

Modifying Definitive Maps: Part 2

Matthew Knight, Knights Solicitors, Tunbridge Wells

Part 1 of this article was published in the Winter 2018/2019 edition of the *ALA Bulletin* (Issue 95) and sets out the background to and the purpose of the reforms. This part deals with the new specific procedures in England (but not Wales).

It was hoped that it would also be possible to cover the official guidance and regulations in Part 2. However, on 29th January 2019, DEFRA informed my firm that whilst they were keen that the benefits of the reforms should be realised at the earliest possible date, work on this had currently been paused due to re-prioritisation within DEFRA for EU exit and they were not able to be more specific on a realisation date.

An announcement will be made when the reforms will commence. No announcement has yet been made.

DEFRA acknowledged that the lack of certainty can be troublesome, though legislating for the United Kingdom's departure from the EU is the Government's immediate priority.

How to change the Definitive Map in England

Application is made under the Deregulation Act 2015, sch.7, which introduced a new Schedule 13A into the Wildlife and Countryside Act 1981.

The Application has to be in the prescribed form accompanied by a map to the prescribed scale showing the way or ways subject to the Application and accompanied by documentary evidence (including witness statements) along with an explanation of the belief forming the basis for modification.

The Local Authority is required to carry out a Preliminary Assessment to decide whether the Application and documentary evidence show that there is a reasonable basis for the Applicant's belief that the Definitive Map and Statement should be modified by reason of:

- the expiry of a presumed dedication period;
- the non-existence of a Public Right of Way; or either
 - that the existence of a Public Right of Way (including a Byway Open to All Traffic up to the cut-off date of 1st

“If the Local Authority declines to make an Order, the Applicant may Appeal to DEFRA within 21 days of notification by the Local Authority of the Decision”

- January 2026) is not shown on the Definitive Map and Statement; or
- a highway of one description shown on the Definitive Map or Statement ought to be designated as a highway of another description.

If the Local Authority decides that there is no basis for the Application, it must give the Applicant a reasoned Decision within three months.

If there is a Decision on the Application, the Local Authority must inform the Applicant within three months and serve Notice on the landowners and occupiers that the Application has been made and is being considered.

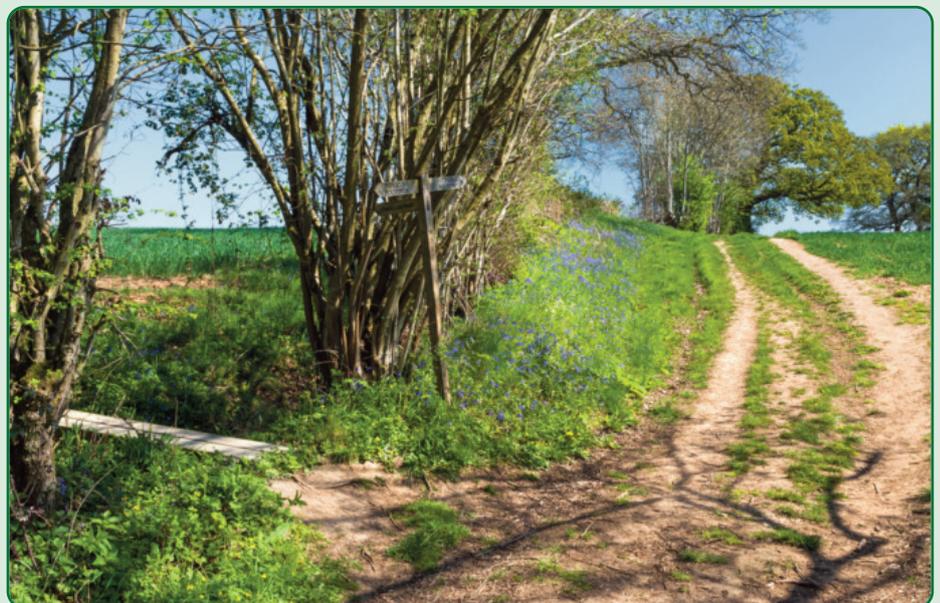
Once the Local Authority has served Notice on the land owners and occupiers, it has a duty to investigate matters in the Application, unless it is an Application by Consent, as soon as reasonably practicable

and it must consult with every other affected Local Authority.

If the Application is by consent, the Local Authority must investigate as soon as reasonably practicable:

- if it finds out that a land owner or occupier will not consent to the Application (even with Orders diverting it, altering the width, or imposing a new limitation or condition);
- deciding for any other reason not to make the Consent Order;
- after the expiry of twelve months following Notice that an Application has been made; or
- making the Modification Order by consent but not confirming it.

Following determination, the Local Authority must give Notice of its Decision whether or not to make an Order by serving it on the Applicant and every affected landowner and occupier.



Safeguards re preliminary assessments and failure to determine

If the Local Authority fails to conduct a Preliminary Assessment within three months, the Applicant may give Notice to the Local Authority in a prescribed form of intention to apply to the Magistrates' Court for an Order. This can be applied for between one and six months after Notice has been given.

The Magistrates can direct the Local Authority to take "specified steps" to discharge its duty within a specified reasonable period and may substitute a longer period for the twelve months period to determine the Application.

The Local Authority has the power to Appeal the Magistrates' Order to the Crown Court. The Magistrates' Order does not take effect for 21 days after being made or until 21 days after the Appeal to the Crown Court or High Court as an Appeal By Way of Case Stated has been determined or withdrawal of the Appeal.

If the Local Authority fails to determine an Application within twelve months, the Applicant or an affected landowner or occupier may give Notice in prescribed form of intention to apply for a Magistrates' Court Order and may make that Application between one and twelve months after Notice has been given.

At the hearing in the Magistrates' Court, the Applicant, landowners and occupiers all have a right to be heard. The Magistrates' Court may direct the Local Authority to take "specified steps" to discharge its duty within a specified reasonable period and the Local Authority can make one Application for an extension of time for determination by up to twelve months.

Again, the Applicant, landowners and occupiers have a right to be heard. The Local Authority, Applicant, landowners or occupiers all have power to Appeal the Magistrates' Court Order to the Crown Court. The Magistrates' Court Order does not take effect for 21 days after being made or until 21 days after being Appealed to the Crown Court or High Court via a Case Stated Appeal until final determination or withdrawal of the Appeal.

“Occupiers of agricultural land may apply to erect works on rights of way crossing the land in the interests of securing agricultural efficiency”

There are requirements as to what information is to be given in an Application for a Magistrates' Court Order and who must be given Notice of the Hearing (including publication by a fixing Notice to some conspicuous object(s) on the land subject to the Application).

Suppose the Local Authority decides not to make a Modification Order

The Applicant may give Notice to the Local Authority to Appeal to the Secretary of State within 21 days of notification by the Local Authority of the Decision.

Unless it is withdrawn, on receipt of Notice of Appeal, the Local Authority must submit "the matter" to DEFRA unless the grounds of Appeal are considered to be irrelevant to DEFRA's Decision. DEFRA has to deal with it as an Appeal against the Local Authority's Decision.

If the Local Authority decides not to submit it to DEFRA it must inform the Applicant of its Decision with reasons, but if it does submit it to DEFRA the prescribed Submission Notice has to set out the Decision, details of inspection places and times (free of charge) with copies provided in return for a reasonable charge, the time (not less than 42 days) and manner for representations/objections to DEFRA (with grounds) and confirmation that it is being submitting to DEFRA.

The Submission Notice has to be published on the Local Authority's website and every landowner and occupier (unless DEFRA grants dispensation), every affected Local Authority and anybody who has required the Local Authority to notify them of certain Decisions not to make a Modification Order must be served with a copy of the Decision within 42 days. The Submission Notice must also be displayed within 42 days with a plan at each end of the route, at Local Authority offices and at such other places as the Local Authority may reasonably decide.

If DEFRA grants dispensation regarding service on landowners and occupiers, the Submission Notice must be addressed within 42 days to "the owners and occupiers" of the described land and copies are fixed to conspicuous parts of

it: in particular at junctions with roads and other Public Rights of Way.

Between publication of the Submission Notice and the expiry of the time for representations/objections, any person can require the Local Authority on 14 days' Notice to give them information as to documents taken into account in the Decision and allow inspections/copies and say where they are if the Local Authority does not have them.

DEFRA must (unless nothing in the grounds for Appeal/representations or objections is relevant to the Appeal Decision) either arrange a Local Inquiry or allow Written Representations to be made to a DEFRA appointed person i.e. a Planning Inspector or allow any person who has made Written Representations to be heard.

What Orders can DEFRA make?

DEFRA will either uphold the Local Authority's Decision, direct it to make an Order or make an Order itself.

If DEFRA intends to direct the Local Authority to make an Order or makes an Order itself which is materially different from the Order sought, DEFRA must give at least 28 days' Notice for representations or objections with grounds.

If any representation/objection is made, arrange a Local Inquiry, it must allow Written Representations to be made to a DEFRA appointed person or allow a person who has made Written Representations to be heard; and consider the Report of any DEFRA appointed person who has held an Inquiry and has received or heard Written Representations.

"Materially different" means: it affects other land not previously affected or it does not show one or more of the proposed routes or it shows a route not previously shown or it shows a Public Right of Way of a different sort.

Modification Orders by Consent

Where it appears to the Local Authority in relation to a Public Right of Way that

- the presumption of dedication period (20 years) has expired or the existence of a Public Right of Way (including a Byway Open to All Traffic up to the cut-off date of 1st January 2026) is not shown on the Definitive Map and Statement;
- a highway of one description shown on the Definitive Map ought to be designated as a highway of another description;
- it is needed because the Local Authority has documentary evidence for the existence of a Right of Way in existence before 1949 and in a case where an

Application for a Modification Order has been made and the Local Authority has served Notice that it is considering the Application,

– the Local Authority shall find out if every land owner or occupier to whom the Modification Order relates will agree to an Order which would otherwise be a Special Order for a not less sustainably convenient diversion, alteration of the width of the Public Right of Way or in possession of a new limitation or condition.

If every landowner and occupier consents, the Local Authority may make a Modification Order by Consent which is noted as such without it being a Special Order.

There are rules about the grounds for diversions and work required to bring a way or route up to standard.

If one landowner would consent if a Special Order was made and the other landowner did not object, the Local Authority may make a Consent Order in combination with a Special Order.

Once the Local Authority is satisfied that it has power to make a Modification Order by Consent, with or without the making of a Special Order, it must serve Notice on every landowner or occupier to that effect and explain that it has twelve months to decide whether or not to make the Order.

If an Order contains a statement that it is made with the consent of every landowner and occupier, it is a Modification Order by Consent.

Unless extended by the Secretary of State, the Modification Order by Consent must be made within twelve months of the date when the Local Authority has served an Order that it is considering making a Modification Order by Consent or, where an Application for a Definitive Map Modification Order has been made, the Local Authority has served Notice it is considering the Application.

Stopping up: Public Path Extinguishment Orders

If a Public Right of Way is not needed, the Local Authority can make a Stopping Up Order, but it has to be confirmed by the Secretary of State.

Considerations for both the Local Authority and the Secretary of State include:

- the extent of likely use and the effect upon land served by the way,
- public safety,
- expediency or preventing or reducing crime in designated high crime level areas and
- expediency to protect staff and pupils where school land is concerned.



In addition, consideration has to be given to the extent to which a new or diverted Public Right of Way is an alternative and any highway improvement plan as well as alternative routes and diversions applicable to designated high crime areas and school land.

The landowner or occupier of land can apply to the Local Authority for a Public Path Extinguishment Order for a footpath or a bridleway where their land is used for agriculture, forestry or breeding horses but the Local Authority can require them to contribute towards compensation and the Secretary of State can force the Local Authority to determine the Application.

Diversion: Public Path Diversion Order

The Local Authority can order diversion by way of creation or extinguishment subject to confirmation by the Secretary of State of footpaths, bridleways or restricted byways crossing lands in the interests of the landowner or occupier.

There are provisions for the Local Authority to require those interested in the crossed land to contribute towards compensation, the Local Authority's costs for making it fit for use and any expenses which the Local Authority may be liable to pay.

Diversions do not have to remain on land in the same ownership, tenancy or occupation and orders made can be subject to new limitations or conditions.

The interests of the landowner or occupier are balanced against the effect the diversion will have on the public enjoyment of the Public Right of Way and can take into account compensation provisions and any improvement plan.

A landowner or occupier of land used for farming, forestry and breeding horses can make an Application to the Local Authority for a Diversion Order.

The Local Authority has to decide Diversion Orders as soon as reasonably practicable and there is provision for the Applicant to require the Secretary of State to force the Local Authority to determine an Application remaining undetermined after four months.

The Local Authority can make Diversion Orders which have to be confirmed by the Secretary of State in relation to footpaths, bridleways and restricted byways when this is expedient in the interests of public safety, or the prevention or reduction of crime in designated high crime level areas and to protect staff and pupils where school land is crossed.

Stiles, Gates and other works on Agricultural Land

Landowners and occupiers of agricultural or forestry land or land used for the keeping or breeding of horses may apply to the Local Authority to erect stiles, gates or other works on footpaths or bridleways crossing the land if it is expedient to stop animals going in or out or to secure agricultural efficiency.

The landowners or occupiers of agricultural land may apply to the Local Authority to erect stiles, gates or other works subject to conditions for maintenance and enabling public use without inconvenience on restricted byways or byways open to all traffic crossing the land if it is expedient to stop animals going in or out or to secure agricultural efficiency. Regard must be had to mobility needs.