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## Direction Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 28 JUN 2019

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**Ref: FPS/Q1770/14D/4**

**Representation by Dr P D Wadey**

**Hampshire County Council**

**Application: to upgrade Tangley FP12 to Byway Open to All Traffic**

- The representation is made under Paragraph 3(2) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') seeking a direction to be given to Hampshire County Council ('the Council') to determine an application made for a Definitive Map Modification Order ('DMMO') under Section 53(5) of that Act.
  - The representation is made by Dr P D Wadey ('the Applicant'), dated 2 March 2019.
  - The Council was consulted about the Applicant's representation on 5 April 2019 and the Council's response was made on 17 May 2019.
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### Decision

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

### *Statutory and policy context*

2. 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 based on 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 twelve months of the authority's receipt of certification that the applicant has served notice of the application on affected landowners and occupiers.
3. 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<sup>1</sup>.

### Reasons

#### *The Council's Statement of Priorities and the reasonableness of its priorities*

4. In January 2019, the Council approved a new policy for the prioritisation of DMMO applications. The new policy introduced the capacity for officers to determine a priority ranking for each claim upon receipt, and to separate user evidence-based claims from historic evidence-based claims.

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<sup>1</sup> Rights of Way Circular 1/09 Version 2, October 2009. Department for Environment, Food and Rural Affairs.

5. The 2019 policy set out new criteria under which an application could be prioritised. These are as follows:
  - The extent to which the claimed route would improve public safety;
  - The extent to which the claimed route would provide a link between existing public highways, population centres or places of interest;
  - Whether the determination of the claim would contribute to resolving an anomaly on the definitive map and statement.
6. The Council states that a claim may also be taken out of turn and processed immediately if it can be demonstrated that the route is at risk of being physically lost (for example, to development). In instances where none of the above criteria applies, a claim may nevertheless be taken out of turn and processed immediately if, upon consideration of the circumstances, it is considered expedient to do so.
7. The Council is currently reorganising its priority lists, transitioning to its current policy. Under the Council's previous policy, this application was ranked 33 out of 61 in the list of applications which met the criteria set out in the Rights of Way Improvement Plan. The Council submits that it is not possible to say where the application will sit on the re-organised priority list of historic evidence claims.
8. The Council clearly recognises that it has a backlog of DMMO applications and has identified as part of its new policy that there are several factors which could lead it to conclude that an application could be considered 'out of turn'. Whilst there is nothing before me to suggest that the approach taken by the Council for bringing and keeping the Definitive Map and Statement up to date is unreasonable, 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. The Council considers that the application appears to meet some of the specified criteria set out in the new policy in that the route applied for would connect a restricted byway to an unclassified road and improve network connectivity and public safety. However, due to the transition between the former policy and that adopted in January, the Council cannot say with any certainty where the application will lie in the revised priority list. Despite the prospect of the application qualifying for priority consideration, the Council considers it unlikely that the application will be determined within the next 2 to 3 years.
10. The Council gives several reasons as to why it does not consider that a direction should be given on this application. First, the application does not appear to be as straightforward as the Applicant contends as the documentary evidence on which he relies is contested by the landowner who has submitted his own counter-evidence. It is debatable whether the view of the status of the claimed route given by the County Surveyor in 1982 provides the necessary basis to take the claim out of turn.
11. Secondly, although the Hansard record of the passage of the 1981 Act through Parliament is acknowledged, the landscape is much changed since that date. The introduction of the 2026 'cut-off' has seen a surge in applications which

has doubled the Council's backlog in the space of three years. The current pressures on local government resources could not have been foreseen in 1981. However, two new officers have been appointed to assist with the processing of applications, although this additional resource is unlikely to enable the consideration of this application within the next 2 to 3 years.

12. The scale of the task facing all surveying authorities dealing with DMMO and other rights of way casework is recognised and understood. It is also acknowledged that the Council has limited resources available to it with which to undertake such work and that it is for the Council to determine how those limited resources are to be deployed. It is also acknowledged that giving a direction to the Council in respect of this application will add to the burden the Council already faces.
13. However, the investigation of section 53 applications is a statutory duty which the Council must carry out and the Council is expected to determine an application as soon as reasonably practicable after receipt of the paragraph 2 (3) certificate. It is not considered reasonable for a period of 3 to 4 years to elapse between an application and its determination, or for the Council to be unable to state when an investigation of this application will commence, other than in the most general terms.
14. Deferring the investigation of the applications for an uncertain length of time is, on the face of it, wholly inconsistent with the Council's statutory duty to investigate a section 53 application as soon as is reasonably practicable following the receipt of the paragraph 2(3) notice and means that there is uncertainty for the applicant as to when a decision is likely to be reached.
15. The lack of action by the Council and its 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***

16. The Applicant considers that the relevant record in Hansard demonstrates that it was the intention of Parliament that applications would be investigated promptly, and decisions reached usually within a period of twelve months. The Applicant acknowledges that the 2026 cut-off date is likely to increase the pressure on surveying authorities.
17. The Applicant submits that the County Surveyor reviewed the evidence available to him in 1982 and concluded that the claimed route was a public carriageway. The relevant correspondence from the County Surveyor also suggests that the Council had decided that the Definitive Map and Statement required amendment. Consequently, in the Applicant's view, it should not take long to reach a decision on the application and for an order to be made.
18. It is the applicant's view that in the circumstances of this case, the Council should be directed to investigate and determine the application within a further 6 to 12 months.

**Conclusions**

19. If the Council's estimate of being able to commence investigating the matters set out in the application is reliable then the Applicant is likely to receive a determination in 2022 or thereabouts. A timescale of between 3 and 4 years

between the application being made and its determination cannot be described as reasonable.

20. In the circumstances I have decided that there is a case for setting a date by which this application should be determined. I am aware that the Council will require some time to carry out its investigation into the application and reach a decision on it. The applicant has suggested a timeframe within which the application should be determined, and I consider it appropriate to allow no more than 9 months for the Council to do so.

**Direction**

21. 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 Hampshire County Council to determine the above-mentioned application not later than nine months from the date of this decision.

*Alan Beckett*

INSPECTOR