

Rights of Way Service - update

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Cabinet Member: Councillor John Woodman

Division and Local Member: All

1. Summary

- 1.1.** A report detailing the Rights of Way Service, with a particular focus on applications to modify the Definitive Map & Statement was presented to the Committee on 13th November 2018. The Committee asked that the Service undertook a review of this area of work and return to present their findings at this meeting. That review has now been completed and the findings are summarised in Appendix 1.
- 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** The Committee is asked to consider and comment of the service review of applications to modify the Definitive Map and the efficiency proposals made.
- 2.2.** There are currently in the region of 330 undetermined applications to modify

the Definitive Map and Statement of Rights of Way. In each case the applicant considers that the legal record is in error and should be corrected. The size of this backlog raises two main areas of concern:

- The authority is under a statutory duty (Wildlife & Countryside Act 1981) to determine applications '*as soon as reasonably practicable*,' which based on current resources and determination rates, is not possible.
- Directions issued by the Secretary of State (SoS) to determine applications within a specified time frame means that the order in which applications are determined is affected, with determination of some of the oldest applications being delayed due to resources being redirected to focus on SoS directions.

39 SoS directions have been received since July 2016, the deadlines for 24 of which have now passed. 6 of those were complied with on time, 9 have been determined after the deadline and 9 still await a determination.

2.3. The appropriate response to address the above areas is to increase the determination/ referral rate, either through additional resource or a change to process. A streamlined process was adopted some years ago 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 will take approximately 6 months to determine (allowing for research, consultation periods, consideration of responses).

2.4. The last 5 years has seen continuous process improvement with regard to report structure and being able to use standard text across similar applications. Previous staff turnover and vacant posts were not helpful with regard to service delivery, but recent stability in this area, coupled with the continuous improvement is beginning to pay dividends, but ultimately will not make a dramatic impact on the current backlog or long delays in investigating recently submitted applications.

2.5. For the purposes of the process review, consideration of where further efficiencies can be achieved was broken down into 3 distinct stages of dealing with applications; i) Investigation & Report (IR), ii) Decision-making (D), and iii) Post Determination (PD). The following sections summarise the proposals being recommended under the first and last stage and the efficiency that each could deliver. Further to consultation with the Regulation Committee the previously proposed recommendations (D2 & D3) under the decision-making section are now not being recommended. Full details of all proposals, including those not recommended for implementation, can be found in Appendix 1.

2.6. Investigation & Report

ID	Proposal	Efficiency per application
IR4	Review both primary and secondary lists of documents	½ day
IR5	Use of volunteer resource to assist with the digitising of records to avoid repeat trips to Somerset Heritage	Neutral in the short-medium term but ½ day in the long term

	Centre	
IR6	Only interview users by phone unless absolutely necessary to do it in person.	1 day (only relevant to approximately 15% the backlog)
IR8	Shortened investigation where there is conclusive evidence, eg: referenced as public in the Inclosure Award	2 days (likely to only apply to 12-15 applications)
IR10	Eliminate draft report consultation stage	3 days

2.7. Post Determination

ID	Proposal	Efficiency per application
PD1	Adopt neutral stance for opposed orders where we cannot contribute further to the process with regard to the evidence <i>NB: To be considered on a case by case basis</i>	10 days (only applies to applications resulting in opposed orders).
PD2	Minimal additional work for refusal appeals	2½ days (only applies to refusal appeals)
PD3	Minimal additional work for statement of case for opposed orders	5 days (only applies to application resulting in opposed orders)

- 2.8.** The efficiencies per application will vary due to the different scenarios as outlined above but could vary from 5½ to 20 working days. The decision-making proposals (D2 & D3) that were previously being recommended would only have increased the efficiency by approximately 1 day per case. There will undoubtedly be fluctuations either way with these estimates and it must be acknowledged that these proposals are not without risks. The risks (actual and perceived) are highlighted in Appendix 1. Condensing and omitting parts of the current process could result in the risk that determinations are open to greater challenge. This risk will be managed on a case by case basis with the main aim to avoid any opportunity for an application for costs at a later date as part of any objection process.
- 2.9.** If an average efficiency of 13 days per case is taken, with currently c.10 applications being determined a year, this could result in a total of 130 extra working days per year being freed up. Based on approximate calculations this could enable a further 3 applications to be determined a year reducing the approximate 30 year wait for an application submitted today to 23 years.
- 2.10** Whilst this is a considerable improvement with almost a third more cases being determined, there would still be a substantial backlog and this highlights the need for additional resources if the rate of determination is to be dramatically increased. The Rights of Way Service will keep under review its processes for determining applications and how these can be improved alongside implementing the recommended proposals. However, a significant reduction in the backlog can only be achieved through increasing the officer resource.
- 2.11.** Continuous process improvement and the above proposals should improve

the determination rate, but it doesn't necessarily follow that the backlog of applications will decrease as we have no control over the rate of incoming applications. Based on the current average rate (22.5 per annum), even if the above proposals are implemented, the backlog is still likely to grow as we get closer to the 'cut-off' date of 1st January 2026 for applications that are based on pre-1949 evidence. The cut-off date is likely to incentivise user groups and other interested parties to identify unrecorded routes and ensure that applications are submitted prior to the deadline.

- 2.12.** In addition to the implementation of the green proposals hereby appended, a business plan will be prepared to request additional investigating officers. Preliminary calculations suggest that 4 additional officers could increase the output to c.36 determinations a year, which would exceed the current application rate and therefore see the backlog begin to reduce. All current applications in the backlog would be determined within 10 years and the delay for any new applications would be reduced from 30+ years to 10 years or less going forward. Recent recruitment for such posts has highlighted that the Council struggles to attract experienced staff. This would suggest a job evaluation or market supplement may be necessary to attract experienced staff. If we continue to recruit inexperienced staff, there will inevitably be a lag whilst training occurs before officers are fully productive, which would impact on the approximate calculations above.
- 2.13.** It should also be noted that there are other provisions within the Deregulation Act 2015 that may help with achieving efficiencies. However, regulations are still awaited (delayed due to parliamentary time being taken up with Brexit), hence it remains to be seen as to what impact in reality the provisions will have once commenced.

3. Background

- 3.1.** The Wildlife & Countryside Act 1981 place a duty on the County Council, as Surveying Authority, to keep the Definitive Map & Statement under continuous review. One of the aspects in doing this is to determine applications made under Schedule 14 of the act.

There are some important points to consider in relation to applications to modify the Definitive Map & Statement;

- 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). Equally, if the evidence is sufficient to show that the Definitive Map and Statement are in error an order must be made to correct it.
- orders will not always reflect exactly what was applied for,
- there are appeal processes involving the SoS regardless of the decision,
- there is no ability to charge applicants,
- suitability of the physical route will not normally be relevant,
- January 1st 2026 will be the cut-off date for applications based on pre-1949 documentary evidence.

- 3.2. The backlog of applications in Somerset is one of the largest nationally. An application submitted today could experience a 30-year delay before being determined. 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. 2018 was a quieter year though with only 8 applications received.
- 3.3. 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.
- 3.4. Applicants do have a right to appeal should their applications not have been determined within 12 months of receipt. 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. The SoS monitors progress where the direction timescale has not been met but doesn't take any further action.
- 3.5. The process review that has taken place has explored the various elements of the process in consultation with other authorities, primarily from across the south west region. Of the 17 proposals identified to achieve efficiencies, 8 are being recommended for taking forward. Those that aren't being recommended for implementation are considered to have significant risks (as documented in the appendix), can't be taken in combination with other proposals, or received negative feedback when the Regulation Committee was consulted.
- 3.6. The primary risks with some of the non-recommended proposals relate to not considering all available evidence and coming to unsound determinations. Whilst there is currently a high level of appeal or objection to decisions and orders respectively, the overall record of the Council in its decision making has been proven to be very good.

4. Consultations undertaken

- 4.1. Other south west authorities were consulted on the proposals we've identified. There is a column in Appendix 1 titled 'Others doing?' which shows that in the main the proposals that are being recommended for taking forward align with what other authorities are doing. The consultation didn't highlight any other proposals that we may have overlooked.
- 4.2. Northumberland and Norfolk Councils have also been consulted previously. The comparison with Northumberland County Council is useful, as they had a backlog of applications with a similar level of resource. Over a period of 10 years or so, they have managed to eliminate the backlog. The key aspects to achieving this appear to be a lower application receipt rate (c.50% less than Somerset) and a lower percentage appeal/objection rate (60-70% compared to 90+ in Somerset). They were also starting with a smaller backlog (c.140

applications). A stable and experienced workforce has also undoubtedly assisted Northumberland in reducing the backlog.

- 4.3. Whilst the efficiency proposals being recommended are generally in accord with the approach of other authorities, PD1 is perhaps a notable exception. PD1: *'Adopt neutral stance for opposed orders where we cannot contribute further to the process with regard to the evidence'* is an approach currently taken by Norfolk County Council. Surveying Authorities are generally expected to support their own orders when they are opposed, and if they don't then there is the risk of an application for costs should it be considered that we have acted unreasonably. Implementation of this proposal will need to be considered carefully on a case by case basis.
- 4.4. Under the current constitution, the Regulation Committee determine applications that in the view of the Economic, Communities & Infrastructure Director for Operations are contentious or controversial. For this reason the Regulation Committee were consulted on the proposals and recommendations that have resulted from the process review. At their meeting on the 9th May 2019 they agreed to support the proposed changes (coloured green in Appendix 1 to the report) to how applications to modify the Definitive Map are processed, subject to the exclusion of proposals relating to Decision Making: D2 - Minimise site visits for Committee decisions & D3 - Redefine criteria for going to Committee (these are now shown as red in Appendix 1), and to support an increase in officer resource. In light of their comments, proposals D2 & D3 are no longer being recommended for implementation, which has a minimal impact on the overall identified efficiencies.
- 4.5. The Local Access Forum were also consulted on 16th May 2019 on the proposals being recommended and have since been sent more detail for their consideration. There was general support at the Forum meeting for more officer resource, and Cllr Paul Maxwell (South Somerset District Council) offered to speak to his Leader about the possibility of the District Council helping to fund additional officer resource for a limited period of time, and suggested whether other Districts may also consider such a contribution. At the time of writing there has been no further contact from Cllr Maxwell or South Somerset District Council in this regard.
- 4.6. Responses to the proposals have also been received from user group representatives, who have either made applications to modify the Definitive Map & Statement or who have an interest in the outcome of applications. The primary issue that they raise is the Council's interpretation of the relevant tests; 'reasonably alleged' and 'on the balance of probabilities'. Each test is applicable in differing circumstances depending on what the application is for. In the event that the County Solicitor or the Planning Inspectorate take the view that officers are not applying the right test or are applying it in an incorrect way then we will review our approach, but as it stands we believe they are being interpreted and applied in the correct way.

5. Implications

- 5.1. The existence of a backlog of applications has implications for the applicants/public and also for landowners. The longer it takes to determine applications, the longer the public may be denied access to the use of existing unrecorded rights. Uncertainty as to the status of a route will also have a negative effect

on landowners. Applications to modify the Definitive Map & Statement are now a mandatory question in the CON29 property searches form, hence when purchasing a property such applications will be declared through the local searches. Depending on the individual circumstances, applications can have an impact of property value and the success of any purchase/ sale.

- 5.2.** The implications for the Council of the backlog are largely reputational. There is no set timescale for determining an application other than the requirement that they be determined 'as soon as reasonably practicable'. There is no apparent course of further action for the SoS where the Council fails to meet their direction deadlines. However, there is the possibility that a court action could be made under the premise of a failure to undertake a statutory duty in a timely manner.

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.** As referenced in 2.11 above, and in light of the failure to meet SoS directions and the potential for court action against the Council, the Service will now prepare a business plan for additional resource with a view to reducing the backlog significantly over the next decade.

6. Background papers

- 6.1.** [Rights of Way report](#) - 13 November 2018 Scrutiny for Policies and Place Committee -

[Consultation on amendments to processing of application to modify the definitive map](#) - 9 May 2019 Regulation Committee

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

Appendices

Appendix 1 Efficiency proposals (revised)