

The Ombudsman's final decision

Summary: Mr C complains the Council is failing to determine definitive map modification applications in a timely way which may adversely affect the available evidence and has caused him unnecessary time and trouble. We have found fault by the Council in failing to meet deadlines set but consider the agreed action of a review of measures to address the backlog of applications provides a suitable remedy.

The complaint

1. The complainant, whom I shall refer to as Mr C, complains the Council is routinely failing to determine definitive map modification applications in a timely way. Mr C further says the Council has failed to comply with directions by the Secretary of State to deal with applications within a specific timescale.
2. Mr C says because of the Council's fault, the availability of evidence and its weight may be adversely affected and he has been caused unnecessary time and trouble in pursuing the matter.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
5. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. I read the papers provided by Mr C and discussed the complaint with him. I have considered some information from the Council and provided a copy of this to Mr C. I have explained my draft decision to Mr C and the Council and considered the comments received before reaching my final decision.

What I found

What should happen

7. Councils must prepare and keep up-to-date definitive maps and statements to show public rights of way (PROW) in their area such as public footpaths and bridleways.
8. The law sets out how people may apply to their council for a definitive map modification order (DMMO) to have a public right of way recorded on the definitive map. Once the council has a properly made DMMO application, it should “*as soon as reasonably practicable*” decide whether to make an order. A decision to make an order needs evidence a right of way exists or is reasonably alleged to exist.
9. If 12 months passes without a decision, the applicant may ask the Secretary of State to direct the council to decide the application. The Secretary of State’s direction may include a deadline for the council to make its decision. The Government’s Rights of Way Circular 1/09 says, when considering whether to make a direction with a deadline, the Secretary of State:

“...will take into account any statement 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.”
10. Circular 1/09 also says, councils “*should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way...*”
11. If a council decides not to make an order, the applicant has 28 days to appeal to the Secretary of State. On appeal, the Secretary of State will consider the evidence to decide if there is a case for making an order and, if so, direct the council to do so. The Secretary of State’s direction may include a deadline for the council to make the order.
12. If a council makes an order, further legal steps follow, which may include the Secretary of State deciding whether to confirm the order if people have objected to it. A public inquiry may be necessary and people asked about their use of claimed rights of way where there are inconsistencies in the evidence.
13. The Planning Inspectorate acts for Secretary of State with respect to the determination of an DMMOs by local authorities.

What happened

14. The Council’s policy for dealing with DMMOs is set out in its Rights of Way Management Plan 2018 – 2026. This says that DMMO applications will be processed in the order they are received with certain exceptions. The exceptions include:
 - where the public benefit to be gained is of more than limited impact
 - where a claim affects a householder in proving the existence or nonexistence of a right of way
 - a claimed route triggered by an event such as fencing off the line of a regularly used path
 - where an application is claimed on 20-year use the personal circumstances of path users will be taken into account

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- where a claimed route is under threat due to development or major road schemes
15. The policy also states that the Council will use dedications where possible in lieu of DMMOs to allow a quicker route onto the definitive map.
 16. The Council has confirmed that a direction from the Planning Inspectorate will generally override this policy. The Council also says it has engaged with Mr C and the Ramblers Association to ensure it prioritises its resources to deal with the most important cases first.
 17. Mr C complained to the Council about its response to various applications where the Planning Inspectorate had made a direction to the Council. Mr C made specific reference to six applications and I will deal with each in turn below.

Claim A

18. The Council says this is a claim based on historical documentary evidence relating to a part existing footpath and upgrade to a restricted byway. The Council says it also identified another bridleway during the research. The Planning Inspectorate directed the Council to make a decision by 15 July 2020 on whether to decline the application or make an order. The Council decided to make an order on 7 January 2022 and this was completed on 22 February 2022.
19. The Council says it has received one objection and is negotiating with the landowner to provide a diversion and part extinguishment to reflect the modern landscape and remove the objection. If the objection remains the matter will be referred to the Planning Inspectorate.

Claim B

20. The Council says this is a claim relating to an extinguishment, dedication of a path and a DMMO which was based on user evidence. The Planning Inspectorate directed the Council to make a decision by 25 February 2020 on whether to decline the application or make an order. The Council has highlighted this is a complex case which required the current legal definitive line to be extinguished and a walked line to be created and dedicated by agreement with the landowner. It also required a DMMO to upgrade the walked footpath to a public bridleway. The DMMO 'extinguishment' Order was confirmed on 4 March 2022 with the dedication by the landowner confirmed on 13 May 2022. The research has been completed for a DMMO to upgrade to a public bridleway and a report was due to be presented at the Council's Planning and Licensing Committee on 5 July 2022.

Claim C

21. The Council says this is a DDMO based on user evidence. The Planning Inspectorate directed the Council to make a decision by 19 December 2020 on whether to decline the application or make an order. The Council has highlighted the complex nature of this case as it involved several claimed routes, adding bridleways and upgrades to a bridleway for which it received a large number of objections. The Council says a report would be presented to its Planning and Licensing Committee on 5 July 2022.

Claim D

22. The Council says this is a claim based on user evidence. The Planning Inspectorate directed the Council to make a decision by 19 December 2020 on whether to decline the application or make an order. The Council has confirmed

the DMMO was made and confirmed on 4 March 2022 with the right of way now available.

Claim E

23. The Council says this is a claim based on user evidence. The Planning Inspectorate directed the Council to make a decision by 21 October 2021 on whether to decline the application or make an order. The Council says it has put the proposal out to pre-consultation and received objections. The Council is currently negotiating another claim made by Mr C affecting the same landowner (claim F below) and has decided it is prudent to conclude those negotiations before making a decision on this claim.

Claim F

24. The Council says this is a claim based on user evidence and some historical documentary evidence. The Planning Inspectorate directed the Council to make a decision by 22 October 2021 on whether to decline the application or make an order. The Council has reached a legal agreement with the landowner to dedicate two footpaths as bridleways and the relevant documents will be signed once the physical upgrades are completed this summer.

Council's comments on the delays identified in the above claims

25. In responding to the Ombudsman, the Council says it is dealing with an unprecedented number of applications to research and register public rights of way. This is due to legislation which proposed a cut-off date of 2026 to stop claims for public rights of way based on old historical documentary evidence. There was a research project known as the Lost Ways Project by the former Countryside Agency. A key part of this work and a priority was ensuring that applications from all stakeholders including Mr C, representing both the Ramblers Association and the British Horse Society be validated and entered onto the Authority's DMMO register, as they would be protected by the cut-off date. Although the legislation was passed it was not brought into force by Parliament and in 2022 it was announced that Central Government had abolished the Lost Ways Project. The Council says this register is up to date and continues to be updated as more applications come in from stakeholders.
26. The Council further says the process of dealing with DMMO applications is intensive and time-consuming requiring detailed research of archives at County Hall, libraries, County and the National Records Office at Kew. The Council also notes it can be emotive particularly the Lost Ways type applications from Mr C where the majority of paths have not been used, sometimes for at least 200 years. Such application can create a large number of meetings, discussions and enquiries from landowners and others who are initially surprised and have concerns regarding their land and privacy.
27. The Council says the COVID-19 restrictions also affected the holding of meetings and undertaking research with the closure of Council Offices, libraries and the local Archives Office. There has also been an impact on staffing levels during this period. The Council says this impact was recognised by the Planning Inspectorate with the average timescale provided being six months before the impact of COVID-19 restrictions but is currently an average of 18 months.
28. Although the Council accepts Mr C's applications provide an extensive catalogue of research it still has to research and check the research to ensure the right decision is reached. The Council notes many applications receive objections and it must ensure the evidence is robust for any Public Inquiry.

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29. The Council says it spends a considerable amount of time negotiating and working with all stakeholders particularly those directly affected by a claim for a public right of way. The Council says Mr C is aware the results can be beneficial with a number of paths being added to the Definitive Map and Statement by means of a quicker and more efficient dedication of public rights.
30. The Council says it employed an extra officer in the late summer 2021 who is primarily working on three user evidence claims applied for by Mr C. The Council has prioritised these three applications due to the large number of applicants and demand from the local community. The Council notes the applications are time consuming as they involve dealing with hundreds of User Evidence Forms and undertaking interviews as well as dealing with rebuttals from the affected landowners. The Council says Mr C is aware of this work and approves of the priority the applications are receiving.
31. The Council also recruited an experienced Commons, Village Green and Definitive Map Officer in August 2022 to fill a vacancy following retirement.
32. The Council says it has recently invested in new technology which assists it in managing public rights of way assets. As part of this technology there are useful automated systems in place which will help with the extensive administrative work which is associated with the legal procedures of adding public rights of way to the legal record. The Council says work is continuing on setting this up and it is hoped the advantages of this system in reducing the administrative tasks will be seen in the near future.

Is there fault causing injustice

33. The Ombudsman has recently issued a Focus Report, 'Under Pressure'. The Report recognises councils face budget pressures and that delay caused by service request backlogs is a key theme in many of our investigations. The Report says the presence of delay does not necessarily mean there is fault by a council. Rather, we will consider whether the law requires councils to act in a set time; what steps a council has taken to explain what is happening and to anticipate and respond to increasing pressures. We will also consider the impact of delay on the complainant.
34. The key issue in Mr C's complaint is the time it is taking the Council to make an order or otherwise on DMMO applications. The law does not set a time limit for councils to deal with DMMO applications but requires them to act 'as soon as reasonably practicable'.
35. The Council accepts it has a backlog of applications and has not been able to meet directions set by the Secretary of State. The available evidence shows the Council's DMMO backlog is longstanding. I consider there is fault by the Council in failing to meet deadlines set to deal with applications and directions.
36. However, I note the Council has made progress on the six applications highlighted by Mr C to the Ombudsman. This includes making a DMMO on two applications with a report to Committee for another two applications, a legal agreement reached on one and cogent reasons for delay on the one remaining.
37. I have also noted the Council's actions both in terms of its resourcing and new technology which the Ombudsman would welcome.
38. More generally, applications for DMMOs often involve evidence given by local people about the use they have made of claimed rights of way. That evidence will be in written statements. Where an order is made and opposed, it is often

necessary and helpful to ask people to clarify and or expand on what they have written. Similarly, if unresolved objections lead to a public inquiry, people may attend and describe their use of a claimed path to the inspector acting for the Secretary of State. As years pass, people move away, may die or become unable and or unwilling to take part in public inquiries.

39. I do find that other DMMO applicants may be facing similar lengthy waits before the Council both investigates their claimed paths and, where appropriate, makes an order (see paragraph 4 of this statement).

Agreed action

40. In order to provide a remedy for the injustice caused to Mr C by the fault I have identified above, the Council will within two months of my final decision:
- arrange for the Chair of the Committee to discuss with Mr C how the system could be further improved particularly in providing resources to facilitate discussions with landowners to deal with their concerns and to include this as part of its wider review.
41. In order to remedy the wider injustice identified, the Council will within three months of my final decision:
- complete a review of the changes to its DMMO service to assess the impact of its additional resource and system improvements to ensure this action is effective in helping the Council to reduce the backlog;
 - report the findings of the above review to councillors and seek approval for any additional changes identified as necessary to further reduce the backlog within three calendar months of completing the review; and
 - following the above, provide an update every six months to councillors on its progress in reducing the DMMO backlog for the next two years.

Final decision

42. I have completed my investigation as I have found fault causing injustice but consider the agreed action above is enough to provide a suitable remedy.

Investigator's decision on behalf of the Ombudsman