

PLANNING & LICENSING COMMITTEE

18 July 2023

APPLICATION FOR DMMO (REF: RCCDC/M17)

Report of the Strategic Director for Places

Strategic Aim:	A special place	
Exempt Information	No	
Cabinet Member(s) Responsible:	Cllr C Wise, Portfolio Holder for Highways, Transport, and the Environment	
Contact Officer(s):	Stuart Crook, Highways Asset Management and Policy Manager	01572 758260 scrook@rutland.gov.uk
	Penny Sharp, Strategic Director - Places	01572 758160 psharp@rutland.gov.uk
Ward Councillors	Councillor A MacCartney Councillor S Harvey	

DECISION RECOMMENDATIONS

That the Committee:

1. consider the application and to approve the making of a Definitive Map Modification Order (DMMO) to add the footpath shown ABC on the draft order map at Appendix 1 to the definitive map and statement for Rutland.

1 PURPOSE OF THE REPORT

- 1.1 This report deals with an application to add a public footpath between Main Street in Barrow and Sheep Dyke in Cottesmore to the Definitive Map and Statement (DMS) for Rutland and seeks committee approval to make a Definitive Map Modification Order (DMMO).

2 BACKGROUND AND MAIN CONSIDERATIONS

- 2.1 Any person may make an application to the council to change the Definitive Map and statement, using a Definitive Map Modification Order application. Such an application is made under section 53(5) of the Wildlife and Countryside Act 1981, and Schedule 14 of that Act.
- 2.2 On 7th December 2021, Jon Mitchell of 'Ways Around Cottesmore' made an application to change the Definitive Map. The application was accompanied by a

statement setting out Mr Mitchell's view on the documentary evidence and copies of the evidence relied upon.

- 2.3 The claimed route of the footpath is shown on page 3 of the Application, which is included here as Appendix A to the report from Routewise consulting (appendix 2). It is described as leading from Main Street, Barrow (OS Grid Ref SK 8916 1512 to Sheepdyke, Cottesmore (SK 9014 1394). The route runs southwards for just over a kilometre from Main Street, along an unnamed green lane (white road) which is recorded as Village Green 29 (Green Lane), continuing southwards across a field to the parish boundary and then south-eastwards across 3 further fields, a track and belt of trees, to the western side of the Market Overton Road. The application route then continues from the eastern side of the Market Overton Road south-eastwards for approximately 565 metres across another 3 fields to join the public road known as Sheepdyke, in Cottesmore.
- 2.4 The council needs to investigate and to consider what the evidence shows. The evidence can come from documentary sources, the user evidence submitted by the applicant in support of their claim, and any evidence provided by the current and/or former landowner. The Council cannot consider other factors, such as the effect on the environment, suitability, safety, security or the wishes of any individuals or groups.
- 2.5 The council needs to make its decision, based on the available evidence, as to whether a highway (i.e., a right of way) has been dedicated, and if so, what is its status and width, and is it maintainable at public expense. The evidence of dedication can either be of an express nature, such as a creation agreement or inclosure award; or else be inferred, such as through use. There may be documentary evidence to show that a way was dedicated in the past. Alternatively, evidence of use can show the existence of a highway under either statute or common law, or evidence can show that such dedication has not occurred or has been prevented ([Planning Inspectorate guidance](#)).

3 LEGAL FRAMEWORK

- 3.1 Section 53 of the Wildlife and Countryside Act 1981 provides that the Definitive Map and Statement should be kept under review by the Authority and modified by making orders if there is evidence to support modification.
- 3.2 Such evidence needs to show that a route has been dedicated as a public right of way, i.e., a highway, where there is a right to pass and re-pass in perpetuity. The evidence of dedication can either be of an express nature, such as a creation agreement or inclosure award; or else be inferred, such as through use. There may be documentary evidence to show that a way was dedicated in the past. Alternatively, evidence of use can show the existence of a highway under either statute or common law.
- 3.3 Section 32 of the Highways Act 1980 states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the

tendered document, the status of the person by whom and the purpose for which it was made or complied, and the custody in which it has been kept and from which it is produced.”

- 3.4 The evidence needs to be judged on the civil standard of proof i.e., on ‘the balance of probabilities’. The test is not ‘beyond all reasonable doubt’.
- 3.5 The legal test under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 that needs to be considered, when deciding whether an order should be made for this application, is:

“The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway, or subject the section 54A, a byway open to all traffic.”

- 3.6 The ‘discovery of evidence’ connotes the finding of some information that was not known to the authority when the map was prepared. This can be information which may, or may not, have existed at that time. Where a case has already been investigated, be it because of an objection at the time of the first Definitive Map or for any subsequent application or investigation, there cannot simply be re-examination of the same evidence that was previously considered. There must be ‘new’ evidence (i.e., ‘not previously considered’) that, together with the evidence already considered, would justify a modification order being made (see *Burrows v. Secretary of State for Environment Food and Rural Affairs* [2004] EWHC 132).

4 DOCUMENTARY EVIDENCE

- 4.1 There are records available at the Leicestershire Records office, deposited by the Noel family, Earls of Gainsborough and Viscounts Campden. The land crossed by the application route was still in the ownership of the Earl of Gainsborough one hundred years ago. However, whilst these documents are available to view at the records office, the documents may not be copied or photographed without the express permission of the depositor.
- 4.2 A detailed examination of the relevant documentary evidence was undertaken by Routewise Consulting, acting on behalf of the council, and is provided in paragraphs 17-81 of the report at Appendix 2.

5 CONSULTATION

Legislation requires for an application for a DMMO to be properly made the owners of any land affected [by the application route] must be given notice [of the application]. The affected landowners in this are Exton Estate (care of Cannon Nominees & MacFarlanes LLP), Mr Albert George White and RG & RT Allen.

- 5.1 After reviewing the application, a representative for the Exton Estate indicated that they’re unlikely to object should the council make an order. However, they did express concerns about the suitability of the historic route and may want to propose an alternative alignment (diversion) if an order is made. This would be subject to a separate legal process.

5.2 Solicitors for Mr White wrote to the council (Appendix 3) explaining that, in their view, the evidence supporting the application is 'not conclusive' and should therefore be rejected. Members are reminded that evidence needs to be judged on the civil standard of proof (3.4). Routewise consulting were asked to consider the representations made on behalf of Mr White but saw no reason to change the recommendations or conclusions set out in their report (Appendix 2)

5.3 RG & RT Allen indicated that they're likely to object if the council make an order but offered no further explanation or grounds.

6 ADDITIONAL CONSIDERATIONS

6.1 A visit to the area revealed no significant physical obstructions of the claimed route meaning that very little work on the ground would be required to make the path available for use by the public.

6.2 The presence of some established farm tracks running nearby were noted, and it may well be preferred by all parties, or the historic route (which now crosses land used for arable crop production) to be diverted along these routes by way of public path order.

7 ALTERNATIVE OPTIONS

7.1 Committee members may, contrary to recommendations, reject the application and refuse to authorise the making of a definitive map modification order (DMMO). Grounds for the decision would be required, and (the decision) would be subject to appeal.

8 FINANCIAL IMPLICATIONS

8.1 There are minor financial implications associated with the council making an order. Some physical work may be required to bring the route in to a condition suitable for use by the public; this may require funding from the council. In addition, if the claimed footpath is added to the definitive map and statement, it would become a highway maintainable at the public expense in perpetuity.

9 LEGAL AND GOVERNANCE CONSIDERATIONS

9.1 Set out within the report.

10 DATA PROTECTION IMPLICATIONS

10.1 There are no significant data protection implications arising from the report.

11 EQUALITY IMPACT ASSESSMENT

11.1 An Equality impact Assessment has not been completed because the report does not propose a significant change to an existing policy or service provision.

12 COMMUNITY SAFETY IMPLICATIONS

12.1 There are no significant community safety implications arising from the report.

13 HEALTH AND WELLBEING IMPLICATIONS

13.1 There are no significant health and wellbeing implications arising from the report.

14 CONCLUSION AND SUMMARY OF REASONS FOR THE RECOMMENDATIONS

14.1 Committee members must make a decision about whether a public right of way exists based on the evidence before it.

14.2 The available evidence is, on balance, believed to be consistent enough to show that a public footpath subsists over a route leading from Main Road Barrow, crossing the Overton Road, and continuing to Sheepdyke in Cottesmore.

14.3 Consequently, it is recommended that committee members authorise legal services to make a DMMO that will add the claimed footpath to county's definitive map and statement.

14.4 Any order made would need to consider the width of the Footpath, the location of structures along the route as suggested in the Parish Survey. As the path was proposed for inclusion on the Definitive Map, it is recommended that the path would be maintainable at the public expense.

15 BACKGROUND PAPERS

15.1 Set out within the report.

16 APPENDICES

Appendix A – Draft Definitive Map Modification Order (DMMO) map

Appendix B – Routewise Consulting report

Appendix C – Letter of objection from solicitors representing Mr White

A Large Print or Braille Version of this Report is available upon request – Contact 01572 722577.