Appendix 4
Deletion from the DM&S

DELETION FROM THE DEFINITIVE MAP AND STATEMENT

1. INTRODUCTION

1.1 The Authority has made a Definitive Map Modification Order ("**DMMO**") to delete the Order Route from the Definitive Map and Statement ("**DM&S**") on the grounds that the Order Route was included in error.

1.2 Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 ("**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. RELEVANT STATUTORY AND REGULATORY PROVISIONS

2.1 Section 53 of the 1981 Act provides:

> *(2) As regards every definitive map and statement, the surveying authority shall -*
>
> *(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
>
> *(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.*
>
> *(3) The events referred to in sub-section (2) are as follows -*
>
> *. . .*
>
> *(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows -*
>
> *(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;*
>
> *(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*
>
> *(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

2.2 Schedule 15(7) of the 1981 Act as amended provides:

> *(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.*
> *(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either—*
> *(a) cause a local inquiry to be held; or*
> *(b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.*
> *(2A) The Secretary of State may, but need not, act as mentioned in sub-paragraph (2)(a) or (b) if, in his opinion, no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order, either with or without modifications.*
> *(3) On considering any representations or objections duly made and the report of any person appointed to hold an inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.*

3. SOME RELEVANT CASE LAW

3.1 In a Court of Appeal decision of the Trevelyan Case[1] concerning a claim for judicial review of an inspectors decision to confirm an order of the Secretary of State, it was held;

> *"Where the Secretary of State or an inspector appointed by him had to consider whether a right of way which was marked on a definitive map in fact existed, he should start with an initial presumption that it did. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed, and thus that such evidence existed. At the end of the day, when all the evidence had to be considered, the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities. Evidence of some substance had, however, to be put in the balance, if it was to outweigh the initial presumption that a right of way existed. In the instant case, the inspector had directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. His finding that it was, on the evidence, beyond the bounds of credibility that a right of way had existed over the material portion of bridleway 8 was a finding of fact which, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error."*

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

3.2 At paragraph 38 of the transcript 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."*

3.3 In the Hood Case[2] concerning an appeal to quash an order made by the Secretary of State 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."*

4. EXTRACT OF RELEVANT GUIDANCE IN DEFRA's RIGHTS OF WAY CIRCULAR 1/09

4.1 Further guidance is contained in paragraphs 4.30 to 4.35 of DEFRA's Rights of Way Circular 1/09 (the guidance has no legal status) which state:

Deletion or downgrading of ways shown on the definitive map and statement

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.

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.

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

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.

4.36 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.