



APPLICATIONS FOR A MODIFICATION ORDER TO DELETE OR DOWNGRADE A PUBLIC RIGHT OF WAY ON A DEFINITIVE MAP AND STATEMENT

Before Cornwall Council accepts an application for a Modification Order to **DELETE** or **DOWNGRADE** a public right of way shown on a definitive map and statement, the surveying authority will need to be satisfied that criteria contained in the Circular 1/09 prepared by the Department of Environment, Food and Rural Affairs have been met. Applicants who are considering making an application for a modification Order to downgrade or delete a right of way should consider the following guidance and commentary carefully before submitting an application.

DEFRA Circular (1/09) Paragraph 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".

Registered public rights of way are recorded in definitive map and statements. The first legislation to enact the creation of definitive maps and statements of public rights of way was the National Parks and Access to the Countryside Act 1949. In Cornwall, during the 1950s and 1960s, a process involving the publication of draft maps, amended draft maps, provisional maps and definitive maps was undertaken by Cornwall County Council. Members of the public and landowners had opportunities to raise objections to the depiction of a path on maps and the inclusion of a path in accompanying statements throughout this process. This was followed by Map Reviews in the 1970s and 1980s where there were also opportunities for objection to the inclusion of paths in published draft map and statements. Since the enactment of the Wildlife and Countryside Act 1981 and the completion of these Map Reviews, amendments to the definitive map and statement have only been possible through confirmed Definitive Map Modification Orders.

DEFRA Circular (1/09) Paragraph 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”.

The conclusive nature of the definitive map and statement is what provides its value for users and landowners alike because it provides clarity about the rights of way that are included therein. However, it is still possible that evidence may be discovered which shows that a way on the map and statement should be downgraded or deleted on the basis that it was wrongly registered in the first place.

Paragraph 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”.

Where Cornwall Council discovers evidence which shows that a right of way did not exist at a time when it was first shown in a map and statement, the Council has the power to make an order to amend the map and statement to show the right of way as a highway of a different description or to delete the right of way from the map and statement in its entirety.

Paragraph 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”.

There are stringent requirements that any application for an Order to downgrade or delete a right of way will need to fulfil. These are that any evidence must be new, in that it has not been considered before; it must be of sufficient substance to displace the presumption that the definitive map is correct, on the basis that the map and statement is an authoritative legal record; and the evidence must be cogent, that is strong and convincing. The Council will consider the new evidence together with any other evidence that is available and will come to a

conclusion on the balance of probabilities about whether the relevant map and statement should be amended.

Paragraph 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".

The onus is on the applicant to show that a way recorded in the map and statement should be revised to delete or downgrade the way. Cornwall Council is not required to demonstrate that the map reflects the true rights, though it is under a duty to investigate the matters raised in an application.

Paragraph 4.35 (extract)

"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".

As noted above, it is possible that a way that is recorded in the definitive map and statement may be downgraded or deleted many years after it was first registered, if evidence is discovered which shows that it was wrongly registered in the first place. DEFRA's view, which is accepted by Cornwall Council, is that use of the path during the intervening period between first registration and the date of an application for an Order downgrading or deleting the way would, if the way is found to have been wrongly recorded, have been dependant solely on the fact of that first registration. As a consequence, the use cannot be used as evidence to claim that the status of the way should be retained, as the owner of the land would have had no opportunity to deny users the right of access because of the conclusive nature of the definitive map and statement.