



Direction Decision

by Jean Russell MA MRTPI

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 10 August 2018

Direction Ref: FPS/M1900/14D/8

Application to add a byway open to all traffic from Lolleywood Lane to Luffenhall

- An application was made by Peter Joseph Natt to Hertfordshire County Council for an order to modify its Definitive Map and Statement of Public Rights of Way under section 53(5) of the Wildlife and Countryside Act 1981 (the WCA81).
 - The Council's reference for the application is NH/89/MOD.
 - The certificate attached to the application, as required under paragraph 2(3) of Schedule 14 of the WCA81, is dated 13 January 1997.
 - A representation has been made by the applicant under paragraph 3(2) of Schedule 14 seeking a direction from the Secretary of State to the Council to determine the application.
 - The representation is dated 1 January 2018.
 - The Council was advised of the representation on 24 January 2018 and its response was made on 27 February 2018.
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Decision

1. The Council is directed to determine the application (ref: NH/89/MOD) as set out in the Direction below.

Statutory and Policy Context

2. Schedule 14 of the WCA81 sets out provisions relating to applications made under s53(5) for an order to make modifications to the Definitive Map and Statement of Public Rights of Way (DMS). The certificate described above was submitted under paragraph 2(3) of Schedule 14, to certify that notice of the application has been served on every owner and occupier of any land to which the application relates.
 3. Paragraph 3(1) of Schedule 14 requires authorities, as soon as reasonably practicable after receiving the paragraph 2(3) certificate, to (a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates.
 4. If the authority has not determined any such application within 12 months of receiving the certificate, paragraph 3(2) of Schedule 14 provides that the applicant may make representations to the Secretary of State who may, after consulting with the authority, direct them to determine the application before the expiration of such period as may be specified in the direction.
 5. Rights of Way Circular (1/09): Guidance for Local Authorities advises that the Secretary of State will take into account, in considering whether to direct an authority to determine an application within a specified period, any statement made by the authority setting out its priorities for bringing and keeping the DMS up-to-date; the reasonableness of such priorities; any actions already taken by the Council or expressed intentions of action on the application; the circumstances of the case and any views expressed by the applicant.
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REASONS

The Council's Statement of Priorities and the Reasonableness of its Priorities

6. The Council's Statement of Priorities is to deal with applications for orders to modify the DMS (Definitive Map Modification Order or DMMO applications) according to three key principles: where public safety could be substantially improved; according to level of use; or where Council actions could result in a significant positive impact on the network.
7. In addition, the Council gives a higher priority to applications where the physical existence of an alleged route is threatened by development; the application involves substantially the same evidence as another which is being or about to be investigated; [and/or] only user evidence is available.
8. The Statement of Priorities was "internally audited" in 2013, when the prioritisation methodology was found to be "fair and balanced". I conclude that the Council has reasonable priorities for bringing and keeping the DMS up-to-date but that does not alter the statutory duty on the authority to investigate the matters stated in DMMO applications as soon as is reasonably practicable.

The Actions or Intended Actions of the Council

9. When the Council's prioritisation scoring procedure was revised in 2011, the application was upgraded to have 17 rather than 6 points. On 26 February 2018, the Council was investigating 60 DMMO applications, and had another 261 pending. The application was at no. 39 on the waiting list, still carrying 17 points.
10. For reasons addressed separately below, the Council estimates that it will be at least 2 years, and more likely 3-4 years, before the application is investigated. That projection, though loose in my view, is subject to change because the Council receives 25 new DMMO applications each year – and when they are scored, existing claims may be prioritised down.
11. It must be deduced that the Council has taken no action on this application, and is ambiguous as to when any action will occur. The intention is to delay determination for an unspecified but plainly long period of time – and yet the application has been on the Council's books for more than 21 years. Deferring action for that length of time is, at least on the face of things, wholly inconsistent with the duty to investigate as soon as is reasonably practical. Adding weight to that assessment, the Council's inaction could not be justified by the Statement of Priorities, although that is reasonable in itself, because it only concerns the sequence and not the time in which applications are determined.
12. Similarly, I accept that the receipt of new applications may lead to existing cases being downgraded, and thus it will be difficult for the Council to say precisely when an application will be "processed". However, that does not explain why the Council has given such a broad and tentative timescale for the start of investigations in this case. The applicant could reasonably expect to have a greater degree of certainty.
13. Unless there are exceptional circumstances in the Council's favour, its lack of action, and failure to set out any firm intended action, would justify making a direction that the application is determined before the expiration of a given period.

The Circumstances of the Case and Views of the Applicant

User Evidence and the Age of the Application

14. The application is for the Council to modify the DMS by order in consequence of the discovery of evidence which shows that a right of way which is not shown in the

map and statement subsists or is reasonably alleged to subsist. The evidence relied upon in the application includes that of users of the route.

15. The applicant requests that the Council is directed to determine the application because he fears, baldly, that his oldest witnesses "might all be dead by the time that the case is investigated". While I have no evidence as to the actual ages or indeed number of witnesses, the applicant's concern has to be understandable given that the application was made 21 years ago.
16. I do not know if the application was made *only* on the basis of user evidence or, if so, whether the Council has factored that matter in when scoring the case for prioritisation purposes. Those questions matter not, however, because I have no remit to comment on the score awarded by the Council; the only question for me is whether investigation is to be commenced as soon as is reasonably practical.
17. The applicant referred to a statement made on 30 March 1981 by the then Minister, during the third reading of the bill later passed as the WCA81, that "we are hopeful that the vast majority of [DMMO] applications will be determined within 12 months". The Act does not require that determinations are made within such a period; the duty under paragraph 3(1) of Schedule 14 is to investigate applications "as soon as reasonably practicable", and make a determination after consultation. The paragraph 3(2) provision in respect of "12 months of receipt" is the applicant can then ask the Secretary of State to direct the authority to reach a decision.
18. However, that point does not assist the Council because it omitted to address or even acknowledge the applicant's concerns in its response to the representation. The Council said nothing about this application beyond its priority score, its waiting list position and the estimated time before investigation would commence. The Council did not show that this case is to be investigated as soon as reasonably practicable following receipt of the certificate on 13 January 1997.
19. In the absence of evidence to the contrary, I find the age of the application, taken with the applicant's reliance at least in part on user evidence, to be a compelling reason to set a date by when the application must be determined.

The Council's Statement of Priorities and Resources

20. The applicant has suggested changes to the Statement of Priorities but that is a matter for the Council. For the avoidance of doubt, my powers are to direct (or not) that the application be determined before the expiration of a given period, not to tell the Council what its policies should be, or how its policies should be applied.
21. I understand that the Rights of Way service is being expected to make significant efficiency savings through re-structuring – and that exercise will follow a reduction in staffing levels in 2017. The Council indicates that its lack of resources and staff is the key reason why it has a backlog, and why the application subject to this representation will not be investigated for two or more years.
22. However, the determination of DMMO applications is a statutory duty which the Council must carry out. The Council's administrative difficulties do not appear to be exceptional and, in any event, the 2017 staffing cut occurred 20 years after this application was made, and 6 years after the prioritisation scoring procedure was revised. The Council's submissions do not persuade me against making a direction.

Conclusion

23. The Council has a reasonable Statement of Priorities for DMMO applications, but failed to take action on this claim in 21 years. There is no concrete intended action, even though the application rests, at least in part, on user evidence. I have had

regard to its staffing and financial situation, but the Council has not shown that it will commence investigation as soon as is reasonably practicable. I conclude that there is a case for setting a date by when the application should be determined.

24. The applicant proposes that Council is directed to make a determination within 12 months of this decision on the basis that time may be needed during investigation to interview witnesses. I shall indeed allow a further period of 12 months for the Council to make a determination, primarily for the reason given by the applicant, although the period could have been less. That the Council will need time to consult other authorities, and has resourcing difficulties, add a little weight to my decision to give a full year for determination.
25. Representations were made regarding the applicant's rights under Article 6(1) of the Human Rights Act 1998. Article 6(1) provides that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This decision addresses the matter of 'investigation is as soon as reasonably practicable' in accordance with paragraph 3(1) of Schedule 14 of the WCA81. The decision does not amount to a determination of the applicant's civil rights and obligations and Article 6(1) is not applicable.

DIRECTION

26. On behalf of the Secretary of State for Environment, Food and Rural Affairs, and pursuant to paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981, **I HEREBY DIRECT** Hertfordshire County Council to determine the application (ref: NH/89/MOD) not later than 12 months from the date of this decision.

Jean Russell

INSPECTOR