

**LEGAL BACKGROUND AND GUIDANCE FOR DETERMINING  
MODIFICATION ORDER APPLICATIONS**

**Effect of the Definitive Map and Statement:**

1. Under section 56 of the Wildlife and Countryside Act 1981 (WCA81), the Definitive Map is conclusive proof of the existence and status, at the relevant date of the Map, of the rights of way that are shown, but without prejudice to the possibility that further rights may exist. The Definitive Statement is conclusive proof of the details which it contains as to width, position and any conditions or limitations on the rights of way shown on the Map. This conclusive proof enables a Definitive Map and Statement to be produced in any proceedings (apart from its own review) as conclusive of what it shows.
2. Definitive Maps and Statements were originally prepared by a statutory regime provided by the National Parks and Access to the Countryside Act 1949. Surveying authorities (county councils) were required to draft a Map and Statement of all public rights of way in their area which in their opinion existed or were reasonably alleged to subsist. Parish and district councils were required to provide information on paths in their area and to hold a meeting to consider the information gathered before submitting it to the surveying authority. There were procedures for hearing and determining objections at both the draft and provisional stages before the final Map and Statement were published. At the draft, provisional and final stages, the validity of the procedure could be challenged by application to the High Court within six weeks of the notice of publication of the draft, provisional or final map respectively. Other than this, the Map and Statement cannot be questioned in any legal proceedings whatsoever. Under WCA81, the Map and Statement is now reviewed by individual modification orders, to which a similar provision applies.
3. The Map must have a Definitive Statement annexed to it containing the relevant date of the Map. This is the date on which the rights shown on the Map were ascertained as existing by the statutory procedure. Public rights of way are highways and can only be stopped up or diverted by statutory order, so in the absence of such an order, the rights shown on the Map continue to exist.
4. According to the principle of regularity, it is assumed the proper procedures of a statutory regime have been carried out. In the case of Definitive Maps and Statements, this would mean that for any route shown on the Map it is assumed there was, at the time it was added to the Map, evidence it was a right of way and moreover this evidence survived the statutory opportunity to challenge it. Therefore when considering whether a right of way shown on a Definitive Map exists, case law has established that the initial presumption, known as the 'Trevelyan presumption', is that the Map is correct in what it shows (Phillips LJ in *Trevelyan v. SoS for the Environment* 2001).
5. The advice of the Department of the Environment (DEFRA) is that everything shown on Definitive Maps and Statements will have gone through a process of challenge and confirmation and that such documents are presumed correct unless there is very cogent evidence that an error was made.

### **Provisions of s53 WCA81 for modifying the Definitive Map and Statement:**

6. Under s53 WCA81 the Isle of Wight Council (Council), as the surveying authority, has a duty to keep the Definitive Map and Statement under continuous review by making modification orders when necessary because of certain events specified in s53(3).

7. The events specified in s53(3)(a) are legal events such as diversion orders under the Highways Act 1980 (HA80), for which an automatic map modification order not requiring advertisement is made. The events specified in s53(3)(b) and (c) are those which require the Council to consider evidence relating to a possible public right of way, or to anything currently recorded in the Definitive Map and Statement. An order is made according to the procedure set out in Schedule 15 WCA81 and must be advertised to allow a period of public challenge and the possibility of a public inquiry or hearing to test the evidence.

8. Under s53(5) and according to the procedure set out in Schedule 14 WCA81, anyone may apply to the Council for a modification order required under (b) or (c), that is, may bring evidence to the attention of the Council. The Council is then under a duty to investigate that evidence and determine whether to make the order. If this determination is not made within 12 months, the applicant may apply to the Secretary of State, who, after consulting with the Council, may direct the Council to do so.

9. If the Council determines not to make the order, the applicant may appeal to the Secretary of State, who may direct the Council to make the order.

10. If the Council decides to make a modification order, it must be advertised for not less than 42 days and if there are any objections which are not withdrawn, it must be referred to the Secretary of State for determination and a public inquiry will usually be held.

### **Section 53(3)(b) WCA81 event - Dedication of Highways:**

11. The event specified in s53(3)(b) WCA81 is the expiration of any period of time such that public enjoyment of the way gives rise to a presumption of dedication of a public right of way. The question which usually has to be determined by the Council when considering a modification order is whether the evidence shows that a highway exists because dedication has occurred at common law or is deemed by operation of section 31 HA80.

### **Section 53(3)(c) WCA81 events:**

12. The event specified in s53(3)(c) WCA81 is the Council's discovery of evidence concerning a public right of way. An order should be made if on the balance of probability the evidence, when considered with all other relevant available evidence, 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.

- (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.

13. Where evidence shows that a path has not been recorded on its true line, the correct procedure is to make a modification order which both deletes the incorrectly recorded line under s 53(3)(c)(iii) WCA81 and adds the correct route under s53(3)(c)(i) WCA81.

Event (i) (s53(3)(c)(i) WCA81):

14. If a way is not shown on the Definitive Map but documentary evidence (for example an enclosure award, or a map and register produced under the Finance Act 1910) shows that the way is, or is reasonably alleged to be, a public right of way, it is under this head that an application will be made for the path to be added to the Definitive Map.

Event (ii) (s53(3)(c)(ii) WCA81):

15. It is under this heading that an application would be made for a path to be “upgraded” (e.g. from footpath to bridleway or restricted byway) or “downgraded”. In *Burrows v Secretary of State for Environment, Food and Rural Affairs* (2004) it was held that to change the status of a way there cannot simply be a re-examination of the same evidence that had previously been considered when the Definitive Map was drawn up: there had to be some new evidence, which when considered with the other evidence justifies a modification.

Event (iii) (s53(3)(c)(iii) WCA81):

16. In the case of the deletion of a right of way, because of the conclusive evidential effect of the Definitive Map and Statement (s56 WCA81), the evidence supporting a deletion must show that no right of way existed at the relevant date of the Definitive Map on which the right of way was first shown. The onus is on the applicant to demonstrate that an error has been made, rather than for the Council to prove that the Definitive Map is correct.

Deletions from the Definitive Map and Statement

Guidance on deletions and downgrading is contained in paragraphs 4.30 to 4.35 of the Rights of Way Circular (1/09) Guidance for Local Authorities issued by DEFRA (Appendix 5, Item 3) and paragraphs 4.18 to 4.23 of the Planning Inspectorate Definitive Map Order Consistency Guidelines, 2015 revision issued to inspectors (Appendix 5, Item 4).

The Rights of Way Circular (1/09) gives a clear summary of the position regarding deletions. The evidence needed to delete a right of way from a definitive map needs to fulfil all of the following stringent requirements, which should be considered in order (para 4.33):

- (i) The evidence must be new – an order to remove a right of way cannot be founded simply on re-examination of evidence known at the time the way was first shown on the map.

- (ii) The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.
- (iii) The evidence must be cogent.

In respect of an application for a modification order to delete a path from the definitive map it is for the applicant to prove the map requires amendment due to discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be deleted. It is not for a local 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 the way.

#### Conflict between the Definitive Map and Statement

For the purposes of s53 when the Definitive Map and Statement itself is under review, a conflict between the two documents which cannot be resolved by reasonably tolerant interpretation is evidence there has been a degree of error in their preparation. In this case there is no evidential presumption in favour of the map over the statement. To resolve the error, each document should be accorded the weight which analysis of the documents themselves and other relevant evidence, including evidence of the situation on the ground at the relevant date, appears appropriate. In this situation, what is required at review is a consideration of which route, or which other route (ie third possibility), on the balance of probability, is correct, in the light of all the relevant evidence, including the Definitive Map and Statement (R. (Norfolk CC) v. SoS 2005).

17. In the case of "any other particulars...require modification", "particulars" have been held to be referring to details such as the position, width and any limitations or conditions affecting the public right of way e.g. where the Statement is vague as to the route of the path and/or a dispute relating to its precise line.

### Quasi-Judicial Role of the Panel

In considering the evidence, the Council is acting as a tribunal of fact and must meet the following requirements.

The Panel must objectively consider all the available relevant evidence, taking advice as to application of legal principles where necessary, and come to a conclusion, on the balance of probability, on matters relating to the existence of public rights of way in order to determine whether a modification of the Definitive Map and Statement is required.

The balance of probability test: Once all of the evidence has been individually assessed, this test requires a comparative assessment of the evidence on opposing sides. It is a complex balancing act, involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together.

Such matters may include whether a presumption of dedication is raised, whether such a presumption is negated, whether a right of way subsists, details relating to position and width, or to limits or conditions on a dedication.

The Panel must disregard all views which are not relevant to the fact which has to be found. Such views may concern for example the effect or desirability of the right of way should it be found to exist.

The Panel must apply the principles of natural justice. The decision itself will depend upon the facts and law, but in making that decision it is important that persons who will be affected by the order if made, notably landowners and occupiers, have sufficient opportunity to put forward evidence themselves and to comment on the evidence being considered by the Council. The Council should therefore consider only the evidence and comments presented in writing in the report, which all landowners will have seen and had the opportunity to comment on.

## ***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

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<sup>13</sup> Document required by the Planning Inspectorate – Checklist for Order Making Authorities : The Planning Inspectorate June 2008

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.

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.

#### ***Preparation of definitive maps and statements for excluded areas***

4.36 Only the area of the former London County Council, i.e. broadly the area of the present Inner London Boroughs, is now excluded from the survey provisions of the 1949 Act. Under section 58(2) of the 1981 Act, the London borough councils may by resolution adopt the provisions of sections 53-57 for the whole or any part of their area.

4.37 The provisions enable an authority to prepare a definitive map and statement by building up from nothing a comprehensive record of the rights of way within its area through adding rights of way to a blank map and statement by means of orders made under section 53 of the 1981 Act. Once modified, that map and statement becomes the definitive map and statement for the area.

#### ***Definition of byway open to all traffic***

4.38 A byway open to all traffic (BOAT) is a vehicular right of way carrying rights for users of mechanically propelled vehicles which is used by the public mainly for the purposes for which footpaths and bridleways are used. When deciding whether a way ought to be shown on the definitive map and statements as a BOAT, authorities should examine the characteristics of the way. Relevant case law suggests that, for a carriageway to be a BOAT, it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test also relates to its character or type and whether it is more suitable for use by walkers and horse riders than vehicles. Further information is available in the Planning Inspectorate's rights of way *Advice Note 8*<sup>14</sup>. Where a way presumed

<sup>14</sup> Advice note 8 – Advice on the definition of byway open to all traffic – the effect of *Masters v Secretary of State for the Environment, Transport and the Regions* : February 2001



## *Deletion and downgrading*

4.18 When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See Section 4 of Circular 1/09 and paragraphs 4 and 7 of WO Circular 45/90.

4.19 *Trevelyan* confirms that cogent evidence is needed before the Definitive Map and Statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of *Trevelyan* 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 presumption that it does. 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 were followed and thus that 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 in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

4.20 In the *Leicestershire* case the Inspector refused to confirm an order which sought to modify the definitive map and statement to show a path which was shown on the map as running through the curtilage of one cottage, as running through the curtilage of another. Collins J held that in these circumstances, *"It is not possible to look at (i) [s53(3)(c)(i)] and (iii) [s53(3)(c)(iii)] in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed"* He went on *"If [the Inspector] is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive.....where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of*

*probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around”.*

- 4.21 Another case relevant to deletions is *Kent*. The Inspector refused to confirm an order under S53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position but not existence was in dispute. In upholding the decision, the judge stated that *it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt.*
- 4.22 The correct way to remove from the definitive map rights whose existence was not in doubt would have been to extinguish (or divert) them under the Highways Act 1980. As the judge continued: *one would expect to look elsewhere [than s53(3)(c)(iii)] for statutory provisions which were concerned with the question whether or not an established right of way (but not its route) should continue to exist.*
- 4.23 Previous guidance has indicated that, in the case of a way that had been incorrectly shown on the definitive map, a case for dedication could be established on the basis of use in the period between the first recording of the way and its subsequent removal. The current view of Defra (as stated in Circular 1/09 version 2) is that it is not possible for a right of way to be dedicated for the purposes of section 31 of HA 80 when use is by virtue of it already being shown on the definitive map; use in such circumstances cannot be ‘as of right’ as rights that cannot be prevented cannot be acquired.