specific questions raised in the consultation document.</p>
<p>Recommendation: That members note the contents of the consultation document, and comment on the specific points and questions raised in the document that are highlighted in this report.</p>

1 Background

- 1.1 The Government's Natural Environment white paper (*The Natural Choice: securing the value of nature*) contained a commitment to consult on simplifying and streamlining the processes for recording and making changes to public rights of way, based on proposals made by Natural England's Stakeholder Group on unrecorded rights of way.
- 1.2 The Working Group put forward a range of proposals including the implementation of the statutory provisions in the Countryside and Rights of Way Act 2000 for the extinguishment (subject to certain exceptions) of all unrecorded rights of way in existence before 1 January 1949 that have not been proven to exist on 1 January 2026.
- 1.3 The proposals also included a number of measures intended to protect useful or potentially useful public rights of way from extinguishment and give local authorities more scope to use their judgement in dealing with insubstantial or irrelevant applications and objections. In short the proposals aimed to make procedures more streamlined and light touch and were in accordance with the Government's aim of reducing regulation and giving more power to local authorities and local people to develop solutions.
- 1.4 The Stakeholder Group's recommendations were specifically concerned with the subject of recording rights of way. However, the consultation document raises the possibility of implementing a wider package of proposals in three additional areas:

- Considering whether similar improvements should be applied to procedures for creating, diverting or extinguishing rights of way thereby maintaining consistency across the rights of way framework.
- Looking at how it could be made easier for landowners to progress proposals for the diversion or extinguishment of rights of way crossing their land, while maintaining the existing checks and balances that ensure that the interests of the public are safeguarded.
- Proposing improvements to the way that changes to rights of way are dealt with in relation to applications for planning permission.

1.5 The full list of questions asked in the consultation document which was published on 14 May is attached to this report at Appendix 1.

2 Recommendations of the Working Group on Unrecorded Rights of Way

2.1 Perhaps the most contentious recommendation put forward by the Working Group is that the 2026 cut off date regarding the recording of public rights of way contained in the CROW Act 2000 should be implemented.

2.2 Importantly the consultation makes recommendations regarding a number of categories of rights of way that could be excluded from extinguishment. These include: routes identified on the list of streets as publicly maintainable and rights of way for which evidence can be produced to show that they were in continuous use at the time of the cut off date. There are also a number of other proposals in the document which seek to streamline the legal process and these are to be welcomed.

2.3 The recommendation of the Working Group is that the cut off date should only be implemented if the whole package of recommendations in its report is implemented. Officers concur with this view.

2.4 Another important proposal set out in the document is that surveying authorities should have the ability to make an application for a definitive map modification order effectively to themselves. This would mean that local authorities would have a means to ensure that rights of way that they believed to exist, but had not yet managed to record, would be excluded from extinguishment. Officers consider that this proposal should be implemented and that Norfolk County Council should be encouraged to devote adequate resources to its Definitive Map Team to ensure that full use of this mechanism is made.

2.5 In a small number of cases historic evidence may suggest that a right of way exists but it has been unused for many years and its use may conflict with current land use or nature conservation designations. In cases such as this the consultation document proposes that a surveying authority should be able to make an agreement with landowners to recognise the existence of the previously unrecorded pre 1949 right of way but allowing it to be recorded with modifications on the definitive map and statement, where justified, to avoid

significant conflicts with current land use. It would not be possible for an objection to block such an agreement although the surveying authority should have due regard to any representations made about the proposed agreement. Officers consider that this proposal should be supported. The consultation document asks if consultees have any suggestions as to how such a process may work and members are asked for their comments on this point.

- 2.6 Questions 3 and 6 in the consultation document ask if there are any other categories of rights of way that need to be protected by the proposals and if there are any issues associated with the proposals for streamlining the legal process that have not been captured in the consultation document. Members are also invited to consider these questions.

3. Proposals Relating to Public Path Orders made under the Highways Act 1980

- 3.1 As mentioned at paragraph 1.4 the Working Group's recommendations only related to the process for recording public rights of way. Given that the main intention of the recommendations put forward by the Working Group was to make legal processes work more effectively and be more cost effective officers agree with the view put forward in the consultation document that it would be logical to apply similar recommendations to the law and regulations relating to the creation, extinguishment and diversion of rights of way.
- 3.2 The most important proposals listed in the consultation document in relation to public path orders are set out below:
- (i) Proposal 10 – The requirement for newspaper advertisements relating to surveying authorities notices of all types should be minimised by referring those interested to details online or at the surveying authority's offices.
 - (ii) Proposal 11 – The surveying authority should be allowed to discount summarily any irrelevant objections. It should be required to treat both these and representations made in support as registrations of interest in the outcome of a case.
 - (iii) Proposal 13 – Review of cases based on documentary evidence should normally be by means of written representations, but with the discretion to hold a hearing or inquiry if in all the circumstances it is likely to add value.
 - (iv) Proposal 14 – The Secretary of State should be able to split a case such that only aspects that are objected to need to be reviewed.
 - (v) Proposal 15 – Orders should be published in draft and there should be flexibility for surveying authorities to correct technical errors in them.
 - (vi) Proposal 16 – Where an order is successfully challenged in the High Court, it is the Secretary of State's decision rather than the surveying

Authority's order that should be quashed – leaving the original order to be re-determined by the Planning Inspectorate as necessary.

- 3.3 Question 17 in the consultation document specifically asks consultees if they agree that these proposals should be applied to the policy and legislation framework governing public path orders. Officers consider that the proposals outlined above would dramatically simplify the public path order process and make it far more efficient and cost effective. In particular the ability to discount irrelevant and vexatious objections to orders and the presumption that case review should normally take place by means of written representations would enable more timely confirmation of orders.

4 Proposals for Changing the Way that Rights of Way are Dealt with in the Planning Process

- 4.1 The Penfold Review on non-planning consents was published in July 2010. The Review recommended delivering greater certainty to developers and removing duplication by improving the way that planning and non-planning consents operate together. Rights of way consents were seen a significant source of risk to developers because of issues relating to delays in the public path order process under the present regulations. The Review went on to say that Government should ensure that the impact of a planning application on public rights of way is considered as part of the planning process in order to reduce the risk of delay arising from challenge to any subsequent diversion order made to allow the development to proceed.
- 4.2 Under the existing regulations it is necessary for a planning authority to wait until planning permission is granted before making a rights of way order to enable a development to take place. There is then a risk that objections made to the making of an order will necessitate the Authority referring the order to the Planning Inspectorate to determine. The Review therefore recommended that consideration should be given to lifting this constraint in order to facilitate the early consideration of rights of way issues in the planning process.
- 4.3 The Government responded to the Review included a commitment to consider how consents might be streamlined and simplified to make the process simpler and more effective. Based on the findings of the Review the Government is considering three options for improving the way planning and non planning consents operate together. These are set out on pages 24 and 25 of the consultation document. Option A effectively maintains the current position and Option B amounts to a minor change to the process to enable the order making process to run concurrently with the determination of the planning permission, rather than afterwards, and officers consider that these options will have little effect on improving adherence to existing guidance or minimising cost and delay to developers.
- 4.4 Option C, however, proposes the creation of a new integrated process that would require the local planning authority to consider and decide upon the development proposals and any changes to rights of way as a single

package. Under this option the existing provisions would be replaced by a combined application for planning permission and rights of way consent comprising a planning application and a draft agreement covering any change, permanent or temporary, to rights of way on the development site.

- 4.5 The draft agreement would be made available for public inspection and any comments submitted would be considered by the planning authority when it considered the planning application. The local planning authority would have the power to approve the agreement but the rights of way element would still be subject to a right of objection by the public. An objection to proposed changes to rights of way would trigger the current procedures out in schedule 14 of the Town and Country Planning Act 1990.
- 4.6 Under this option it would also be possible to develop a system whereby applicants for planning permissions involving rights of way could submit a combined planning and rights of way consent form to the local planning authority through the planning portal website. The Government considers that this would, in all likelihood, lead to a more thorough consideration of rights of way issues and better consistency of approach by developers and local planning authorities.
- 4.7 Officers consider that the development of a completely new integrated process as set out in Option C would be more likely to deliver the sort of cost benefits and minimisation of delay that the Government seeks to achieve. Officers also consider that the proposal to allow local authorities to summarily discount irrelevant or vexatious objections should be extended to the proposals for rights of way affected by the planning process. Members' views are also sought on this point.

5 Conclusions

- 5.1 The current legislative and regulatory framework for recording and making changes to the rights of way network is cumbersome and overly bureaucratic. This has resulted in significant delays to the processing of applications for definitive map modification orders by surveying authorities and difficulties for landowners in obtaining diversions of rights of way on their land. Further the current complicated two stage process for diverting or stopping up rights of way affected by development can be costly and protracted for developers and local planning authorities.
- 5.2 The measures set out in the consultation document are developed from the recommendations of a Stakeholder Working Group which included user groups, landowners and rights of way professionals who reached a high level of consensus on their proposals. Officers consider that the implementation of this rounded package of measures would simplify the current legal framework which would deliver significant benefits for local authorities, user groups and landowners alike. Moreover, the proposals would ensure that adequate safeguards would be in place to defend the right of the public to object to proposals and to enable surveying authorities to register important rights of way by self application. Members' views on these conclusions are welcomed.

Background papers: Nil

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Broads Plan Objectives: TR2, TR3

Appendices: APPENDIX 1 List of questions in the consultation document.

Annex A – List of questions on the consultation proposals

1. Do you agree that there should be a brief, post cut-off period during which applications that pass the basic evidential test can be registered?
2. Do you agree that during this period, local authorities should be able to register rights of way by self application, including any self applications made in the past, subject to the same tests and transparency as for any other applications?
3. Are there any other categories of rights of way that need to be protected by exceptions set out in regulations?
4. Do you agree that the [Stakeholder Working Group's] proposals [in paragraphs 5.1-5.12] would be effective in improving the process of recording rights of way?
5. Do you think that more use could be made of electronic communications, for example, to make definitive map modification order applications online and to serve notice of rights of way orders?
6. Are there any particular issues associated with these proposals which have not been captured and which we should consider?
7. Do you think that the mechanism [proposed in paragraph 6.2 and annex B], would work effectively?
8. Do you think that there would be a residual risk that it would be in a local authority's interests to decline to make an order in the first place?
9. Do you think that the alternative mechanism set out [in paragraph 6.3] would work effectively?
10. Do you have any other suggestions for ensuring that cases go to the Secretary of State only once?
11. Do you agree that applicants and affected owners should be able to seek a court order requiring the authority to determine an outstanding definitive map modification order application?
12. Do you think this is an appropriate way to resolve undetermined definitive map modification order applications?
13. Do you have any suggestions for alternative mechanisms to resolve undetermined definitive map modification order applications?
14. Do you have any suggestions on how a process might work, which would enable an appropriate diversion to be agreed and put into effect before the way is recorded and brought into use?
15. What aspects of data management systems for recording public rights of way need to be tackled?
16. What are the key outcomes that need to be achieved in terms of data management systems?

17. Do you agree that the proposals identified in [Part 2] should be applied to the policy and legislation governing public path orders?
18. Do you think that more use could be made of electronic communications for public path orders, in similar ways to those suggested for definitive map modification orders in Question 5?
19. Do you agree that enabling local authorities to recover their costs in full would incentivise them to pursue public path orders requested by landowners or managers?
20. Would local authorities be incentivised sufficiently to enable retention of a right of appeal to the Secretary of State without the risk of local authorities shifting the burden and cost of order-making onto the Secretary of State?
21. Should the proposed arrangements apply to all public path orders and not just to land used for agriculture, forestry, or the keeping of horses?
22. How could it be made clear what charges are levied for each stage of the public path order-making process and that the charges reflect the costs actually incurred?
23. Do you think that landowners should have the option of outsourcing some of the work once a public path order is made in order to have more control over the costs?
24. Might this [full cost recovery for public path orders] have an impact on other aspects of rights of way work?
25. Are there any alternative mechanisms [to full cost recovery for public path orders] that should be considered?
26. Under Option A [in Part 4], how do you think wider adherence to existing guidance might be achieved?
27. What do you think would be the best option to minimise the cost and delay to developers while safeguarding the public interest on public rights of way?
28. Are there other options that should be considered [to minimise the cost and delay to developers while safeguarding the public interest on public rights of way]?
29. Do you think that enabling a single application form to be submitted through the Planning Portal would improve the process?