

DERBYSHIRE COUNTY COUNCIL

Regulatory-Licensing and Appeals Committee

18 May 2009

Report of the County Secretary

Applications to Modify the Definitive Map and Statement - Progress Report

1. Purpose of the Report

To inform the Committee of steps being taken to deal with applications made to the County Council to modify the Definitive Map and Statement.

2. Information and Analysis

The County Council is responsible for investigating claims made by individuals and organisations under the Wildlife and Countryside Act 1981 (WCA), to modify the Definitive Map and Statement which records public rights of way in the County, and for dealing with orders for diversion and extinguishment of footpaths and bridleways under the Highways Act 1980 and the Town and Country Planning Act 1990.

Claims made under the WCA are dealt with by a small team within the Environmental Services Section of the County Secretary's Division and generally are processed in chronological order of receipt.

There are currently 288 claims being dealt with which are at various stages in the investigation process. Some claims were made several years ago and for various reasons have not yet been completed.

The team work closely with the rights of way team in the Environmental Services Department in progressing individual claims and meet regularly to agree a programme of claims to be taken forward each quarter in order to deal with claims as expeditiously as existing resources permit.

The opportunity has arisen to temporarily re-organise the work of two other members of the County Secretary's Environmental Section and to train them to also deal with rights of way claims. This will enable claims to be dealt with more quickly.

3. BOAT claims

- (i) A considerable number (189) of the current claims are applications made to the Council under the WCA to record Byways Open to All Traffic (BOATs) on the Definitive Map and Statement or to modify existing rights of way to make them into BOATs.

As the Committee is aware, BOAT claims involve a considerable amount of senior officer time in investigating each claim and are usually strenuously resisted by local residents. Experience has shown that the majority of decisions on BOAT claims made by the Committee become the subject of an appeal to the Secretary of State.

The temporary re-organisation referred to above will provide much needed assistance to the senior officer who deals with BOAT claims.

- (ii) Disposal of ineligible BOAT claims

As from 2 May 2006 the Natural Environment and Rural Communities Act 2006 (NERCA) extinguished any motorised vehicular rights over routes which were not already recorded as BOATs on the Definitive Map and Statement or in respect of which an application had not already been received subject to certain specified exemptions.

About 80 of the current Definitive Map Modification Order (DMMO) applications fall into this category.

Where NERCA has extinguished any possible BOAT status on these routes there is considered to be no point in the Committee determining to refuse to make a BOAT order since the Council has no power to make such an order in any event. Furthermore, a determination by the Committee to refuse to make an order gives rise to a right of appeal of the Secretary of State under Schedule 15, but the Secretary of State is likewise unable to direct the Council to make an order. Therefore in those cases where it is established that none of the exemption categories apply to the route it is proposed to inform the claimant that the claim is not to be processed further.

One of the exemption categories is where, by 20 January 2005, the route was subject to a claim received as an application made in accordance with WCA Schedule 14 Paragraph 1. Paragraph 1 requires a claimant to submit copies of all documents adduced in support of the BOAT claim with the application to the County Council. In a case involving Hampshire County Council ('the Winchester Case') in 2008 the Court of Appeal decided that where a claimant had submitted an application for a BOAT which referred to various documents in support of the claim, but did not submit copies of those documents with the application, the claim had not been made in accordance with the requirement and so the exemption did not apply.

The Court of Appeal did recognise that where it was impossible for an applicant to produce a copy of a document, its absence would not invalidate the application for the purpose of Schedule 14.

Officers are in the process of identifying those BOAT claims caught by the Winchester case and writing to the claimants to explain that the applications are considered not to be within the pre 20 January 2005 exemption (nor any of the other NERCA exemption categories) and they will not be processed further.

DEFRA guidance on Part 6 of NERCA indicates that the Winchester case does not preclude local authorities from exercising discretion to treat other types of non-compliant DMMO applications as if they were compliant by waiving certain requirements.

However the County Secretary considers that in the interests of consistency, the Council should not adopt a general practice of waiving the requirements of Schedule 14 in respect of any application for a DMMO. Where non-BOAT claims, and BOAT claims otherwise exempt from the NERCA exclusion, are identified as not complying with the requirements of Schedule 14 the same general approach will be taken and the applicants will be informed that the Council has not waived the requirements of Schedule 14. However, in applicable cases the claimant will also be informed how they might rectify the non-compliance by submitting copies of the relevant documents. In those circumstances the application would be considered to be duly made with effect from the date of the rectification.

(iv) General duty to keep the Definitive Map and Statement under review

The Council has a general duty under section 53 WCA to keep the Definitive Map and Statement under review and promote such modifications as it considers necessary.

Resources are used to give priority to dealing with applications for modifications received from the general public.

However some of the ineligible BOAT applications may have raised evidence which would support the making of a non-BOAT modification order, for example, for a recorded bridleway to be recorded as a restricted byway.

It is of course open to any person to make a new application for such a modification using that evidence. However in the absence of such an application, it is proposed to retain the evidence to enable officers to assess it together with such other relevant evidence as might become available, so that some other type of DMMO might eventually be recommended for the route. As already indicated work on individual DMMO applications would normally take priority over non-application work.

The approach set out above is considered to be the most suitable in the light of the Winchester case, and to be in accordance with the applicable advice in the DEFRA guidance in all important respects.

4. **Other Considerations**

In preparing this report the relevance of the following factors has been considered; financial, legal, prevention of crime and disorder, equality of opportunity; and environmental, health, human resources, property and transport considerations.

5. **Background Papers**

Contained on file 34796 in the County Secretary's Division

6. **Key Decision**

No

7. **Officer Recommendations** - That the Committee -

- a) notes the report and the steps being taken by the County Secretary to deal with rights of way claims more quickly,
- b) approves the approach proposed by the County Secretary for the disposing of ineligible applications to record Byways Open to All Traffic on the Definitive Map and Statement,
- c) agrees not to adopt a general practice of waiving the requirements of Schedule 14 of the Wildlife and Countryside Act in respect of applications for Definitive Map Modification Orders

**DAVID W TYSOE
COUNTY SECRETARY**