

**Open Report on behalf of Richard Wills,
Director responsible for Democratic Services**

Report to:	Highways and Transport Scrutiny Committee
Date:	24 October 2016
Subject:	The Implementation of the Public Rights of Way Sections of the Deregulation Act 2015

Summary:

To present a summary of the expected effects of the public rights of way (PROW) elements of the Deregulation Act 2015. It considers the implications and issues for Lincolnshire County Council, landowners and members of the public resulting from changes to the PROW processes

Actions Required:

That the scrutiny committee notes:

- a) The cut off date for claims to amend the Definitive Map & Statement based on historical documentation provided by the Countryside & Rights of Way Act 2000 has not yet been brought into force and that the necessary guidance and regulations required under the Deregulation Act 2015 are not expected to be made before January 2017.
- b) That the appropriate decision making powers are currently delegated to officers. It is probable that the current scheme of authorisation for officer sub-delegations will need to be altered as will a number of existing LCC policies concerning public rights of way.
- c) That the Deregulation Act 2015 will provide cost savings as notices will no longer be required to be advertised in local newspapers. LCC will also benefit from full cost recovery where applicable to applications for diversions and/or extinguishments of PROW.

1. Background

- 1.1 Lincolnshire County Council is under a duty to keep a legal record of public rights of way and this is known as the "Definitive Map & Statement" (DMS). This record is conclusive evidence of all footpaths, bridleways, restricted byways and byways open to all traffic (BOATs). These are shown without prejudice as to whether any higher rights exist on these routes or as to the

existence of other public rights of way which are not currently shown. Changes to the DMS can only be made by means of a Legal Order

- 1.2 The County Council also has a duty to keep the legal record under "continuous review". This means that when the Council is presented with evidence (or discovers evidence itself) that a right of way is either missing from the DMS or is shown incorrectly in some way it must make a legal order to modify the DMS (Definitive Map Modification Orders (DMMO)). These will be made following the expiration of a period of time where the public have been using a route, usually known as the 20 year rule although other, shorter, timescales can be applied, or if historical documentation is presented that demonstrates that a route exists or is somehow shown wrongly on the DMS.
- 1.3 The County Council also has powers to make orders to divert, extinguish or create PROW for which a fee can be charged for various elements of the work to any applicants.
- 1.4 The Countryside & Rights of Way Act 2000 included provisions, subject to regulations not yet made, to extinguish on 1st January 2026 any unrecorded historic footpath and bridleway rights. This is referred to in this report as the "2026 cut-off date". Unrecorded BOAT rights were extinguished by the Natural Environment and Rural Communities Act 2006. The 2000 Act also made provisions, subject to regulations not yet made, giving landowners a "right to apply" to divert or extinguish paths.
- 1.5 Natural England in consultation with the Stakeholder Working Group of 15 representatives from user groups, landowner groups and local authorities produced a report "Stepping Forward" to inform the Department for Environment, Food and Rural Affairs (Defra) of what changes were needed to PROW legislation. The aim of these changes was to achieve certainty, clarity and the ability for negotiation between parties in matters of historic PROW, and to enable the implementation of the 2026 cut-off.
- 1.6 The result was the seven sections in the Deregulation Act 2015 (sections 20 to 26) which include provisions on how the 2026 cut-off is to be implemented as well as providing new powers for councils. Provisions were also made in the Act for implementing the "right to apply".
- 1.7 It is not expected that the necessary regulations to implement the Deregulation Act will be brought into force before 1st January 2017. This report outlines what the new provisions will mean for applicants and landowners, and how the County Council will need to change the way it deals with applications to implement the new legislation when it comes into effect.

2. Current Processes

- 2.1 All cases are processed through the following distinct phases – application, consultation, decision, order, consultation, inquiry (dependent on whether objections are received after an order is made) and confirmation. Currently all decisions about whether an order should be made are taken by an officer under delegated authority. This report first deals with DMMOs and then will look at diversion and extinguishment cases.
- 2.2 **Definitive Map Modification Orders (DMMOs)**
From the County Council's perspective, the current system is rigid. Each case has to be investigated as there is no means for rejecting poor applications or for negotiating with affected landowners to get a better outcome for the public. Each application made is recorded at www.lincolnshire.gov.uk/countryside/definitive-map/definitive-map-modification-orders-dmmos/dmmo-register and is prioritised for investigation according to current policy HAT 33-3-11. Once a case is actively under review by an officer a set of consultations is undertaken prior to a decision being made as to whether the evidence demonstrates the existence of a public right of way and where necessary an order is made. This order is published and consulted upon and if no objections are received then the order can be confirmed by the authority. If objections are received then the case is submitted to the Secretary of State for Defra (in practice this is via the Planning Inspectorate) whereupon a public inquiry will be held into the matter (regardless of whether the objections are considered to be relevant to the order made). Occasionally matters are concluded after a period of written representations as opposed to an inquiry.
- 2.3 Currently landowners will first hear about an application for a route to be recorded across their land when they are sent an official notice by the applicant as required by existing regulations. Under current legislation it is not possible for landowners to negotiate with the Council and it is a very difficult process to provide an alternative route on a different line. Details of such applications are available to the public and since July 2016 they have become declarable by the authority when a local search is made prior to house or land purchasing.
- 2.4 Should the Council take longer than 12 months to decide whether or not to make an order, or where it declines to do so because officers believe that evidence is insufficient to make an order, then the applicant has a right of appeal to the Secretary of State. These appeals are heard by the Planning Inspectorate and after consideration by an inspector the Council may be directed to make a decision or an order as appropriate to the appeal. If a subsequently made order receives objections then the matter will be once more referred to the Secretary of State as per para 2.2 above.

2.5 **Diversion or Extinguishment Orders (Collectively known as Public Path Orders (PPOs))**

Unlike DMMOs the County Council has a discretion as to whether or not to make an order to divert or extinguish a public right of way. The Council receives many inquiries to do so but under current policy the County Council will only invite an application should it be considered that there is some public benefit within the proposals. Equally should an order be made and then receive objections then there is no obligation to submit the case to the Secretary of State for public inquiry although the Council must outline its reasons for not doing so to the applicant. There is no scope to appeal against the Council's decision not to make an order or to not pursue an order to a public inquiry.

2.6 Current Costs Recovery Regulations apply to applications for a public path order however these are limited and do not allow for full cost recovery. For example the Council cannot recharge the cost of taking a case to a public inquiry if it decides to do so. The current fee for a PPO is £1700 plus associated costs of advertising in the local press which would put the average cost of a case at approximately £2500 to £3000. The Team Leader for Countryside Services has discretion to waive all or part of the fee should there be significant public benefit in a proposal (for example if the proposal includes upgrading an alternative footpath route to bridleway status).

2.7 Currently, only applications involving safety at railway level crossings or crime prevention on land connected to schools have to be processed. In all other cases, as outlined, there is no right of appeal against the Council's decisions or any timescales by which the Authority must act.

3. Deregulation Act 2015

3.1 Following the coming into force of the currently awaited regulations to implement the PROW sections of the Deregulation Act 2015 the 2026 cut-off date will be applied in England. This means that any unrecorded historic PROW will be extinguished automatically unless they are subject to a saving provision within the regulations.

3.2 For DMMO applications the new regulations will enable:

- a "preliminary assessment" to be applied to applications therefore enabling the Council to reject applications submitted with no, or little relevant, supporting evidence.
- a new appeals process via the Magistrates' Court for applicants and affected landowners should the Council fail to make a decision within a given timescale (and not to the Secretary of State as per current legislation)

- the County Council to reject objections that are not deemed relevant to the order made (irrelevant objections are usually based on the effect a route will have on security, land value, occupation, need or convenience)
 - Inquiries to be heard in cases where there is an appeal against the Council's decision not to make an order. Following the inquiry the Council may be directed to make an order but without the need for any further inquiry to be held.
- 3.3 For diversions and extinguishments cases the new regulations will provide
- that landowners of prescribed land will have a right to apply to the Council
 - all such applications will be required to be recorded on a register
 - that authorities will be able to recover full costs associated with processing applications
- 3.4 For all forms of orders there will no longer be need to advertise them in the local press. The alternative will be that they are published on the County Council's website or by other appropriate digital communication.
- 3.5 If a case is appealed to the High Court (following an order decision made by the Secretary of State after a public inquiry) then the Court will be able to quash that decision. Current legislation requires that the order itself is quashed which requires the whole process for that case to start again.

4. Implications and issues

- 4.1 Lincolnshire County Council will have to ensure that:
1. officers have the capacity to make the necessary decisions within the required timescales. This will need changes to the existing scheme of delegation to ensure that the new duties and powers are reflected within it.
 2. within 3 months decide whether new modification order applications meet the "preliminary assessment" or whether they should be returned to the applicant.
 3. within 4 months determine whether diversion and extinguishment applications are "duly made" and provide a decision report as to whether the authority will promote an order.
 4. ensure that all applications are placed on the Register of Applications.
 5. contact landowners to inform them that a modification order has been applied for and to discuss any opportunities for a "modification by consent" whereby the landowner will accept the claimed route albeit on a slightly amended route, at a different width or with new limitations (such as gates).
 6. provide timely decisions to prevent applications to the Magistrates' Court which may result in costs being awarded against the County Council.
 7. attend the Magistrates' Court when decisions have not been made within the given timescale and appeals made.

8. make decisions in any timescales subsequently ordered by the Magistrates' Court.
 9. decide whether or not appeals to Lincolnshire County Council's decision not to make an order, or objections made to relevant orders are relevant.
 10. set the County Council's scale of charges for cost recovery, depending on the new regulations.
- 4.2 Additionally, the County Council will need to decide whether:
1. orders need to be made as a result of an administrative error (what constitutes an administrative error is not yet prescribed by regulations but examples are expected to include where a path changes status or abruptly terminates at a parish boundary.)
 2. in 2026, whether routes should be nominated as "designated routes" and saved from extinguishment. These routes will need to be made known in a separate section of the Register of Applications.
- 4.3 Landowners will be:
1. able to make applications for diversion or extinguishment orders
 2. required to pay the Council's costs for such applications;
 3. contacted by Lincolnshire County Council when a modification order application is made and informed of the process;
 4. able to negotiate changes to the location of an applications route, its width and whether it should be affected by limitations as part of the Modification Consent Order process;
 5. able to appeal to the Magistrates' Court where the County Council has not made a decision on a DMMO application (made after regulations are published) within 12 months of receipt.
 6. a landowner's rights to access land will be preserved regardless of whether the route is extinguished as an unrecorded public right of way in 2026. These routes will become private rights of way.
 7. able to apply to the County Council to erect gates across BOATs and Restricted Byways where there is a need to control livestock on agricultural land.
- 4.4 Applicants for DMMOs will be:
1. required to provide a statement as to why they believe the evidence they are submitting demonstrates that a public right of way should be recorded on the Definitive Map & Statement for Lincolnshire.
 2. able to appeal to Magistrates' Court in respect of DMMO applications (post regulations) where the County Council has not made a decision on the "preliminary assessment" within 3 months or determined an application within 12 months of receipt;
 3. able to transfer responsibility for an application to another person or body.

5. Financial Implications

- 5.1 The changes arising for the Deregulation Act 2015 will need to be managed within existing resources. Evaluation of the practicability of doing so can only be assessed once the full extent of the regulations is known and the take up of the "right to apply" for applicants for diversions and extinguishments is known.
- 5.2 There is a potential cost saving of c.£5,000 p.a. from no longer having to publish adverts for orders in the local press and using the Council's website as an alternative.
- 5.3 There is a low risk of appeals being made to Magistrates' Courts where the County Council has not made a decision within a given timescale. Under the current process the Council has been subject to c.1 appeal per annum. Such appeals will require officer time and potentially legal representation and may result in the award of costs against the Council.
- 5.4 There is an increased, but still relatively low, risk of appeals being made to the High Court where an applicant or landowner disagrees with a decision made by Lincolnshire County Council on the basis that they feel that the Authority was not acting within the powers available to it in the legislation.

6. Consultation

a) Policy Proofing Actions Required

n/a

7. Background Papers

- Countryside & Rights of Way Act 2000 – www.legislation.gov.uk
- Natural Environment & Rural Communities Act 2006 - www.legislation.gov.uk
- Deregulation Act 2015 - www.legislation.gov.uk
- HAT 33-3-11 – LCC Policy on Prioritisation of DMMO Applications – www.lincolnshire.gov.uk/countryside

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