DELETION FROM THE DEFINITIVE MAP AND STATEMENT

1. The Applicants have applied for the Application Route to be deleted from the Definitive Map and Statement ("the DM&S") on the grounds that the path was included in error. Section 53(3)(c)(iii) of the 1981 Act states that the DM&S can be modified upon; *"…the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that there is no public rights of way over land shown in the map and statement as a highway of any description…"*

2. The Court of Appeal has provided judicial guidance on the correct interpretation of this subsection in the Trevelyan Case[1]. At paragraph 38 of the Court of Appeal judgement, Lord Phillips states that; "*Where the Secretary of State or an Inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial assumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance if it is to outweigh the initial presumption that the right of way exists."*

3. As detailed in Appendix 5, the Application Route is currently recorded on the DM&S as a public bridleway and the advice of Lord Phillips in the Trevelyan Case therefore requires the Authority to put a significant amount of weight in favour of public bridleway status into the balance at the outset. However, the presumption that the DM&S is correct can be rebutted if clear and cogent evidence of some substance is produced to demonstrate that an error was made. In the Hood Case[2], Lord Denning states that "*The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living, Such evidence might well have been lost or forgotten by 1975*." The onus lies with those who contend that a mistake was made when the Application Route was recorded, rather than for the Authority, or any party who opposes deletion of the Application Route, to prove that the DM&S is correct.

4. Further guidance is contained in paragraphs 4.30 to 4.35 of DEFRA's Rights of Way Circular 1/09 which state:

> **Deletion or downgrading of ways shown on the definitive map and statement**
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> 4.30 The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.

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[1] Trevelyan v Secretary of State for the Environment, Transport and the Regions (CA) [2001] EWCA Civ 266, [2001] 1 WLR 1264 (BBE)

[2] R v Secretary of State for the Environment, ex parte Hood [1975] 1 QB 891, [1975] 3 All ER 243

4.31 Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.

4.32 Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways described in paragraphs 4.30 and 4.31, the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the definitive map and statement in cases where evidence shows that rights did not exist at the time when they were first shown on the map. In making an order the authority must be able to say, in accordance with Section 53(3) (c) (ii) or (iii), that a highway of a particular description ought to be shown on the map and statement as a highway of a different description; or that there is no public right of way over land shown in the map and statement as a highway of any description.

4.33 The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:

- the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made,
- the evidence must be of sufficient substance to displace the presumption that the definitive map is correct,
- the evidence must be cogent.

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.

4.34 Applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application; however it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way.

4.35 In the case of deletions, earlier guidance indicated that a case for presumed dedication could be established on a way that had previously been recorded on the definitive map but which was found, subsequently, to have been recorded in error. This was based on the belief that user, between the time of the first recording of the way on the definitive map and statement and the time when it was determined that an error had been made could give rise to presumed dedication. The date of first recording means either the date of the original publication of the first definitive map; the date of publication of a review; or the relevant date of an order adding the path to the definitive map, whichever was appropriate. The date of first recording would have been the first point in time at which it could have been legally recognised that rights over the way were recorded in the form being challenged. Defra believes that this advice was wrong. Defra's view is that use of the way in such circumstances cannot be seen to be as of right, as rights that cannot be prevented cannot be acquired. It not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed.

5. The Authority's decision as to whether a Definitive Map Modification Order should be made to delete the Application Route from the DM&S must be based solely on the available evidence which indicates whether or not a public right of way exists. The Authority cannot take into consideration the desirability or suitability of the Application Route, as stated in the Mayhew Case[3], the Lasham Case[4] and Planning Inspectorate's Rights of Way Advice Note No.7.

[3] *Mayhew v Secretary of State for the Environment [1992] 65 P & CR 344; [1993] JPL 831; [1993] COD 45*
[4] *Lasham Parish Meeting v Hampshire County Council [1992] 65 P & CR 3; 91 LGR 209; [1993] JPL 841*