

## **Rights of Way Service**

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### **1. Summary**

- 1.1.** This report provides an update on the finances and workload of the Rights of Way Service (the Service), with a particular focus on the statutory duty to keep the Definitive Map & Statement under continuous review.
- 1.2.** Rights of Way has many cross-cutting themes, most notably with health, sustainable transport, modal shift, tourism, and economic regeneration. As a result, the Service has many links, direct or indirect with the targets contained within the County Plan, as follows:
  - We will reduce early deaths from preventable causes.
  - We will work to increase customer satisfaction across Somerset County Council.
  - We will improve digital services such as dedicated websites for vulnerable groups – providing necessary alternatives for those unable to access online services.
  - We will work with the voluntary, community and social enterprise sector to have more volunteers, help and support available within Somerset's communities.
  - We will work with our partners to bring more start-ups and attract new business into Somerset.
  - We will maintain our highways to allow our communities to travel safely and invest in our street lighting to help reduce Somerset's carbon footprint.
  - We will provide more opportunities for local suppliers to provide us services.
  - We will ensure that more of our contracts deliver a real social benefit to our communities.
  - We will ensure that by 2020, when Government ends its funding for our day-to-day services, we will be in a sustainable financial position.

### **2. Issues for consideration / Recommendations**

- 2.1.** Concerns have been raised in relation to applications to modify the Definitive Map & Statement. This paper sets out the context of the Service from a financial and resource point of view, with a particular focus on the backlog of applications and associated issues.
- 2.2.** The Committee is invited to consider the contents of the report.

### 3. Background

- 3.1. In broad terms the Highways Act 1980 provides a range of duties and powers in relation to how the Service should protect and assert the rights of the public and how changes can be made to the path network. Most local authorities, Somerset County Council (SCC) included, for practical purposes generally interpret this as the recorded path network on the Definitive Map & Statement (DMS). The Wildlife & Countryside Act 1981 provides a range of duties in relation to ensuring that the DMS is kept up to date and under continuous review. It is under this Act that there is provision for anyone to apply to SCC where they believe the DMS is not an accurate record of the public rights (this could be an existence, status, width or alignment issue).
- 3.2. The Service is structured around delivery of functions under these two acts. The Maintenance & Development Team deals with; day-to-day maintenance, development control issues, volunteer scheme administration, and the Definitive Map Team determine Definitive Map Modification Order (DMMO) applications and process other legal orders and events.
- 3.3. **Service Staff Structure**  
The Maintenance & Development Team has 12.34 FTE (inclusive of Service Manager post, excluding Exmoor National Park Authority staff) and the Definitive Map Team has 6.2 FTE (2.2 of which are focussed on non-rights of way work dealing with Land Charge enquiries). A full breakdown is available in Appendix 1.
- 3.4. **Service Budgets**  
The Maintenance & Development revenue budget is currently £669k. The Definitive Map revenue budget is currently £147k (this includes c.£110k income from Land Charges work and other paid for Rights of Way services). The total capital allocation for 2018/19 is £433k, which goes towards new bridges, structures and minor capital items to support the volunteer schemes.
- 3.5. There is a legal presumption that the DMS is conclusive evidence of what it shows until proven otherwise. The backlog of DMMO applications is primarily comprised of applications to add or upgrade rights as opposed to deletion of existing rights. These factors are pertinent in how the Service currently weights limited resources towards the network that is recorded on the DMS, with a lesser amount focussed on investigating applications that assert that the DMS is incorrect (not all applications are successful). It should also be noted that the Council is on occasions served Highways Act 1980 notices by the public in relation to the recorded network, for obstructions (s130A) or routes being out of repair (s56). It is therefore important that where possible we continue to maintain a high percentage of the recorded network being available and easy to use to avoid court action that may flow from any notices served.
- 3.6. **Workload & performance**  
Maintenance & Development - approximately 3100 live issues (service requests, obstructions, etc.) on the recorded 6100km+ path network, administration of 6 volunteer schemes, development control issues, and processing of diversion proposals. The primary performance indicator for this team is a nationally recognised indicator known as 'ease of use'. Current performance in this respect is relatively stable and for 2017/8 was 82% of the

network being classed as 'easy to use'.

Definitive Map – 325 undetermined DMMO applications and 6 Town & Village Green (TVG) applications, and processing of other legal orders/ events. Approximately 10 determinations a year, ideally including one TVG application. This was achieved last year and is hoped to be achievable this year, albeit there was no TVG application determination last year.

### **3.7. DMMO applications**

There are some important points to consider in relation to DMMO applications;

- they are the applicant's assertion,
- officers are required to consider all available evidence and make a recommendation based upon the evidence,
- where the evidence is insufficient to support the making of an order, applications must be, and are, refused (44% of those applications determined in 2017/18 were refused)
- where confirmed, the orders will not always reflect exactly what was applied for,
- there are appeal processes involving the Secretary of State (SoS) regardless of the decision,
- there is no ability to charge applicants,
- suitability of the physical route cannot be a consideration,
- January 1<sup>st</sup> 2026 will be the cut-off date for applications based on pre-1949 documentary evidence.

**3.8.** The backlog of applications is one of the largest nationally. An application submitted today could experience a 30-year delay before being determined. DMMO applications should be determined 'as soon as reasonably practicable', however there is no set timescale. The backlog has occurred for the simple reason that the rate of applications being submitted has exceeded the determination rate and this has occurred to greater or lesser degrees for a significant number of years. Over the last 5 years the average number of applications received per annum is 22.5, over double the current determination rate. The appropriate response to address the backlog is to increase the determination rate, either through additional resource or a change to process. A streamlined process has been adopted and is largely still in place, however the levels of scrutiny that currently exist from applicants and objectors means that on most occasions a fully streamlined process is not achievable. A typical investigation can take approximately 6 months to determine (allowing for consultation periods).

**3.9.** Due to difficulties with staff retention and recruitment, the use of consultants was trialled on a small number of applications. Following a successful recruitment exercise no further applications have been assigned to consultants. There were concerns raised about the quality of the consultants' reports. Whilst the reports were not in the standard Council format, their content was deemed sufficient to enable a decision to be taken. Any future use of consultants would see them use the Council's template for consistency.

**3.10.** The size of the backlog has reduced slightly in the last year, but will be subject to fluctuation, and there is the possibility it will increase further as the 2026 cut-off date approaches.

**3.11.** Applicants do have a right to appeal should their applications not have been

determined within 12 months of receipt. The Deregulation Act 2015 contains a provision that this appeal process will switch from the Secretary of State (SoS) to the Magistrates' Court. This change would mean appellants paying a court fee, where currently there is no charge to appeal to the SoS. It is considered that this change (yet to be implemented) has been part of the reason behind a considerable increase in the number of appeals in the last 3 years. In parallel there has been a change in response from the SoS to such appeals. Historically such appeals were dismissed, whereas now the SoS is directing the Council to determine them within a set timescale (varying from 6 months – 4 years so far). This change in approach is replicated across the country. There are currently 27 applications subject to a direction. It is not always possible to meet the timescale set by the SoS.

### **3.12. Statement of Priorities**

DEFRA advises that the SoS, when determining a non-determination appeal, will consider any statement that the local authority produces that sets out their priorities in relation to DMMO applications. This statement is often referred to as a Statement of Priorities. It is believed the Council has had such a statement in place for more than 15 years. The current version is appended to this report.

**3.13.** The current SoP refers to a scoring mechanism to prioritise applications, which was a product of the Rights of Way Improvement Plan 2006. In 2011 applications were scored with a view to scoring rounds taking place every 5 years to ensure a degree of chronology to the system. Applicants submitting DMMO applications after 2011 were assured they would be scored in 2016. The scoring round in 2016 was put on hold pending consideration of a revision to the SoP. The 2016 scoring round, along with the size of the backlog, and increase in non-determination appeals led to a review of the SoP, which is now nearing a conclusion. The latest draft, along with the 2011 scored list and the list of applications since 2011 (unscored), are appended to this report.

**3.14.** It is not expected that the draft SoP, if adopted, will prevent non-determination appeals or resulting directions from the SoS. However, a few important changes are proposed as follows:

- Where there is a direction from the Secretary of State to determine an application within a specified timeframe the application will be prioritised (reflecting current practise).
- The current scored list of applications will continue to be investigated in scored order, and unscored applications will be investigated thereafter in chronological order.
- Investigations initiated by the County Council will be treated as 'applications' for the purposes of this policy (reflecting current practise).
- Applications in relation to paths where a decision has already been reached by the Authority will not be treated differently in terms of priority simply because they are second applications. Previously such applications were given less priority than first applications. However, a disadvantaged applicant or landowner may well find additional evidence to support their position and reverse any previous decision. Arguably if such evidence is found, the application should be given no greater or lesser priority than a first application.

### **3.15. Register of DMMO applications**

There is a statutory requirement to publish a register of DMMO applications. This can be found at <http://roam.somerset.gov.uk/roam/Dashboard/Welcome> . Details of who has made the applications is also available via this website. By far the greatest type of applicant are the equestrian users, responsible for over 80% of applications. Current off-road provision for equestrians is poor outside of the protected landscapes, hence the applications from equestrian associations or individuals are for adding bridleways/ restricted byways or upgrading of existing footpaths to bridleways/ restricted byways.

- 3.16.** Given not all applications are successful it is difficult to speculate too much as to the reasons for a high level of applications from the equestrian sector. However, possible reasons are that; not all rights were captured when the Definitive Map was first produced (1950s-70s), and the particular geography of Somerset with numerous drove roads potentially provides for a greater number of physical routes compared to other authorities and that these routes may carry public rights.

**3.17. Costs of processing DMMO applications**

A rough cost estimate of investigating an application to the point of determination (based on current resource and determination rate per annum) is £4,000 (inclusive of on-costs). Once determined there are a number of routes an application could take with different officer costs associated with each.

Applications, where they are not controversial or contentious, are determined under delegated powers. Where they are controversial or contentious, then they are recommended to the Regulation Committee for a decision. The approximate split is 50/50. Preparing a determination to go to Committee attracts additional Rights of Way officer time in the region of £500-600.

**3.18. Legal support and costs**

Legal support for the Maintenance & Development functions is very ad-hoc and is almost entirely internal apart from for occasional development-related legal agreements that are outsourced and funded by the developer.

Legal support for DMMO applications prior to decision is generally only called upon when the decision is taken by the Regulation Committee, i.e.: where the case is controversial or contentious. The cost of this support per Committee (assuming usually one Rights of Way item per Committee) is estimated to be £1300-1500. Combined legal support and rights of way officer costs for applications being determined by Regulation Committee equates to c.£6000.

Where determinations result in a public inquiry being held, advocacy support is generally sought. This tends to be a Rights of Way specialist, as opposed to a legally trained professional. Preparation and attendance at a 3-day inquiry can cost in the region of £2000.

**3.19. Town & Village Green applications**

Whilst there are only a handful of applications, it is not unusual for those applications intended as a possible way of preventing development, to be controversial or contentious. In such circumstances it is the Regulation Committee that makes the decision. To support the Committee in coming to a decision it is common practise for Councils to instruct a barrister to hear the evidence at a non-statutory public inquiry and come to a recommendation. A

standard inquiry would be 3 days and the Council sets aside £15,000 for the cost of such an inquiry.

#### **4. Consultations undertaken**

**4.1.** The draft SoP has undergone consultation with the Local Access Forum and with the Regulation Committee in September. The decision to adopt the draft will be taken in the coming weeks.

#### **4.2. Approach of other Councils**

It is understood that there are only 3 or 4 Councils in a similar position, although this may be a changing picture with the revenue support grant reduction and the 2026 cut-off date approaching. At one such authority, applications were dealt with by the legal services team and were not considered a high priority. Another authority has triple the officer resource for tackling their sizeable backlog.

**4.3.** In general, the legislation does constrain what is achievable in dramatically increasing productivity when it comes to determining modification applications. Contact was made recently with Northumberland County Council, as we were made aware that they had a backlog (less than half the size of Somerset's), which they have since managed to eliminate with a similar staff resource. This was achieved over the space of a decade and centred on reduced analysis of evidence, leaving the Secretary of State to consider the finer details and arguments should a decision be appealed or objected to. The application receipt rate was much lower than in Somerset and they also had a lower percentage of appeals/ objections. It was also based upon a stable and experienced workforce, something that we are striving towards.

**4.4.** As previously referenced, the current level of scrutiny on determination reports in Somerset makes a lighter analysis of evidence more difficult. There would likely be criticism from both the applicant and affected landowners/ objectors as and when decisions were not in their favour, for not considering the evidence in sufficient detail. The Council currently has a good record in decisions being upheld by the SoS and there is a danger that reducing the analysis would lead to that reputation changing and the quality and impartiality of officer reports attracting greater scrutiny and criticism. Officers continue to examine how investigations and reports can be streamlined to achieve greater efficiencies without losing quality. The similarity of evidence in many of the applications enables some of the analysis to be replicated across reports.

**4.5.** Research has shown that there is one Council (Norfolk CC) that have taken the decision that where possible a neutral stance will be taken at public inquiries. In such circumstances it would generally fall to the applicant to support the decision of the Council at the public inquiry. The expectation of the SoS is that the decision made by the Council would be supported by the Council at any resulting inquiry.

#### **5. Implications**

##### **5.1. DMMO applications**

There are currently 3 areas where the performance falls below what might be considered to be acceptable:

- The timescale for determinations from receipt of application is longer

than a fair interpretation of 'as soon as reasonably practicable'.

- The capacity to refer opposed orders to the SoS is being hampered by concentrating on meeting SoS directions.
- The cumulative effect of SoS directions (currently 27) and their short timescales means that the deadlines are increasingly being missed.

**5.2.** The implications of the above are largely reputational. There is no set timescale for determining an application. There is no apparent course of further action where the Council fails to meet SoS direction deadlines.

To avoid the backing up of too many opposed orders awaiting referral to the SoS, the workload balance is now being altered to ensure that this workstream resumes alongside continuing to attempt to meet SoS directions. With no additional resource this will likely result in the determination rate being affected and the degree by which SoS directions not being met, increasing.

**5.3.** To address, in part, the above implications, the Service contends that an additional 4 investigating officers would greatly assist, although it is recognised that such an investment may be difficult in the current financial situation.

## **6. Background papers**

**6.1.** See appendices

**Note** For sight of individual background papers please contact the report author

### **Appendices**

- Appendix 1 Rights of Way Service Staff Structure
- Appendix 2 Statement of Priorities
- Appendix 3 Draft Statement of Priorities 2018
- Appendix 4 Scored and unscored list of DMMO applications