

## **General Overview and Scrutiny Briefing Note**

### **Recording of Highway Rights**

**22<sup>nd</sup> April 2016**

This briefing note builds upon information set out in previous briefing notes to the GO&SC during the autumn of 2015 about Public Rights of Way issues and the role of Parish & Town Councils. A meeting was also held to discuss these topics on 14<sup>th</sup> March 2016 involving members of the Herefordshire Local Access Forum (HLAF), the Chair of the GO&SC, the Cabinet Member for Transport & Roads and officers of Herefordshire Council and BBLP. A set of meeting notes for this is available.

The discussions centre on the need for Herefordshire Council to produce accurate records of highways in the county, maintainable at public expense or otherwise. HC is required to maintain four slightly different sets of records; the Definitive Map & Statement (DMS) of public rights of way, the List of Streets (LoS), the Street Works Register (SWR) and the Local Street Gazetteer (LSG). This is in the context of the imminent implementation of legislation from the Countryside & Rights of Way Act 2000 and the Deregulation Act 2015 which will have the effect of extinguishing certain categories of public rights of way that not already recorded on the DMS by 2026.

It is anticipated that exemptions will be set out preserving rights not recorded on the DMS as long as they are shown as a highway on one of the other sets of highway records referred to above although the exact form of the exemption is not currently known. Implementation of the new legislation is expected to take effect on 1<sup>st</sup> July 2016 and thus the form of the exemptions should become clear at that point.

It is common ground that there are many roads and paths with highway rights that are not currently recorded in Herefordshire. This is a national problem and many other local authorities already have long backlogs of existing applications to modify the DMS.

The process to apply for a modification to the DMS is prescribed and can be lengthy and bureaucratic (a DMMO application under Schedule 14, Wildlife & Countryside Act 1981). In contrast, amendment of the other records is not set out in legislation and the process is at the discretion of the local authority. However, in essence the same questions have to be answered: is a particular route a highway, and if so, is it maintainable at public expense? In order to ensure robustness and consistency, HC has adopted a Highways Records Protocol, to set out how requests to amend its highway records are considered and processed. In essence it requires those requesting the amendment to provide evidence to enable those questions to be answered and provides a means of prioritising the processing of such applications alongside DMMO applications.

Some members of the HLAF have consistently lobbied HC to adopt a much less rigorous approach and to record routes on the SWR and / or LSG effectively as highways of unknown status and maintenance responsibility based primarily on alleged observed current patterns of public use. They consider that this would entail a quicker and more efficient use of resources.

It is the view of officers that such an approach would be inappropriate for a number of reasons:

- As a matter of law, HC must consider whether a particular route is a highway on the balance of probabilities. This requires an assessment of all the readily available evidence of which current patterns of use would only be a part.

- Declaring a way to have highway status necessarily imposes obligations and restrictions on the owners and others with an interest in the land over which it passes. The rules of natural justice require that these parties are provided with an opportunity to provide evidence of their own as to the status of the route. HC's Highway Records protocol allows for this whilst the proposals for a less robust recording process do not.
- The current guidance and requirements for the LSG do not allow for the recording of alleged / unknown highway rights.
- To create a less robust system of recording rights would create an incentive to avoid the statutory DMMO process, distorting the allocation of staff resource and is considered unfair to those that have made legitimate DMMO applications.

Officers have been advocating for some time, that volunteers submit properly researched and evidence-supported applications either for a DMMO or, where the nature of the alleged highway is not capable of being recorded on the DMS, for a Highway Records Protocol amendment. On April 18<sup>th</sup> 2016, HC / BBLP Officers supported the HLAf in the delivery of a training session at the Herefordshire Archives and Records Centre to parish volunteers in how to research and make such applications. Approximately 50 people attended indicating a level of interest in this area of work.

HC is in the process of writing to the relevant government departments and agencies (Defra, DfT and GeoPlace) seeking clearer guidance but as the law currently stands, it appears that the only way rights at risk of extinguishment in 2026 can be protected is by making a full DMMO application. Officers believe that people interested in protecting such rights should therefore be encouraged to make such applications and not to follow some less robust approach with no certainty as to outcome.

Should the emerging regulations and guidance, particularly with regards to the framework of exemptions from extinguishment of rights, indicate that a different approach is required then this can be reviewed in light of that new information. However, to try and second guess what that framework might be now is considered premature.

It is therefore recommended that members of the public and organisations that have identified routes that they think should be recorded follow the protocols and procedures identified above. This would involve the submission of properly researched and evidence-supported applications either for a DMMO or, where the nature of the alleged highway is not capable of being recorded on the DMS, for a Highway Records Protocol amendment.

The Council and Balfour Beatty are keen to work with voluntary organisations directly or through the Local Access Forum to support work on the ground to improve and maintain the public rights of way network for the benefit of the local community and visitors.