

Public Guidance Note 12

Definitive Map Modification Orders Process for Applications made under Section 53 Wildlife & Countryside Act 1981

Introduction

1. The Definitive Map and Statement (DMS) is the legal document for recording Public Rights of Way. The map and statement are not a complete record of all Public Rights of Way, many more unrecorded public rights may exist. Local Authorities have a statutory duty to keep their DMS under continuous review. This is to ensure that public rights are recorded as accurately as possible. Shropshire Council holds the DMS for Shropshire, where it can be viewed by anyone at the Shrewsbury Library.

2. Alterations can be made to the DMS based on evidence or based on preference. Changes can also be made where a highway is affected by development. Changes based on evidence are dealt with under the Wildlife & Countryside Act 1981 and it is these changes that are covered by this guidance note. Changes based on preference are covered in public guidance note PGN 08.

3. Under Section 53 of the Wildlife and Countryside Act 1981 anyone may apply to have a route(s) added to the DMS, or amend a highway that is already recorded. This is known as a Schedule 14 application, or more commonly a 'Formal Application'. This guidance note is intended to give detailed information for applicants and affected landowners on the processes involved, and the way that these applications are dealt with in Shropshire. There are four types of changes that can be made to the DMS under this legislation:

- **Addition** - To add a Public Right of Way of a particular status to the DMS where none is currently recorded. This could be for a Public Footpath, Public Bridleway, Restricted Byway, or Byway Open to All Traffic¹.
- **Upgrading/downgrading** - To change the status of a recorded Public Right of Way. For example, to upgrade a Public Footpath to a Public Bridleway or to downgrade a Public Bridleway to a Public Footpath.
- **Varying Particulars** - For example to alter the legally recorded location of a Public Right of Way or the width of a highway
- **Deletion** - To remove a recorded highway from the DMS.

4. In order to make a Formal Application you must have evidence to support your claim.

5. Before you make an application, it is advisable to talk to a Rights of Way Officer about what is considered relevant evidence for the type of change your application will be seeking to make, as different types of changes have different evidential requirements.

¹ Since the commencement of the Natural Environment & Rural Communities Act (NERC) 2006 applications for Byways Open to All Traffic can only be considered where they satisfy certain prescribed exception. See DEFRA guidance for more information.

Do I have enough evidence to support a claim?

6. Formal Applications can be supported either by documentary evidence or by evidence of long use by the public. Most applications rely on a combination of both.

User Evidence

7. Evidence of use can be gathered from people who have used the route or have seen other people use it. The Council can provide blank evidence of use forms that ask questions that will aid our investigation into the change the application is seeking to make. Guidance on completion of these user evidence forms can be provided. People who provide evidence forms might be asked to provide further detail or clarification. They might eventually be asked to present their evidence at a Public Inquiry or Hearing. Whilst evidence can be accepted without a commitment to attend an Inquiry - if one is required - that evidence will naturally be afforded less weight than evidence that can be tested during an Inquiry.

8. As a guide, to add a Public Right of Way it must be shown that the public have used the route for twenty years or more. This is the statutory period of time required under the provisions of Section 31 of the Highways Act 1980. Usage has to have been *as of right* and without interruption. Each individual does not need to have used the route for 20 years provided there has been cumulative use of the route by the general public for this period.

9. Under common law, usage can be for a period of less than 20 years. This arises where there has been long use by the public *as of right* to the extent that the landowner must have been aware of that usage and acquiesced to it.

Documentary Evidence

10. The principal historical documents are Enclosure Awards, Tithe Maps, maps and documents produced under the Finance Act 1910, Highways Board Minutes, and Parish or Vestry Minutes. These documents are important as they went through due legal process. Other information can be extracted from Ordnance Survey maps, estate maps, other maps and papers, and local history sources. The individual circumstances of the location and nature of the claimed route will dictate which documents might provide relevant evidence. For instance, if the route was ever affected by a proposed railway or canal, the plans associated with these projects might reference any public rights that were accepted at the time.

11. Officers will be able to advise you whether the evidence you have found is sufficient to support an application. For instance, simply finding the route marked on an historic Ordnance Survey map would not be sufficient in itself, although it might provide supporting evidence as part of a more comprehensive application.

12. Most of the relevant documents are available to view at Shropshire Archives, in Shrewsbury, or at other local archives. Officers can give more detailed advice on the value of historical records, if required.

Making the application

13. If you feel you have enough evidence to support a Formal Application, the relevant forms can be obtained from the Council's website [Application forms | Shropshire Council](#)

14. For each application to change the DMS, three forms must be completed:

- 1) **Application Form** (coded A1, D1, U1, V1 or Del 1 depending on the type of application)
This should be signed by the applicant and submitted to the Council together with copies of the documentary evidence, any evidence of use forms **and a map clearly showing the route to be added or altered.**
- 2) **Notification Form** (coded A2, D2, U2, V2 or Del 2 depending on the type of application)
It is a requirement that anyone submitting a Formal Application **MUST** serve notice on **ALL** the landowners affected. If the application affects a route that appears to be outside of any obvious landholding, then notice should be served on all adjoining owners. You should send the form to the landowner(s) along with details of the application i.e. the route affected and the proposed change. If the landowners are not known, this notice should be erected on the route at strategic locations. **If affected landholders are not notified, then this is likely to cause significant future problems and delays and could mean your application is rejected.**
- 3) **Certificate** (coded C1 regardless of the type of application)
This must be sent to the Council with the application confirming that the landowners have been notified of the application.

15. The **Application Form, evidence and Certificate** must be returned to the Council. These should be accompanied by a map drawn to a scale of 1:25,000 or larger (e.g. 1:10,000) that clearly shows the route(s) in question. The **Notification Form**, and copies of it, must be delivered to the landowner(s).

When will the application be dealt with?

16. Shropshire Council meets its requirements to keep the DMS under review, by processing applications according to its Statement of Priorities (Policy Statement No. 8).

17. Shropshire Council receives many applications to amend the DMS. To ensure that applications requiring urgent attention, or where amendments would have significant public benefit, are dealt with promptly, the Statement of Priorities details the order and priority in which Formal Applications are dealt with.

18.

Currently applications are dealt with in accordance with the priorities detailed below:

Priority Area 1 – North Shropshire and the remaining un-reviewed Parishes within Oswestry District.

Priority Area 2 – All other outstanding areas which have not yet been reviewed.

Priority Area 3 – The rest of the County in relation to key historic document resources.

A map of priority areas is included as Appendix 1: See where your parish fits into this plan.

19. In addition, applications within the three priority areas will be prioritised in accordance with key local demands identified through the Shropshire's Great Outdoors Strategy.

20. It is recognised that there may be occasions when applications outside of this priority programme need to be determined in the public interest. Such instances may apply where the application is for a route that is being threatened by potential development work or where an amendment to a route would significantly improve public safety. In these instances, such applications will be dealt with in order of receipt.

21. The statement is updated periodically, as priorities change and updates are sent to interested organisations. The Statement was last reviewed on 17th October 2018.

What if I am unhappy about how quickly my application is being dealt with?

22. When a Formal Application is accepted, the Council must consider it within 12 months. The Council may decide that it is not justifiable to treat the matter as a priority and may decide to place the application on 'hold', in accordance with our priority statement.

23. If an application has not been dealt with within 12 months of it being registered and acknowledged by the Council, then the applicant can apply to the Secretary of State (via the Planning Inspectorate) to request that Shropshire Council are directed to determine the issue. The Secretary of State will consider the Council's Priority Statement (as detailed above) in these instances.

If you do not want to go through the Formal Application procedure but feel you have information or evidence that may indicate that the DMS should be amended, you may submit the information to the Rights of Way Team. The information will remain on file, and should a formal application be received in future that relates to it, the information will be considered as part of the investigation into that application. The Planning Inspectorate direction procedure only applies to formal applications which have been submitted in the prescribed form and does not apply to information submitted in this way.

What happens when an application is investigated?

- The investigating officer will review the case file and the evidence submitted with the Formal Application.
- They will contact the applicant and the affected landowners to advise them that the investigation into the application has commenced.
- They may take this opportunity to request further information or gain clarification on points made.
- They may contact other witnesses at this time for the same purpose.
- A consultation will be carried out with relevant user groups, the local Parish Council the local Council member, and any other interested groups and individuals whom the officer thinks might have an interest in the application.
- The investigating officer will usually undertake further research.
- This may include consulting historical evidence, checking records, Legal Orders or correspondence held by the Council, and interviewing witnesses.

- The officer will undertake one or more site visits and will carry out a Land Registry search to confirm landownership.

Throughout the process the investigating officer will:

- Investigate all of the available evidence that both supports or undermines the application
- Work with both the applicant(s) and the affected landowners to obtain a balanced view on whether the claimed public rights exist or not.
- Make recommendations based solely on the available evidence.
- Evaluate the evidence based on the statutory tests that must be applied under the relevant legislation.

28. A Public Right of Way can only be recorded on the DMS if evidence shows that public rights subsist. To counter an allegation of public rights subsisting at a location, or to object to a Legal Order, comments or evidence must be submitted which show that public rights do not subsist. This evidential requirement applies when an application is made to upgrade, downgrade or alter the location of a Public Right of Way.

29. Under the terms of the legislation, the following matters are issues that cannot be considered relevant when reaching decisions:

- The suitability of the route
- Invasion of privacy
- Security risks to property
- Potential effects on the value of property
- Damage to the environment (unless the area is a Site of Special Scientific Interest)
- Loss of tranquillity
- Dog or horse excrement deposited on the route
- Health and safety issues
- Nearby, existing Public Rights of Way
- Preferential, alternative routes
- Maintenance of the route
- Potential, additional costs to the Council

30. The investigating officer will produce a report based on all the available evidence and correspondence, with a recommendation to either make a Legal Order or to reject the application. In some instances, the investigating officer might decide that the evidence supports amendments that differ to the initial application. The report passes through a process within the Council, to ensure it complies with the relevant legislation and Council policy.

31. The report will be considered by a senior officer with delegated powers², who will consider the case and decide whether a Legal Order will be made, or whether the application is rejected.

32. The applicant and affected landowners will be sent a copy of the final delegated report, and any other interested party may request a copy.

² Authority given to an individual officer to make certain specified decisions normally made by a committee.

An illustrative flow chart is included as Appendix 2 showing the process which is followed when a Formal Application is received by the Council.

What if I am not happy with the decision?

33. If the Council decide to reject the application, the applicant will be notified by letter. They then have a period of 28 days in which they may appeal to the Secretary of State, via the Planning Inspectorate. An independent inspector will review the application and either agree with the Council's decision or direct the Council to make a Legal Order.

34. All other interested parties will be written to, to inform them of the Council's decision to reject the application. Only the applicant has the right of appeal.

Making the Order

36. If the Council decide to make a Legal Order as a result of the Formal Application, then the investigating officer will inform the applicant, landholders and other interested parties of this decision.

37. When a Legal Order is made, the Council is required to:

- Erect notices at either end of, and at any junctions with, the route with details of the proposed changes to the DMS and an accompanying map.
- Advertise the making of the Legal Order in at least one local newspaper.
- Notify statutory consultees, the Parish Council, the local Councillor and any landowners/interested parties. All parties will be sent a copy of the Legal Order together with a guidance note on how to object to the proposals if they wish to do so

What happens next?

38. Anyone can object or make representations to the making of the Legal Order within 42 days of the Legal Order being made. The Council cannot confirm a Legal Order that is subject to outstanding objections.

What happens if objections are received?

39. The investigating officer will try to negotiate the withdrawal of any objections. If objections are not relevant, then the officer will explain this to the objector and give grounds for their opinion. However, the Council does not have the power to dismiss irrelevant objections. If negotiation fails, the Council will refer the Legal Order and any outstanding objections to the Planning Inspectorate. An Independent Inspector will then be appointed by the Secretary of State to determine the contested Order. A decision will then be made on how best to deal with the matter, based on the number and content of the objections received. There are three different procedures for dealing with contested Orders:

- a) An exchange of written representations.
- b) A hearing; or

c) A local public inquiry.

40. The Planning Inspectorate has clear guidelines on how they deal with objections relating to Definitive Map Modification Orders. Depending upon the procedures being employed, the Inspectorate provide both the Local Authority who made the Legal Order (the order making authority (OMA), i.e. Shropshire Council), the applicant, and other relevant people, with notification of how they intend to deal with the matter. They will then provide a specific timetable of when the required information must be submitted. The timetables vary depending on the process that is being employed.

41. The two main sets of documentation that will be required by the Planning Inspectorate are:

A Statement of Case – this is required at an earlier stage in the process and is required from both the OMA and anyone who has formally objected to the Legal Order. It should include:

- The Planning Inspectorate Reference Number for the Order
- Full particulars of the case proposed to be put forward
- Copies of any documentary evidence and a list of those documents
- Reference to any case law being relied upon with full references and copies attached in the Appendix.
- The OMA's Statement of Case should cite the statutory provisions under which the Legal Order has been made, the reasons for making the Legal Order, a description of the site and the authority's comments on the representations or objections to the Legal Order.
- Supporting material should be contained within appendices, which are provided separately, collated and appropriately numbered and indexed.

Both the Statement and appendices should be A4 size, typed on one side and bound or placed in a ring binder so that they can be laid flat. Any larger documents contained within the Appendices should be folded to A4 size. Photographs should be mounted on A4, referenced to a plan, and include other relevant details e.g. time, date taken etc.

Proofs of evidence (these are only required for Public Inquiries)

- This contains the written evidence which a person appearing at a Public Inquiry will speak about.
- They should be concise and concentrate on the points in dispute.
- They should not rehearse all the matters which are not in dispute or refer to new material not previously mentioned in the Statement of Case.
- If facts are to be included in detail, the proof should focus on the information necessary to make the case.
- If a document is referred to it should be clearly referenced as to where it is in the Statement of Case.
- All pages and paragraphs should be numbered. Proofs should not exceed 3000 words and if the proof is longer than 1500 words (approx. 3 A4 pages) then a written summary should be provided which will be read out at the Inquiry. Any summary should accurately condense the gist of the proof of evidence.

42. The Inspectorate copies all Statements of Case and circulates them to the relevant bodies involved. They do not copy the OMA's Appendices but these are made available by the Authority

for public inspection. The OMA makes all Statements of Case and proofs of evidence (its own, and all other parties') available for public inspection.

43. The Inspector will also undertake an unaccompanied site visit to view the site prior to making any determination, and again (if necessary) after the hearing or public inquiry has closed. Site visits after the hearing or inquiry are normally accompanied. It should be noted that no new evidence can be produced during the site visit.

44. The Inspector concerned will consider all the relevant evidence. This evidence is that relating to:

- **The existence of the way:** whether there is documentary evidence or evidence of use by members of the public, sufficient to show that a right of way for the public exists.
- **The status of the way:** whether there is evidence to show that the way has been used by people on foot, horseback or in vehicles, and if so, what the nature and extent of that use is; and
- **The precise location of the way.**

45. For the full details of the Planning Inspectorate procedures please visit
www.gov.uk/government/organisations/planning-inspectorate

Can costs be awarded?

46. All parties at hearings and inquiries relating to Public Rights of Way Legal Orders made by local authorities are normally expected to meet their own expenses, no matter what the decision on the Legal Order is. However, the Secretary of State or Planning Inspectors are empowered to award costs by virtue of Section 250 (5) of the Local Government Act 1972 when unreasonable behaviour is held to have occurred. This power applies to opposed Definitive Map Modification Orders. If any party wishes to apply for an award of costs against another party, they must tell the inspector before they close the hearing or inquiry that they want to apply for costs. To be awarded costs, you need to show that you have incurred unnecessary or wasted expense because another party acted unreasonably. The Planning Inspectorate encourage advance notice to the opposing party of your possible intention to apply for costs. Costs decisions are only issued when the Inspector has issued their final decision on the Legal Order. If the case is decided by written representations, no-one can apply for costs.

47. The right of objection to an order under the Wildlife & Countryside Act 1981 is a statutory right but it should be exercised in a reasonable manner. Objectors who have been given the opportunity to modify the grounds of an objection that are not legally relevant, but have declined to do so, will be at risk of an award of the OMA's costs against them if they pursue the objection, unmodified, to a hearing or inquiry. But it must have been obvious that the objection, so pursued, had no reasonable prospect of success.

48. Other actions that can constitute 'unreasonable behaviour' causing an application for costs against objectors include:

- Failing to comply with normal procedural requirements for Inquiries and Hearings
- Failure to provide a pre-inquiry statement when asked to do so

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- Causing the proceedings to be unnecessarily adjourned or prolonged
- Being deliberately or wilfully uncooperative, such as refusing to discuss the matter or failing to provide necessary information when requested
- Introducing new grounds of objection or new evidence late in the proceedings
- Failing to attend an inquiry or hearing.
- Withdrawing an objection at the 'last minute', resulting in late cancellation of an inquiry or hearing arranged after the objector(s) asked to be heard.
- Pursuing a Legal Order with a fundamental defect that renders it incapable of confirmation.
- Pursuing an objection that the Secretary of State has advised, in writing, is not legally relevant.

49. Further information is available at www.gov.uk/government/organisations/planning-inspectorate

Planning Inspectorate decisions

50. Following either the written representations, hearing or Public Inquiry process, the Inspector will make a decision on the Legal Order. They will detail their reasons and interpretation of the evidence in a written decision letter. The decision letter is sent to; the OMA, all statutory objectors, the applicant, any listed supporters or interested parties, prescribed organisations, and any other person who has asked for a copy.

51. The Inspector may decide:

- to confirm the Legal Order
- not to confirm the Legal Order
- to confirm the Legal Order with modifications

52. **If the Legal Order is confirmed**, the Council will publish final notices of confirmation and serve notice on all those who were served notice when the Legal Order was made.

53. **If the Legal Order is not confirmed**, the Council will forward a copy of the Inspector's decision letter to all those served notice of the making of the Legal Order.

54. **If the Legal Order is confirmed with modifications**, the Planning Inspectorate will sometimes require that the Legal Order is re-advertised. There is an opportunity at this stage to make objections to the proposed modifications, which may lead to a second Public Inquiry to determine the outcome of the modified Legal Order. Where the modification is minor (for instance, the addition of a grid reference or correction of a spelling mistake) re-advertisement is not normally be required.

55. Following the publication of the notice of confirmation, there is a final opportunity to appeal against the validity of the Legal Order to the High Court, on the grounds that the Inspector's decision was not within the powers of the Wildlife and Countryside Act 1981.

An illustrative flow chart is included at Appendix 3 showing the process which is followed after a Legal Order has been made.