

Bath & North East Somerset Council

MEETING:	Regulatory (Access) Committee
MEETING DATE:	18 December 2012
TITLE:	Manor Farm DMMO
WARD:	Chew Valley North
AN OPEN PUBLIC ITEM	
List of attachments to this report:	
Appendix 1 –	Bath and North East Somerset Council (CL15/11, Manor Farm, Norton Malreward) (No. 2) Definitive Map Modification Order 2012
Appendix 2 –	Definitive Map and Statement process
Appendix 3 –	Reclassification Order
Appendix 4 –	Deletion from the Definitive Map and Statement
Appendix 5 –	Evidence
Appendix 6 –	Objections and representations

1. THE ISSUE

- 1.1 Bath and North East Somerset Council, in its capacity as the surveying authority, (“**the Authority**”) is required to submit the Bath and North East Somerset Council (CL15/11, Manor Farm, Norton Malreward) (No. 2) Definitive Map Modification Order 2012 (“**Order No. 2**”) (see Appendix 1) to the Secretary of State for determination and it falls to the Regulatory (Access) Committee (“**the Committee**”) to consider what position the Authority should adopt during the determination of Order No. 2

2. RECOMMENDATION

- 2.1 The Regulatory (Access) Committee is requested to decide whether to support, oppose or take a neutral stance regarding confirmation of Order No. 2 which it was previously satisfied to make.

3. FINANCIAL IMPLICATIONS

- 3.1 Financial implications are not a relevant consideration which may be taken into account under the provisions of the Wildlife and Countryside Act 1981 (“**the 1981 Act**”). The Authority’s costs associated with the determination of Order No. 2 are likely to total in the region of £2,500 if external legal representation is not considered necessary; this will be met from existing public rights of way budgets in 2013/14. These costs include the venue and advertising of the public inquiry/hearing, legal fees and the officer time required to prepare for, and attend, the public inquiry/hearing. These costs are likely to increase by approximately £7,500 if the Authority considers that external legal representation is necessary at the inquiry/hearing.

- 3.2 Paragraph 9.1 of DEFRA's Rights of Way Circular 1/09 deals with the issue of costs awards to parties at a hearing or inquiry and states;

"The parties in rights of way proceedings that arise when a rights of way order is submitted to the Planning Inspectorate for confirmation are normally expected to meet their own expenses. In these cases, unlike with civil litigation, an award of costs does not necessarily follow the outcome. In other words costs are not simply awarded to the party in whose favour the judgement goes. Subject to the exceptions outlined in paragraphs 9.6 to 9.9 [of Circular 1/09], costs are awarded only on grounds of "unreasonable" behaviour. The Planning Inspectorate may order that one party pay the costs of another in a case where:

- 1. that party has behaved "unreasonably"; and,*
- 2. the unreasonable behaviour has caused the other party to incur unnecessary costs that they would not otherwise have incurred."*

4. THE REPORT

- 4.1 The Authority is under a legal duty to keep the DM&S under continuous review under the 1981 Act.
- 4.2 On 31 March 1998, Mr M J P Pye, Mrs R A Pye and Mr J G Jones ("**the Applicants**") made an application for a Definitive Map Modification Order ("**DMMO**") to be made to delete "bridleway CL15/11 from Norton Malreward village to Parish Boundry" (sic.) from the DM&S on the ground that the route is not a public right of way. On 30 May 2012, the Committee resolved that a DMMO should be made to delete from the Definitive Map and Statement ("**the DM&S**") the section of bridleway CL15/11 running from a junction with restricted byway CL15/11 to a junction with public footpath CL15/2 on the grounds that it was not a public right of way. The Committee also resolved that a DMMO should not be made to delete the remainder of bridleway CL15/11 from the DM&S; the Applicants did not lodge an appeal against this decision under schedule 14(4) of the 1981 Act.
- 4.3 On 18 July 2012 the Authority made the Bath and North East Somerset Council (CL15/11, Manor Farm, Norton Malreward) Definitive Map Modification Order 2012 ("**Order No. 1**"). The map which forms part of Order No. 1 was subsequently scrutinised by officers and it transpired that the map is fatally flawed. Consequently, on 11 September 2012 the Authority's Senior Rights of Way Officer authorised for Order No. 1 to be submitted to the Secretary of State with a recommendation that Order No. 1 is not capable of confirmation. Furthermore, a new DMMO was authorised to be made to give effect to the Committee's intentions as expressed at the meeting on 30 May 2012.
- 4.4 On 18 September 2012, the Authority made Order No. 2 which seeks to delete the section of bridleway CL15/11 commencing from a junction with restricted byway CL15/11 at grid reference ST 6033 6509 (Point A on the Order Map contained at Appendix 1 ("**the Order Map**")) and continuing in a generally easterly then southeasterly direction for approximately 84 metres to a junction with public footpath CL15/2 at grid reference ST 6041 6508 (Point B on the Order Map); this route is hereafter referred to as "**the Order Route**". Order No. 2 is therefore made pursuant to the Committee's resolution made on 30 May 2012 and referred to in paragraph 4.2 above.

- 4.5 The making of Order No. 2 was duly advertised in accordance with schedule 15(3) of the 1981 Act and consultees were informed that objections previously received in respect of Order No.1 would be considered to apply to Order No. 2 unless the objectors informed the Authority otherwise. In addition to the 48 objections originally received against Order No. 1, the Authority also subsequently received 7 additional objections against Order No. 2. This brings the total number of objections to 55 and the total number of representations to four; all objections and representations are contained at Appendix 6. In light of the outstanding objections, the Authority is required under schedule 15(7) of the 1981 Act to submit Order No. 2 to the Secretary of State for determination. The Secretary of State has authorised the Planning Inspectorate to determine DMMOs on his behalf and the Planning Inspectorate will appoint an Inspector for this purpose.
- 4.6 However, before Order No. 2 is submitted to the Planning Inspectorate for determination it falls to the Committee to consider the objections and to decide whether the Authority should support confirmation, oppose confirmation or take a neutral stance during the determination of Order No. 2. The Committee's decision should be based upon whether or not the available evidence shows the Order Route to be a public right of way.
- 4.7 The Order Route was originally recorded on the DM&S which has a relevant date of 26 November 1956. The DM&S, the process involved in the production of the DM&S and the process involved in the inclusion of the Order Route on the DM&S are discussed at Appendix 2.
- 4.8 In 1989 the Order Route was the subject of a Reclassification Order and two public inquiries together with a High Court hearing which was subsequently held, as discussed at Appendix 3. This Reclassification Order process was concerned with whether or not the Order Route should be reclassified as another status of public right of way. The purpose of the Reclassification Order, public inquiries and High Court hearing did not principally consider whether or not the Order Route was a public right of way. Subsequent to the conclusion of the Reclassification Order process, the Applicants submitted their Application contending that there are no public rights over the Order Route.
- 4.9 If Order No. 2 is to be confirmed, the Inspector must be satisfied that there is no public right of way over the Order Route. To arrive at such a conclusion the evidence must fulfil certain requirements:
- the evidence must be new,
 - the evidence must be of sufficient substance to displace the presumption that the DM&S is correct,
 - the evidence must be cogent.

Paragraphs 4.30 to 4.35 of DEFRA's Rights of Way Circular 1/09 provide guidance on what is required to delete a route from the DM&S. Extracts from this Circular, the relevant statutory and regulatory provisions and case law are contained at Appendix 4.

- 4.10 The grounds for objection broadly fall into two groups; firstly, that the evidence does not demonstrate that the Order Route is not a public rights of way and, secondly, that deleting the Order Route from the DM&S would inconvenience path users and would increase the risk to horseriders. The former of these grounds are legally relevant and the associated matters are addressed in paragraphs 4.12 to 4.15 below and in Appendix 5. The second group are not a relevant consideration as detailed in the Planning Inspectorate's Advice Note No. 7 and these grounds should therefore be disregarded by the Committee.
- 4.11 Previous to the making of Order No. 2, the Authority's Senior Rights of Way Officer examined all the available evidence in the Authority's possession comprising that which has been submitted by Applicants and consultees and that held at the Somerset Heritage Centre in Taunton and The National Archives in Kew. This evidence is detailed and assessed in Appendix 5.
- 4.12 The following documents provide evidence that, at the time they were surveyed or produced, at least a section of the Order Route physically existed:
- 1" Ordnance Survey map (1830)
 - 1:2500 Ordnance Survey map (1903)
 - 1:2500 OS map (1986)
 - User Letter (1989)
 - Sale Particulars Plan (1992)
- 4.13 The following documents which relate to the Order Route, or land adjacent to the Order Route, do not provide evidence of either the physical existence of the Order Route or whether the Order Route was a public right of way:
- Langdon Estate Survey (1693)
 - Norton Malreward Deeds (1718-1799)
 - Day and Masters' Map (1782)
 - 1" Ordnance Survey map (1809)
 - Norton Malreward Tithe Map and Award (1840)
 - Railway Plans (1860-1886)
 - Vestry Minute Book (1861)
 - Finance Act documents (1910-1914)
 - Building Control Plans (1914)
 - Take Over Map (1929)
 - Bartholomew's Map (1945)
 - 1:2500 Ordnance Survey map (1958)
 - Land Registry Title Plans (1992)
- 4.14 A letter from the then landowner Mr Young (1990) contained at Fig. 18 of Appendix 5 and the Statutory Declaration of Mr Goldstone's (1997) contained at Fig. 23 of Appendix 5 suggest that the Order Route was not physically passable. However, this evidence must be weighed in balance with other evidence, particularly that detailed in paragraph 4.12 above and the email from Mr Young's daughter (2012) contained at Fig. 19 of Appendix 5. Mr Young's letter and Mr Goldstone's Statutory Declaration rely upon recollections of events which took place several decades earlier; whereas, with the exception of the User Letter, the authoritative documents detailed in paragraph 4.12 were produced following contemporaneous surveys. On balance the Senior Rights of Way Officer considers that the Order Route did physically exist and was passable by pedestrians, equestrians and cyclists prior to, and at the time of, the DM&S's Relevant Date of 26 November 1956.

- 4.15 Aside from the DM&S, it is considered by the Senior Rights of Way Officer that the documents listed above and considered at Appendix 5 provide modest evidence of the existence of public rights over the Order Route on the Relevant Date of 26 November 1956. Notwithstanding that, the approach in relation to the confirmation of Order No. 2 must be whether there is the necessary clear and cogent evidence to remove the public rights of way over the Order Route from the DM&S and whether it has been demonstrated that an error was made when the Order Route was originally recorded. As stated in paragraph 4.34 of DEFRA's Rights of Way Circular 1/09, it is not for those supporting the continued recording of the Order Route to demonstrate that the DM&S reflects the true rights, but for those seeking deletion to show that an error was made and that the Order Route should be deleted.
- 4.16 In light of the Committee's previous decision and any new information and objections it may be necessary to revisit the Committee's earlier approach to how to deal with Order No. 2 at the inquiry.
- 4.17 If the Committee considers that there is insufficient cogent evidence to show on the balance of probabilities that an error was made when the Order Route was recorded as a public right of way on the DM&S the Authority should oppose confirmation of Order No. 2 when it is being determined by the Inspector.
- 4.18 If the Committee considers that there is sufficient cogent evidence to show on the balance of probabilities that an error was made when the Order Route was recorded as a public right of way on the DM&S the Authority should support confirmation of Order No. 2 when it is being determined by the Inspector.
- 4.19 Alternatively, the Authority can take a neutral stance if the Committee considers this to be the appropriate position to adopt. Paragraph 7 of the Planning Inspectorate's Rights of Way Section Advice Note No. 1 states; "*There may...be occasions where the [Authority] supported the initial making of the order but advertisement brought to light new information, further evidence or valid objections which caused the [Authority] to conclude that confirmation was not justified. Again, the [Authority] may opt to actively oppose confirmation of the order or it may choose to remain neutral as regards confirmation.*" If the Committee resolves that the Authority should take a neutral stance then the Applicants, or any other supporter of Order No. 2, will have the opportunity to present the case for confirmation of Order No. 2.
- 4.20 Importantly, if the options in paragraphs 4.17, 4.18 and 4.19 are considered justified by the Committee the Planning Inspectorate will require an indication of the Committee's reasons for doing so.

5. RISK MANAGEMENT

- 5.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Authority's decision making risk management guidance.

6. EQUALITIES

- 6.1 An Equalities Impact Assessment has not been completed because the impact upon equalities is not a consideration which may be taken into account under the provision of the 1981 Act.

6.2 The Authority's position with regards to Order No. 2 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 Order Route. The 1981 Act does not permit personal considerations to be taken into account.

7. CONSULTATION

7.1 The Authority wrote to all owners of land over which the Order Route runs, the Applicants, Statutory Undertakers, national and local user groups, Norton Malreward Parish Council, the Ward Councillor and interested individuals. Consultees were provided with a copy of Order No.2 and the accompanying statutory notice. Interested parties and all other members of the public then had 42 days during which they could object to Order No.2.

7.2 As stated in paragraph 4.5 above, objections and representations to Order No. 1 were considered to apply to Order No. 2. A total of 55 objections and four representations were received by the Authority. The objections and representations are contained at Appendix 6 and the contents of the objections are considered in paragraph 4.10 above.

8. ISSUES TO CONSIDER IN REACHING THE DECISION

8.1 The issues to be considered in reaching the decision are detailed in the body of the Report and in Appendix 4.

9. ADVICE SOUGHT

9.1 The Authority's Monitoring Officer (Divisional Director – Legal and Democratic Services) and Section 151 Officer (Divisional Director - Finance) have had the opportunity to input to this report and have cleared it for publication.

Contact person	Graeme Stark, Senior Rights of Way Officer (Telephone 01225 477650)
Background papers	DEFRA's Rights of Way Circular 1/09 Planning Inspectorate Rights of Way Section Advice Note No. 1 Planning Inspectorate Rights of Way Section Advice Note No. 7 Inspector's Decision Report into the Inspector's Decision Report dated 28 May 1997
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