

Direction Decision

by **K R Saward Solicitor**

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

Decision date: 16 OCTOBER 2019

Ref: FPS/W2275/14D/2

Representation by Miss D S Latham

Kent County Council

Application to add a public footpath running from public footpath HM149 by Hind Close to the forecourt of the Ship Inn (Ship Close) at Dymchurch, Kent

- An application was made by Miss Dorothy Latham to modify the Definitive Map and Statement of Public Rights of Way under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act').
 - The certificate attached to the application, as required under Paragraph 2(3) of Schedule 14 of the 1981 Act, is dated 12 May 2018.
 - The Council's reference for the application is PROW/FH/C405.
 - A representation is made under Paragraph 3(2) of Schedule 14 of the 1981 Act seeking a direction to be given to Kent County Council to determine the application.
 - The representation made by Miss D S Latham is dated 22 May 2019.
 - The Council was consulted about the representation on 21 June 2019 and its response is dated 23 July 2019.
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Decision

1. The Council is directed to determine the above-mentioned application.

Reasons

2. Schedule 14 of the 1981 Act sets out provisions for applications made under section 53(5) for an order which makes modifications to the definitive map and statement ('DMS').
 3. Authorities are required to investigate applications as soon as reasonably practicable and, after consulting the relevant district and parish councils, decide whether to make an order on the basis of the evidence discovered. Applicants have the right to ask the Secretary of State to direct a surveying authority to reach a decision on an application if no decision has been reached within 12 months of the authority's receipt of certification that the applicant has served notice of the application on affected landowners and occupiers.
 4. The application is to add a public footpath to the DMS. An applicant's right to seek a direction from the Secretary of State gives rise to the expectation of a determination of that application within 12 months under normal circumstances. The application was made on 12 May 2018. As of 23 July 2019, the application was positioned at 27 on the Council's list of applications awaiting determination and with investigations yet to commence.
 5. Current guidance is contained within Rights of Way Circular 1/09 Version 2,
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- October 2009¹. This explains² that the Secretary of State in considering whether, in response to such a request, to direct an authority to determine an application for an order within a specified period, will take into account any statement made by the authority setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the authority or expressed intentions of further action on the application in question, the circumstances of the case and any views expressed by the applicant.
6. The Council determines applications in order of receipt. In its Statement of Priorities one of the definitive map key principles is for priority to be given to the investigation and determination of outstanding claims and the resolution of anomalies and mapping errors. That work will be prioritised according to key principles. These allow definitive map claims to be given priority when the resolution of the application may, for example, enable the Council to (i) properly assess or manage issues of public safety (ii) manage the network more effectively by resolving whether the claimed route would form all or part of a missing link in the network, form part of a longer route or resolve an anomaly in the DMS, or (iii) where a path is threatened by imminent development.
 7. It is entirely reasonable for the Council to determine applications in order of receipt, subject to the prescribed exceptions. In practice, the Council says it is uncommon for applications to be taken out of sequence. Where it does so it invariably reflects development for which planning permission has been granted although its Statement of Priorities is not confined to that scenario. It gives other examples of when priority may be given. It is not expressed as a closed list and consideration must be given to the individual circumstances of each case. Indeed, the Council recognises that it may need to review its Statement of Priorities to reflect the 2026 cut-off date when unrecorded historical public rights of way shall be extinguished.
 8. Whilst the Council currently has three Officers who deal with such applications, they are responsible for other work areas also. In reality, the available staff resource equates to 1 full-time employee. The Council estimates that it will be in the region of 3 years before the application is allocated to an Officer and then at least a further 6 months before a decision is reached.
 9. The applicant considers the claim to be urgent because the owner of the field over which the claimed path lies is trying to gain planning permission for several houses. It is feared that the path would be 'obliterated' if the application must wait its turn until the forecasted timescale. It is also suggested that the path is of historical value having formed part of an old coaching road and originally established in mediaeval times. In addition, it is asserted that the path forms a continuation of footpath HM149.
 10. Whilst noting that a planning application was submitted, there is no indication of its progress or outcome to suggest an imminent threat of development. Nor is there any suggestion that the resolution of this case would enable the Council to manage the network more effectively even if it does form part of a longer route. On the face of it, the case does not fall within the circumstances contemplated by the Council's Statement of Priorities.
 11. The Council has given assurances to the applicant that the application will be

¹ Published by the Department for Environment, Food and Rural Affairs.

² At paragraph 4.9

- accelerated if planning permission is granted to directly affect the line of the claimed path. This has not allayed the concerns of the applicant who fears that works will commence immediately upon planning permission being secured.
12. As the Council itself states, applications for Definitive Map Modification Orders can be complex and the procedures lengthy. Therefore, the claim could potentially be prejudiced if it is left too late to begin investigations.
 13. I appreciate that the Council has many outstanding applications and receives more new ones each year. The number of applications can exceed the resource available to determine them. It is encouraging that the Council is recruiting another Definitive Map Officer who, it is hoped, will be able to free up the time available by other officers for investigations. If so, it is possible the application may reach the top of the waiting list earlier than the 3 years estimated.
 14. Even so, the Council has a statutory duty to keep the DMS up-to-date. Difficulties complying with that duty due to resourcing issues cannot be considered as an exceptional circumstance. Circular 1/09 is clear that Authorities should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way.
 15. There are other applications ranked higher in the Council's list. To issue a direction to make a determination would disadvantage those who have waited longer. It might also delay applications which warrant greater urgency.
 16. However, the arguments advanced do not justify a direction not being given in this instance when the 12-month period³ has now expired, albeit fairly recently. There is some reason to believe that the claimed route could be at risk from development although the likelihood of planning permission being granted and how soon is unclear. Nevertheless, the applicant is entitled to expect the application to be determined within a finite and reasonable period. No exceptional circumstances have been advanced by the Council.
 17. In the circumstances I have decided that there is a case for setting a date by which time the application should be determined. It is appreciated that the Council will require some time to carry out its investigation and make a decision on the application. A further period of 9 months has been allowed to make a determination. I consider this reasonable and proportionate in all the circumstances. If planning permission is granted it is open to the Council to expedite the application further.

Direction

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** the Kent County Council to determine the above-mentioned application not later than 9 months from the date of this decision.

K R Seward
INSPECTOR

³ The 12-month period commences on the date a valid certificate is submitted to the order making authority in accordance with paragraph 2(3) of Schedule 14