

Stakeholder Working Group on Public Rights of Way

Meeting notes for the eighth meeting of the Group
held on 8th September 2009
at John Dower House, Cheltenham.

Attendance

- 8.1 The meeting was chaired by Ray Anderson and attended by: Alan Kind, Alasdair Mitchell, Alex Lewis, Andrea Graham, Carys Drew, Dave Waterman, Gavin Stark, Janet Davis, John Thorp, Kate Ashbrook, Mark Weston, Mike Walker, Paul Johnson, Richard Gething, Robert Halstead, Rosalinde Shaw, Sarah Slade & Sue Steer.
- 8.2 Apologies were received from Gwyn Williams & Terry Robinson.

Notes of the previous meeting

- 8.3 The draft meeting note for 25th June 2009 was confirmed, subject to the following amendments:
- a. 7.4 – reword the penultimate sentence to say that the objective is to make the process work better by improving understanding.
 - b. 7.7 – clarify the footnote reference by applying it to the first bullet point.
 - c. 7.12 – correct by replacing ‘the’ with ‘to’.
 - d. 7.23 - add in the suggestion to specify a time-limit for resubmitting rejected applications.
 - e. 7.32 – clarify that several Group members felt strongly that to allow negotiation over status would be against the public interest.

Review of action points

- 8.4 Updates on action points were as follows:
- a. AL had completed both action points 7.57 & 7.58
 - b. 7.59 DW said that the lawyer he planned to contact had been unavailable. This was to advise on whether a threshold test for applications could be applied retrospectively. A precedent has been set by the NERC Act, where extinguishment of rights for motorised users was applied to unprocessed applications. DW said that he was confident that the Group’s proposal to apply the test to application backlogs would be

allowed but that he would seek further confirmation of this point.

- c. 7.60 MW apologised that he had not contributed a list of other suggested improvements.
- d. 7.61 The outline agreement paper was prepared and circulated as planned.

Outline agreement paper

8.5 The majority of the meeting concerned feedback on the outline agreement paper and further development of the proposals described in that paper.

The meaning of 'landowner'

8.6 The Group will need to specify what is meant by 'landowner' in its final report. Details of who must be contacted when serving notice, consulting or negotiating will need to be spelled out.

Copies of documents

8.7 Some metropolitan authorities said that they relied on applicants to supply copies of documents and were concerned that dropping the requirement for applicants would mean significant extra work for them.

Problems with the DM

8.8 Some local authorities have consistently failed to act on DM recording problems. Bradford was cited as an example: approx 200 upgrades that were identified over 40 years ago have still not been dealt with in spite of formal complaints having been made. The upgrades were identified as part of review work in the late 60's but then forgotten about during local government reorganisation in the 70's and formally abandoned with the switch to continuous review of the DM in 1981. It was said that this situation is not unique

8.9 DM anomalies were said to be even more widespread, numbering in the hundreds for many authorities. Anomalies might be scribing errors or discontinuities between map edges or over parish boundaries. The concern raised was that this type of problem will be made more difficult to resolve by the cut off, leading to widespread connectivity issues.

8.10 Closing the DM will improve certainty but it would be imprudent to implement the cut off when there are a large number of outstanding issues with the DM. Monitoring the impact of the improvements proposed by the Group will help to inform the decision on commencement of the cut off. One way of measuring this could be to monitor how long it is taking to get applications through the system as revealed by tracking the number of new applications against the number processed.

- 8.11 Improving DM procedures, together with the threat of a cut off, helps and motivates good authorities but has no effect on poor performers. Where there is an entrenched attitude problem the opposite might be true and the cut off be a disincentive to do anything.

Screening of applications

- 8.12 The prima facie test needs to be a quick and easy way of screening applications and SAs would be able to make a summary rejection. The opportunity to dispute a claim would come once an application had got past this stage.
- 8.13 The Group discussed options for how evidential screening of applications could be brought in. One possibility is by new guidance on what's necessary for an application to comply with existing legislation. This was felt to be stretching guidance too far, since statutory provisions should not be made in this way. A possible variant on this approach could be statutory guidance, as was done for restrictions to open access under the CROW Act.
- 8.14 Assuming screening of applications can be applied to backlogs, it would be unfair to immediately reject an application that has been in the system for a number of years. Instead, applicants should be allowed time to improve their application whilst retaining their place in the queue. If, after this time, the application is not sufficiently improved it would be de-registered and rejected.

Negotiation

- 8.15 The Group wants to strongly encourage SAs to resolve disputed claims by agreement. Negotiation can be time consuming and depends on both parties being willing to find a solution. SAs will need to be free to weigh up the chances of a successful outcome and decided how much effort to put in to trying to reach a negotiated settlement.
- 8.16 It's proposed that as soon as a prima facie case has been made the SA can begin discussion with the landowner. A possible problem with this approach is that actual legal status has not been established at this point. It's possible that an application (or SA investigation) may have under or over sold the status of a route. One way around this is to allow the status of the route to be revisited at a later stage, if new evidence comes to light. The problem with this approach is that it doesn't give certainty and could be wasteful of resources. The Group's preferred approach is to rule out future claims where a route is recorded by agreement. A challenge that the status has been over recorded is unlikely, and anyway it is in the landowners gift to dedicate higher status over a route. It's possible that a route could be under recorded but again this was felt to be unlikely since a prima facie case must have been made in the first instance. A further safeguard for the public could be provided by allowing an opportunity to query the status of routes recorded through an agreement process.

- 8.17 The revised procedure described in an annex to the outline agreement paper is a hybrid of the current evidential DMMO procedure with an alternative way of recording by agreement. It was suggested that from a legal point of view these elements would be better treated as separate approaches.
- 8.18 The main benefit of recording by agreement is in resolving conflict over rights of way omitted from the original DM that would need work on the ground before being available for public use. Where a route has been out of use for some time, it seems reasonable to allow a degree of flexibility over how it is reinstated, a diversion for example. Where a claim is to add rights over an established route the degree of flexibility is reduced.
- 8.19 Negotiation over a reduction in status was ruled out as being against the public interest in all cases.

Delays

- 8.20 A problem with allowing claims to be prioritised is that it could mean that some applications never make it up the queue. The current appeal over delays in determining an application is relatively crude and available only to applicants. An alternative approach would be to introduce a notices procedure, along the lines of that successfully brought in for removal of obstructions on public rights of way. Notices would be an effective and targeted way of allowing applicants (and owners) to demand cases are dealt with. Where a complaint is upheld the SA would initially be put on notice and a date specified by which the case must be determined. The period allowed would be reasonable and take account of factors such as attempted negotiation. A court order would be the final step and only needed as a last resort.

Objected orders

- 8.21 Several points were clarified in connection with PINS treatment of orders that have been objected to:
- a. PINS should have flexibility to cross examine as they feel appropriate (a problem at the moment is that objectors can demand an inquiry);
 - b. written representations should be the norm but with discretion to hold a public inquiry;
 - c. award of costs should be possible if unreasonable objections are sustained;
 - d. where PINS uphold an objection, the SA would be forced to make an order by direction of the SoS.

Implementation of the cut off

- 8.22 The Group's agreed approach to the cut off is described in the outline agreement paper. In summary: a decision on commencement of the cut off should be deferred to a specified

review date when the impact of improvements can be assessed. Several points of clarification were made:

- a. the cut off should remain on the statute book;
- b. Government should seek to implement the Group's recommendations as soon as possible, using a range of mechanisms.. guidance, regulations etc.
- c. at least five years should be allowed for the improvements to take effect;
- d. at this point a decision should be made on whether to commence or abandon the cut off;
- e. in the meantime, the expectation should be that the cut off will be commenced;
- f. monitoring and evaluation should focus on the effectiveness of procedures;
- g. Natural England could have a role in this; and
- h. all interest sectors would need to be involved in the review.

Review of other suggestions

8.23 The outline agreement paper features the main points of agreement and suggested improvements to emerge from previous meetings. Mindful that other ideas have been discussed, and in preparation for starting work on the Group's report, the secretariat asked for views on the inclusion/exclusion of a list of suggestions.

[Note from the Secretariat- time was running out for this agenda item and discussion severely limited as a consequence. Several of the suggestions listed below might have benefited from more substantive discussion and hence we might want to treat the yes/no verdict as a guide and keep open the possibility to revisit ideas when developing the Group's report]

Avoiding unintended consequences from the cut off		
Protect routes included in the Street Works Register. Several means of achieving this have been suggested: (a) exempt by regulations; (b) blanket record routes on the DM; (c) give these routes a status to protect them from development.	✓	There would be greater clarity after the cut off if the need for exemptions could be avoided. If exemptions are needed then the SWR is the best statutory record to refer to.
Further consider the robustness of procedures for making changes to the Street Works Register and the possibility of errors.	✓	If the SWR is to be made part of an exemption then an assessment of robustness will be needed

Make greater use of omnibus orders for urban paths or other suggested alternative approaches in situations where separate orders might otherwise be made.	✓	This approach could be applied to publicly maintained routes that are not recorded on the DM
Introduce a rebuttable presumption over the status of publicly maintained highways to make recording such routes on DM easier.	✗	An omnibus order approach to adding publicly maintained routes to the DM is preferred
Protect the ability to make a prescriptive claim where an unrecorded route that continues to be used by the public is extinguished at the cut off. See also the note on treating use 'of right' as 'as of right'.	✗	Routes that are in use should not be extinguished: so we need to consider how they can be exempted. Protecting the ability to make prescriptive claims might be considered at a later review stage.
Review ORPAs/List of Streets routes to identify those that are non-vehicular and might be at risk from the cut off for inclusion on the DM.	✗	In principle a good idea and getting these routes on the DM would be helpful. However, it would be difficult to do since people will object to recording all purpose highways on the DM unless they can be used as such. Protection for these routes would be via the SWR exemption.
Improving the DMMO procedure		
Improve the information provided to affected landowners, including a map of the route.	✓	
Establish an expert panel or equivalent to advise on evidential merit.	✗	The need is for a single common source of guidance and clarity over its ownership
Make legislation to overrule the Andrew's judgement.	✗	No consensus
Extend the cut off to include evidential claims for downgrading or removal of route.	✓	
Prevent political interference in the evidential procedure.	✓	Stronger guidance on political interference is needed
Change the outcome of statutory review so that an order cannot be quashed, it can only be re-determined by PINS.	✓	The Group should recommend that this is clarified
Other suggestions		

Allow carriage drivers to use bridleways, and so negate the need for bridleway to restricted byway upgrade claims.	✘	Concern that this could lead to new obligations
Clarify the legal status of routes for cyclists.	✓	The Group should recommend a review of rights of way for cyclists. Cycle tracks should be recorded on the DM and equestrians should be able to use them as well.
Clarify that the requirement to keep a List of Streets is fulfilled by the Street Works Register and specifically local street gazetteers.	✘	
Consider how the DMMO procedures should relate to CROW powers to divert/regulate the use of rights of way for nature conservation reasons.	✓	A suggestion from GW that the Group need to revisit
Make it easier to divert a right of way where there is a need (the right to apply) including locally supported deals over minor changes to alignment without outside interference.	✘	No consensus
Make it easier to create a new right of way where there is a need possibly in conjunction with rights of way improvement plans.	✓	The would be part of a later phase, once the cut off had been implemented. A further associated possibility is to introduce standard levels of compensation.
Make it easier to correct clerical errors in the DMS.	✓	
Make it easier to resolve DM anomalies, such as unexplained changes in status.	✓	Suffolk has 2,500 technical anomalies. The Group should look at this issue: it is distinct from unrecorded rights
Improve access to historical documents for volunteers (and landowners) e.g. record office opening hours, cost of photocopying.	✓	Improved guidance would help
Consider what routes should show up in conveyancing searches.	✘	

8.24 Three further suggestions were highlighted that had not been included in the list put to Group. These were:

- a. there should be greater flexibility over gating of restricted byways
- b. all public rights of way should be made publicly maintainable

- c. where existing rights of way are diverted the whole of the affected path should be included in the order

Actions

- 8.25 AL & RH to provide further thoughts on how negotiation over changes to rights of way might be introduced to the DMMO procedure.
- 8.26 AK to provide further thoughts on how a notices procedure might be designed.
- 8.27 The secretariat to prepare a first draft of the Group's report for discussion at the next meeting on 22nd October 2009.