

Update from the Public Rights of Way & Access Service

A report by the Public Rights of Way and Access Service Manager to Kent County Council's Regulation Committee on Tuesday 17 October 2023.

Recommendation:

I recommend that Members consider this report and note its content.

Progress with Definitive Map & Statement applications

1. Members requested that a summary of the current position in respect of applications to amend the Definitive Map and Statement (DMS) be provided annually to the Regulation Committee.

Section 53 Applications

2. Any person may make an application to the County Council, as the Surveying Authority, under section 53 of the Wildlife & Countryside Act 1981, to amend the DMS to add, upgrade, downgrade, or delete a Public Right of Way. The County Council has a duty to investigate every application it receives. Investigation involves undertaking interviews with witnesses and landowners, documentary research and consultation, amongst other things. It is our policy to deal with these applications in order of receipt except where:

- the physical existence of the claimed route is threatened by development or,
- the resolution of an application would enable the County Council to substantially improve public safety or
- the claimed route may result in a significant improvement to the network.

In such instances a case may be accelerated.

2.1. During the period April 2022 to March 2023, 14 applications were determined, 6 orders were made and 2 were confirmed. 17 cases are currently under investigation. To date there are 82 unallocated applications. The number of applications received fluctuates with 7 applications being received in 2018, 22 in 2019, 37 in 2020, 19 in 2021, 21 in 2022 and 5 have been received so far this year. The large increase in applications between 2020 and 2022 will have an impact on the backlog. The next application to be allocated was received in May 2019 indicating a backlog of close to 4.5 years. However, when considering that on average, 10-12 applications are determined each year, the reality is that the current backlog is nearer 8 years. As reported last year, 2 newer members of staff were to be allocated their own applications. This has now happened, resulting in an increased capacity allocated to this area of work and therefore the number of applications that can be progressed.

2.2. There are 4 cases with the Planning Inspectorate awaiting determination as objections were received to the made order.

2.3. The Schedule of Applications is updated on a regular basis and can be located on the County Council's website at:

<http://www.kent.gov.uk/waste-planning-and-land/public-rights-of-way/correct-the-rights-of-way-map>

Applications to divert, extinguish or create public rights of way

3. As part of its rights of way functions, the County Council also deals with applications from landowners to divert or extinguish public rights of way using powers available to it under the Highways Act 1980. Public rights of way can be diverted for a range of reasons provided that it is 'expedient' (or necessary) to do so and that the proposed diversion is not substantially less convenient, or less enjoyable, for users. The test for extinguishing (stopping up) a right of way is considerably narrower, and it is only possible to do this in cases where the right of way is 'unnecessary' or 'not needed for public use'.

3.1. During the period April 2022 to March 2023, 15 Public Path Orders have been confirmed. There are 43 unallocated diversions/extinguishments resulting in a backlog of approximately 2.5 - 3 years between the receipt of an application and allocation to an officer.

3.2. There is 1 case with the Planning Inspectorate awaiting determination.

3.3. The County Council also deals with applications made under the Town & Country Planning Act 1990 to close or divert public rights of way that are affected by development. This work is undertaken on behalf of Ashford, Canterbury, Dartford, Dover, Gravesham, Folkestone and Hythe, Sevenoaks, Swale, Tonbridge & Malling & Tunbridge Wells Councils and the Ebbsfleet Development Corporation. A small number of applications are also processed in respect of our own planning functions. During the period April 2022 to March 2023, 12 Public Path Orders have been confirmed/certified. There are 39 cases where orders have been made and confirmed and are awaiting certification following the completion of the works on site.

3.4. There is 1 case with the Planning Inspectorate awaiting determination.

3.5. The Schedule of Applications, which is updated on a regular basis, can be located on the County Council's website at:
<http://www.kent.gov.uk/waste-planning-and-land/public-rights-of-way/change-rights-of-way>

Statutory Deposits under section 31(6) of the Highways Act 1980 and/or section 15A(1) of the Commons Act 2006

4. This is a means by which landowners can protect their land against any, or further, public rights of way or a village green from being registered as a result of future unchallenged public use.

4.1. During the period April 2022 to March 2023, 25 Deposits have been received, a decrease of 5 from the previous year.

Land Searches and Temporary Traffic Regulation Orders

5. The Definitive Map Team also provide local authority search responses in respect of public rights of way and common land and village greens. The Team processes the Temporary Traffic Regulation Orders required by the Public Rights of Way and Access Service when undertaking maintenance work, or to ensure public safety. Orders are also made to facilitate work by statutory undertakers, landowners and developers. The full cost of providing these services is recovered from the applicant.

Given that much of this activity is tied to the state of the housing market and the level of development it does fluctuate and may impact on the capacity of the team to progress Public Path and Definitive Map Modification Order applications.

Backlogs

6. The backlogs for applications to both divert/extinguish public rights of way and to amend the DMS reflect the complex and lengthy procedures to be followed. There is a strong correlation between the number of applications determined and the number of experienced officers available to undertake the work. Additionally, there is no ability to limit the number of applications to amend the DMS that are received in any year. The number of applications received, in any one year, can exceed the resource available to determine them.

6.1. Within Schedule 14 of the Wildlife and Countryside Act 1981 there is provision for an applicant to apply to the Secretary of State if their application has not been dealt with within 12 months of receipt. The County Council received 1 Notice that an applicant had applied to the Secretary of State in the last 12 months. The Secretary of State considered this request and directed that the County Council determine the application within 12 months. It is predicted that more applicants will consider this course of action as the backlog continues to increase.

6.2. The capacity of the team was increased at the end of 2019 to 5.3 fte. The benefits of that increase are starting to feed through in terms of the number of cases being progressed, especially as the newer officers have now started processing section 53 applications.

Legislative Update

7. Deregulation Act 2015 – The Deregulation Act was enacted on 27 March 2015, however a package of reforms in relation to PROW have still not come into force as we are awaiting the associated regulations and guidance. No firm indication as to when the regulations will be published has been given by Defra but we are aware that momentum is building and anticipate that for some elements it will be months as opposed to years.

7.1. 2026 cut-off-date - This is where all unrecorded rights of way created before 1949 are to be extinguished immediately after 1 January 2026 – subject to certain exceptions: -

- It provided for Local Authority's to designate a right of way for protection during a short window after the cut-off – a one year period.
- It anticipated that routes identified on the list of streets/local street gazetteer as publicly maintainable or as private streets carrying public rights would be preserved.
- It preserved rights over routes that were subject to a pending application.

7.2. I reported at the last update that Government had decided to repeal this element. However, in a Statement issued on 22 March 2023, Defra has determined that the cut-off-date will be brought into force. This will, in effect, act as a guillotine, after which time no further applications can be submitted based on historical evidence, subject to the savings provisions above. However, the Secretary of State also stated that due to the reforms being delayed by covid, they intend to use existing powers within the Countryside & Rights of Way Act 2000 to extend the cut-off-date by

5 years to 1 January 2031. It is therefore expected that many more applications will be received before the cut-off-date comes into force, as the main user groups are continuing with their research and submitting applications.

7.3. It is interesting to note that of the 82 unallocated section 53 applications, 51 are based upon pre-1949 historical evidence with the remaining cases being based predominately on user evidence. This reflects a significant change in the basis on which applications had been made with the majority previously having relied on user evidence.

New Guidance

8. Defra has introduced new guidance (August 2023) setting out Government policy on changes to public rights of way where they pass through a garden or curtilage of a residential dwelling, a farmyard or other commercial or industrial premises. Where the guidance applies, the Order making authority should weigh the interests of the owner/and or occupier against the overall impact of the proposal on the public as a whole. Reducing or eliminating the impact of the current route on the owner and/or occupier, in terms of privacy, security and safety are important considerations to which due weight should be given.

8.1. Whilst the guidance introduces a presumption in favour of diverting or extinguishing a public right of way through certain types of land, where privacy, safety or security are a concern, the relevant legislative tests, as detailed above, at paragraph 3, must be satisfied. Where a proposal has already been considered and declined by the Secretary of State, it is highly unlikely that we will process a new application, unless the proposal has altered substantially.

8.2. The guidance refers to the diversion of a right of way onto other land where landowner consent is not forthcoming. However, having considered this, we are not in a position to process an application unless all landowner consents are in place. This is because the compensation provisions within section 28 of the Highways Act 1980 are triggered; an affected landowner can claim compensation from the County Council if they can demonstrate that the value of their land has depreciated, or they have suffered damage by being disturbed in their enjoyment of the land. The costs for this could be significant and would have to be paid in full by the County Council. Processing these claims and recovering the costs from applicants could have a disproportionate impact on officer time meaning fewer applications can be dealt with.

8.3. The General Notes which accompany the application form have been updated to reflect this new guidance and these are available on the County Council's website.

Recommendation

9. I RECOMMEND Members consider this report and note its content.

Contact Officers:

Laura Wilkins – Definitive Map Team Leader
Tel 03000 41 34 80 – Email: laura.wilkins@kent.gov.uk

Graham Rusling – Public Rights of Way and Access Service Manager
Tel: 03000 41 34 49 - Email: graham.rusling@kent.gov.uk
Public Rights of Way & Access Service