

Stakeholder Working Group on Public Rights of Way

Outline agreement reached by SWG on 25th June 2009

Streamlined claims determination procedure

1. A conundrum for the Group has been how radical to be in its recommendations:

Tweaks to established procedures are relatively low risk and easier to agree, but their practical impact might be limited.

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Major change (of whatever type) might bring about a step change, but would be difficult to agree and potentially high risk.

2. The Group's objectives in recommending change are to:
 - greatly reduce the administrative burden and cost of the DMMO system
 - enable current backlogs to be efficiently tackled
 - put dialogue at the heart of procedures, with a much greater emphasis on negotiated solutions where there are potential conflicts with established land use
 - put the onus on would-be applicants and objectors to make their inputs reasonable and appropriate
 - prevent claims getting stuck in time-consuming procedural loops
 - permit a lighter touch administration
3. Having carefully considered the options, the Group believes that the best way of achieving these objectives is by streamlining the current claims determination procedure. An initial, top level outline of the streamlined procedure envisaged by the Group is appended as Annex 1 to this paper.
4. Merely making these changes legally will not achieve the objectives. The revised procedure proposed by the Group will only be effective if accompanied by a change in attitudes and culture both within surveying authorities and among claimants and land owners. Unlocking the proper resourcing of this function is also a key issue, and is likely to involve increasing the political priority of definitive map work at both national and local level as well as realising the procedural economies that the recommendations would bring.

5. Backlogs are a key issue to be tackled. It is vital that the streamlined procedures expedite the clearance of applications that are already in the system.
6. The Group drew up the revised procedure outlined in Annex 1 specifically with claims based on documentary evidence in mind. However, the approach is applicable to user claims too. The applicant would need to provide sufficient information to demonstrate a prima facie case (at Step 1). This would allow the Order Making Authority (OMA) to discuss the application with affected owners (Step 2). Were an owner to refute the claim, then the OMA would need to further investigate as at Box A.
7. We recognise that implementing this new procedure will necessitate changes to primary legislation and we recommend that this is achieved by Legislative Reform Order (LRO). Such an approach is considered realistic since the Group expects that new procedure will bring about a significant overall reduction in administrative burden and command widespread stakeholder support.

Proposal on the cut off date for unrecorded rights of way

8. The Group assessed options relating to the cut off date for unrecorded rights of way at its meeting in May 2009. This discussion was written up by the Secretariat as an options paper for members of the Group to consider further with their constituents. The Group re-considered this issue at its meeting on 25th June. Several members emphasised that agreeing a way forward on the cut off is inextricably linked to other proposals under discussion, and in particular improvements to the claims procedure.
9. Having agreed in outline what form these improvements might take, the Group also agreed that its preferred option was to recommend that a decision over the eventual implementation of the cut off should be deferred to a specified review date, perhaps ten years hence, to allow sufficient time for this new procedure to be implemented and its impact to be evaluated. On the assumption that the new claims procedure does bring about the benefits envisaged and enables backlogs to be addressed efficiently, then the Group expects that the cut off will be implemented with appropriate saving provisions and exemptions. This would mean that the cut off would take effect in 2026, and that Defra would use regulation making powers, based on those already in the Act, to protect registered applications through to determination and to protect from extinguishment any further categories of right agreed by the Group. A further suggestion was made that a short window should be allowed

before the cut off takes effect to allow surveying authorities to assess its impact and resolve any outstanding issues¹.

Completing the work of the Group

10. The SWG is due to report at the end of 2009 and has three further meetings scheduled before then. During this time the Group will be completing its work on the detail of the procedural reform it wishes to see, including considering further suggestions for technical improvements and other matters closely associated with documentary claims such as the Andrews judgment, and links to land registration and nature conservation issues. Other issues that the Group will need to return to are the use of regulations to exempt specified categories of route from extinguishment at the cut off (or alternative means of ensuring that for example routes on the Street Works Register are recorded on the definitive map); and whether the new procedure subsumes other suggestions for negotiated solutions (e.g. taking into account agreed diversions and/or width modifications, as well as the proposal for recognition agreements).

The Secretariat
31st July 2009

¹ This suggestion is a parallel to what happened once the opportunity for commons registration closed to public applications in 1970. A further window of some months was allowed for registration authorities to ensure that obvious omissions were captured on the register.

Annex 1. Proposed new claims procedure

The new procedure is described below and illustrated in the associated flow diagram (Figure 1).

Step 1: A duly made application is received

The procedure is initiated by a duly made application. An application will be duly made where the applicant provides sufficient evidence to constitute what the Order Making Authority (OMA) considers a prima facie case that the alleged rights, or some variant of them, may exist. The OMA will have a new power to reject applications that are not duly made without substantive consideration, on the understanding that they may be resubmitted if more convincing evidence can be found. Defra will issue guidance on duly made applications and what is needed to make a prima facie claim. A formulaic test based on particular items of evidence is not envisaged. There would be no time limit for resubmission of applications. The current requirement for an applicant to provide copies of documentary evidence to accompany an application will be removed where the reference is to documents readily available to the OMA, such as those held at the County Record Office.

Step 2: OMA contacts affected owners and discusses the application with them

Once the OMA accepts an application as duly made, it is added to the register of applications. The OMA then formally notifies affected landowners of the application². Landowners are provided with a copy of the application and a map of the route. The OMA explains to the landowner what the application means and how it will be dealt with. It is recommended that the OMA also contact the parish or town council at this stage to make them aware of the application as a matter of courtesy. A landowner could at this stage provide relevant evidence that might affect the OMA determination at Step 4. The OMA also discusses any concerns a landowner may have about the application. Where there are serious conflicts with established land use the OMA will have a new power to negotiate with a landowner over how such concerns could be mitigated by changes to the alleged rights³. Diversion of the route may be possible and also changes in status or width: see Table 1. Subject to what follows, any agreed changes will be reflected in the route added to the map, possibly by way of a legal event order, and the replaced aspects of the alleged right will cease to have any status legally. Use of this power by the OMA will be limited so

² Currently it is the applicant that must serve notice

³ This could be accomplished by a proposed new section to follow s.119 of the Highways Act 1980

as to ensure there is no overall detriment to the public as a result of the change⁴. Defra will issue guidance on this point and the OMA would be expected to consult with its LAF on its approach to the use of this power.

Table 1. Negotiating changes to claimed rights where there are serious conflicts with established land use

Proposed change to the route as claimed	A. Where application is for an unrecorded route	B. Where application is to upgrade an existing route
None	If there are no objections from affected landowners then the OMA proceeds directly to Step 3.	If there are no objections from affected landowners then the OMA proceeds directly to Step 3.
Diversion	OMA can agree a diversion with an owner where a suitable alternative route can be provided.	OMA can agree a diversion for the upgrade element only under this special process.
Change in status	OMA can negotiate over a change of status. A downgrade from the status applied for would need the agreement of the applicant.	OMA can negotiate over a change of status. A downgrade from the status applied for would need the agreement of the applicant.
Change in width	OMA can agree changes subject to a minimum width for a particular status.	OMA can agree changes subject to a minimum width or the width being no less than is currently recorded – whichever is the greater.
Other possible changes	The OMA can negotiate over limitations. Additional limitations would need the agreement of the applicant.	The OMA can negotiate over limitations. Additional limitations would need the agreement of the applicant.

⁴ This might be achieved by virtue of the general duty on highway authorities to assert and protect public rights, or by a further qualification linked to this duty.

Box A: If issues cannot be resolved through negotiation

Where a landowner objects to the recording of a route and the matter cannot be resolved through negotiation at Step 2, the OMA will need to decide when to draw a line under negotiations with a landowner and move to Box A. Defra will issue guidance on this point. Where an agreement cannot be reached the OMA will then proceed to make its own investigation of the alleged rights. In these circumstances the OMA will go beyond the prima facie test and will seek to establish whether on the balance of probabilities the rights actually subsist⁵.

Step 3: OMA consults on its proposed course of action

Before making its final decision on what to do, the OMA will be required to formally consult with prescribed bodies. The OMA will need to have regard to any relevant responses in making its decision at Step 4.

Box B: If there is a complaint that the OMA is not following its published policy and procedures

Defra will issue guidance to OMAs on the handling of applications. OMA's will be expected to have a published policy that will be drawn up in conjunction with their LAF. OMA's will not necessarily have to process applications chronologically on receipt but would need to set out any variation on this approach in its published policy and procedures. Examples might be where an OMA decides it is more cost effective to take a parish by parish approach or where a claimed route is already identified on the ROWIP as a genuine priority. The guidance should address such issues. Where an OMA does not adhere to its published policy and procedures in respect to a particular application, it might for example be open to both applicant and land owner to apply for a magistrates' court order.⁶

Step 4: OMA makes its determination and then advertises its decision

The OMA then makes its determination, taking account of any relevant responses to the consultation at Step 3. Where an owner remains opposed to an application the OMA determination will be made on the basis of whether in its view the alleged rights on the balance of probabilities actually subsist (as per Box A). The OMA will not make the actual order at this stage (if it is decided to make an order, the advertisement may take the form of a draft), so that any errors identified can easily

⁵ Currently the OMA may make a modification order where it is satisfied that on the balance of probabilities a reasonable allegation has been made.

⁶ The arrangement would replace current right of appeal against non-determination.

be corrected at Step 5. In advertising its decision the OMA will write formally to both the applicant and affected owners. Any changes the OMA has agreed with a land owner would be included in the advertised proposals. Other suggestions to change the current requirement for advertising decisions are being considered by the Group, for example the possibility of reducing costs by having short published adverts linked to full details available on the web.

Box C: If duly made objections to the OMA decision are received

It is at this stage that formal representations can be made in respect of the OMA decision. The scope for objections will be limited as set out in Table 2 below. As with applications, objections must be duly made. This means that they must be properly reasoned and made with supporting evidence⁷. The OMA will have a new power to ignore objections that are not duly made⁸. Defra will issue guidance on the use of this power.

Positive representations can also be made at this stage. These will be logged so that anyone who makes a positive representation can be notified of any inquiry in the same way as an objector. Positive representations will not require submission to the Secretary of State.

The Group has discussed the issue with the current DMMO process that participants appear in some cases to withhold evidence during the early stages of the process. Should the new procedure not offer sufficient inducement to encourage early transparency by all parties about any evidence they know of that appears relevant, there should be scope for inspectors to award costs against those concerned.

Duly made objections will be passed to PINS who will reassess the case on behalf of the Secretary of State. Cases dependent on documentary evidence alone will be dealt with by written representations. Other cases may be taken at a hearing. The Secretary of State may at this stage direct the OMA to make an order.

⁷ Under current procedures, objections are immediately escalated to PINS whatever their nature.

⁸ The Secretary of State already has this power

Table 2. Formal representations in respect of the OMA's decision

Where OMA proposes to:	Owner	Applicant	Other
Accept an application	Duly made objection only, on grounds that the evidence does not show on the balance of probabilities that the claimed right actually subsists	Can register an interest. No right of objection	Can register an interest. No right of objection
Refuse an application	Can register an interest	Duly made objection only, on grounds that the claimed right can be shown on the balance of probabilities actually to subsist	Duly made objection only, on grounds that the claimed right can be shown on the balance of probabilities actually to subsist
Accept an application including changes agreed with an owner	Can register an interest	Duly made objection only, on grounds that an overall detriment to the public would result	Duly made objection only, on grounds that an overall detriment to the public would result

Step 5: OMA completes the process, making the order if appropriate

If there are no objections following Step 4 then the OMA moves directly to complete the process. The OMA will make⁹ any modification order at this stage. In some circumstances the OMA may progress directly to Step 5 for a part of the original application, putting any contested aspect aside to be resolved at Box C. Where the case has been reassessed by PINS the OMA will make the order on the basis of the PINS decision.

⁹ The order would be effective from the date of making and hence there is no need for a separate confirmation stage.

Step 6: The definitive map is amended as necessary

The final step is for the definitive map to be amended according to the order.

Box D: If there is a complaint that the statutory procedure has not been correctly followed

At the end of the process an aggrieved party may have recourse to statutory review, as now, if they are not satisfied that the statutory procedure has been correctly followed.

Figure 1: Streamlined claims determination procedure

