

The Implications of the Rights of Way Sections of the Deregulation Act 2015

Report of the Head of Highways, Capital Development and Waste

Please note that the following recommendations are subject to consideration and determination by the Committee before taking effect.

Recommendation: It is recommended that:

- (i) officers be given delegated powers to make Modification Orders in respect of obvious administrative errors where applicable, under the streamlined procedure and that, accordingly, a report be referred to the Procedures Committee in due course to approve the necessary change to the Council's Constitution;**
- (ii) officers be given delegated powers to make Modification Consent Orders and that, accordingly, a report be referred to the Procedures Committee in due course to approve the necessary change to the Council's Constitution;**
- (iii) Members agree the draft proposed Definitive Map Review Procedure subject to further clarification from Defra, and that should further clarification come forward before the next Committee meeting it is recommended that the chair of the Committee and the County Solicitor be able to agree the additional details; and Members note the changes to the legal process as a result of the Rights of Way provisions of the Deregulation Act 2015, and the risks and implications for County Council resources.**

1. Purpose of Report

The purpose of this report is to present a summary of the expected effects of the rights of way sections of the Deregulation Act 2015. It considers the implications and issues for Devon County Council, landowners and members of the public resulting from changes to rights of way processes. A previous report to the Committee on 20 November 2013 (Report HCW/13/65), detailed the proposed changes as the Act went through the Parliamentary process.

2. Summary

New provisions have been made in the Deregulation Act 2015 which will affect the procedures in relation to the determination and making of Definitive Map Modification Orders. A previous report to the Committee on 20 November 2013 (Report HCW/13/65) detailed the proposed changes as the Act made its way through the Parliamentary process. It is not expected that the necessary regulations to implement the Act will be brought into force before Autumn 2016. This report outlines what the new provisions will mean for landowners and members of the public, and how the County Council will need to change its Definitive Map policies and procedures to implement the new legislation when it comes into effect.

As reported in November 2013, and subsequent verbal updates to the Committee, the detail of specific regulations and guidelines relating to different parts of the Act are important and will determine the clarity of processes and the impact on staff and resources. There will also be a transitional period for the new legislation to bed in. Until this happens it is difficult to predict the finer details of the outcomes. However, the primary legislation does set out a

number of new procedures which will come into effect once the Act is implemented. It is expected that the current scheme of delegations and County Council procedures will need to be altered to ensure that the County Council is prepared for the implementation of the new legislation and to streamline the County Council's Rights of Way processes. The County Council's Public Rights of Way policies and procedures may need to be reviewed further once the necessary guidance and Regulations have been published and the implications of the new legislation are fully understood.

3. Background

Devon County Council, as surveying authority, has a duty to keep a legal record of Public Rights of Way, known as the Definitive Map and Statement (DMS). This record is conclusive evidence of all the Footpaths, Bridleways, Restricted Byways and Byways Open to All Traffic (BOAT) it shows, without prejudice to any higher rights that may exist or to routes which are not shown. Changes can only be made to the DMS by means of a legal order – a Definitive Map Modification Order (DMMO).

The County Council has a statutory duty, imposed by section 53(2) of the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review and to make such modifications as appear requisite. Current law on highways states that “once a highway, always a highway”. This means that where evidence is discovered which shows that rights exist which have not been recorded, Orders must be made to modify the DMS. It has been Devon County Council's policy since 1989 to undertake this duty of keeping the DMS under continuous review on a systematic parish-by-parish basis. In addition to the county-wide Definitive Map Review there is a process whereby the public can make a formal application to the County Council to make a change to the Definitive Map. This process is currently set out under Schedule 14 of the Wildlife and Countryside Act 1981.

As the highway authority the County Council also has powers, but not a duty, under the Highways Act 1980, to create, divert or extinguish public rights of way where the requisite legal tests are satisfied, but there is currently no formal means for landowners to insist that an application to divert or extinguish rights of way be dealt with, except in connection with rail crossing or crime prevention in schools.

The Countryside and Rights of Way Act 2000 (CROW Act) included provisions, subject to Regulations not yet made, to extinguish on 1 January 2026 un-recorded historic Footpath and Bridleway rights. This is referred to in the report as the “2026 cut-off date”. Unrecorded BOAT rights were extinguished by the Natural Environment and Rural Communities Act 2006 (NERC Act). The CROW Act also included provisions, subject to Regulations not yet made, giving landowners the “Right to Apply” to divert and extinguish rights of way.

Natural England in consultation with the Stakeholder Working Group (formed of 15 representatives from user groups, landowner groups and local authorities), produced a report “Stepping Forward” to inform the Department for Environment, Food and Rural Communities (Defra) of what changes were needed to the legislation. The aim of these changes was to achieve certainty, clarity and the ability for negotiation between parties in matters of historic rights of way, and to enable to implementation of the 2026 cut-off date and the “Right to Apply” provisions of the CROW Act.

The result was seven Rights of Way Sections in the Deregulation Act 2015 (sections 20 to 26 and parts 1 to 3, schedule 7) which include provisions on how the 2026 cut-off date is to be implemented and new powers for councils and the Secretary of State. Provisions were also made in the Act for implementing the “Right to Apply” (part 4, schedule 7).

As stated above, it is not expected that the necessary Regulations to implement the Deregulation Act will be brought into force before Autumn this year. This report outlines what the new provisions will mean for applicants and landowners and how the County Council will need to change the way it deals with applications and claims to implement the new legislation when it comes into effect. The Act sets out new procedures for Definitive Map Modification Orders and Public Path Orders, and it is considered that will require a change to the existing scheme of delegation and Definitive Map Review Procedure to ensure that the County Council is prepared for implementation and to streamline County Council processes.

4. Current process

The determination of proposals for modification of the DMS based on evidence of use or historical documents often involves difficult and sensitive decisions. Currently all proposals for modifications to the DMS, arising from the parish-by-parish review or formal applications made under Schedule 14 of the Wildlife and Countryside Act, are referred to the Public Rights of Way Committee for determination. The Committee's role is to act in a quasi-judicial capacity to assess the evidence and decide whether the claim meets the legal tests, namely whether the evidence shows that a right of way *subsists on the balance of probabilities*, or is *reasonably alleged to subsist*. Once the principle of a proposal has been debated and determined by the Public Rights of Way Committee then the action of publishing and confirming orders is delegated to officers, as reflected in the current schedule of delegated powers to the County Solicitor in the Council's Constitution, namely: To publish and confirm Modification Orders following consideration of proposals by the Public Rights of Way Committee.

Currently decisions about whether Public Path Orders (Diversions, Extinguishments and Creations) are taken by an officer under delegated authority in non-contentious cases. The Committee may be asked to consider whether applications for changes such as diversions under the Highways Act 1980 meet the relevant legislative tests in cases where such proposals are opposed. This report first deals with Modification Order cases and then Diversion and Extinguishment cases.

5. Modification Order cases

Devon County Council's current Definitive Map Review Procedure is set out at Appendix I to this report. This procedure was approved by the Public Rights of Way Sub-Committee in September 2003. Proposals put forward through the Parish Review process (including earlier uncompleted reviews) are put out for public consultation if they are considered by the PROW officers to be prima facie valid, i.e. if there is sufficient evidence to warrant further investigation. Formal applications under Schedule 14 of the Wildlife and Countryside Act 1981 are also put out for consultation. Under current legislation there is no means of rejecting poor applications or for negotiating with landowners. After consultation, recommendations are referred to the Public Rights of Way Committee for authority to make an Order to modify the DMS where the evidence shows the existence of public rights. This might be followed by a Public Inquiry if objections are received, whether or not the objection is relevant to the Order made.

Currently landowners first hear about formal applications when they are sent an official 'Notice' by the applicant, as required by the Regulations. They are also then consulted by the County Council at the informal consultation stage in the Definitive Map Review Procedure. Under current legislation, it is not possible for landowners to negotiate with the County Council, and it is not easy to provide the route on a different line – currently this can only be achieved by means of a separate Public Path Diversion Order, although this may be made concurrently with the DMMO. Pending applications can affect owners wishing to sell their land. However, landowners are currently unable to appeal for the County Council to be

directed to make a decision on an application affecting their land. They usually are involved if the matter goes to Public Inquiry and would need to submit their case to the Inspector.

Currently an applicant can appeal because the County Council has not made a decision or because it has decided not to make an order. In such cases appeals are sent to the Planning Inspectorate. An Inspector considers the evidence and may either direct the Council to make a decision or an Order as appropriate. If, as a result, an Order is made and receives objections, it will again be sent to the Planning Inspectorate who will arrange for another Inspector to hear the case and make a decision on the Order.

Also under current legislation even obvious administrative errors must follow the same procedure as for all other proposals for modification of the DMS and must be referred to the Public Rights of Way Committee.

As outlined at Section 3 above the County Council undertakes its duty to keep the DMS under continuous review by carrying out a Definitive Map Review on a parish-by-parish basis to ensure that existing rights of way in each parish are correctly recorded. This proactive policy of determining all claims and issues on a parish basis, rather than dealing with individual claims at a time, has been found to deal with them as efficiently as possible, making most effective use of staff resources. To date the Review is almost 80% complete, with a target for completion of the county by 1 January 2020. As a result of this comprehensive review Devon County Council should be less affected by the 2026 cut-off-date than other authorities, as many historical routes and anomalies will have been identified prior to that date.

6. Diversion or Extinguishment Orders

Devon County Council does use its powers to process applications for diverting or extinguishing rights of way and has regard to the Rights of Way Improvement Plan when considering such requests. Unlike Modification Order cases, the County Council has the discretion not to take an Order to an inquiry if objections are received, but needs to have clear reasons for its decision. Current Costs Recovery Regulations apply, but these are limited on what can be charged for and do not allow full cost recovery. For example, the Council cannot charge the cost of taking a case to Public Inquiry. Like Modification Order cases, a Public Inquiry might be necessary if objections are received, whether or not the objection is relevant to the Order made.

Currently only applications where there are safety issues regarding rail crossings or for crime prevention in schools does the County Council have a requirement to process. As a result other applicants cannot appeal against decisions by the Council not to deal with their requests and there are no timescales given for the authority to make a decision. Applicants are expected to be involved if the matter goes to Public Inquiry and have to submit their case to the Inspector.

7. Deregulation Act 2015

Regulations are currently being drafted to implement the Rights of Way sections of the Deregulation Act 2015. It is not expected that they will be published before Autumn 2016.

When this happens, the 2026 cut-off date will be applied in England. This means that on 1 January 2026 any unrecorded Rights of Way will automatically be extinguished unless they are subject to a saving provision.

The full provisions are essentially as drafted in the Deregulation Bill and as reported to the Committee previously. The main changes are summarised below.

For Modification Order applications, new Regulations will enable:

1. a “preliminary assessment” to be applied to all new applications. Only applications which pass the preliminary assessment will need to be added to the County Council’s register of applications. The County Council will be required to notify the landowner if the application passes the assessment.
2. a new appeals process via Magistrates Court for applicant and landowners where the County Council fails to make a decision given in Regulations (replacing the current process outlined in Section 6 above whereby applicants only can appeal to the Secretary of State (SoS)).
3. Inquiries to be heard in cases where there is an appeal against the Council’s decision not to make an Order. The Inspector appointed by the SoS will, if necessary direct the Authority to make an Order at the end of the process without the need for a further inquiry (replacing the process outlined in Section 6 above).
4. The Authority does not have to submit the appeal if the grounds are considered irrelevant.

The above provisions will also apply to existing applications where Orders have not been made.

A new simplified procedure will enable the County Council to make Modification Orders arising from obvious administrative errors where the landowner (and applicant if applicable) agrees.

Modification Orders need no longer be made on the basis of “reasonably alleged to subsist”. Instead, before making a Modification Order the County Council must be satisfied that the claimed rights subsist – under the current process this is the higher test for confirmation of an Order.

The County Council would also have a duty to establish whether a landowner would consent to a Modification Order, with or without modifications to the route e.g. changes to the location of a historic route, but not its status – a Modification Consent Order.

For diversion and extinguishment cases, new Regulations will enable:

1. Landowners to make formal applications with a right of appeal to the SoS if the County Council does not determine the application within a timescale prescribed in the Regulations or, if the County Council refuses to make an Order for the diversion or extinguishment applied for – the ‘Right to Apply’.
2. Requirements to record applications in a new statutory Register of Applications.
3. Authorities full cost recovery when dealing with such applications.

Guidance, which is being drafted, will require authorities to work on the basis that, wherever practicable, public rights of way should be removed, on application under the ‘Right to Apply’ from family gardens, working farmyards and commercial or other premises where privacy, safety and security is a significant concern.

Rights of Way Orders (Modification and Public Path Orders) will no longer need to be advertised in local newspapers; they must instead be published on the County Council’s website.

Where cases are appealed to the High Court, the decision made by the Planning Inspectorate (on behalf of the SoS) may be quashed, rather than the Order made by the Authority.

The Authority may disregard an irrelevant objection or representation. Authorities and the SoS may also sever Orders, so that just those parts that are subject to relevant objections need be considered by the SoS.

8. Implications and issues

Devon County Council will need to:

1. ensure that officers have the capacity to make the necessary decisions within the required timescales;
2. decide within 3 months whether new modification order applications meet the “preliminary assessment” (PA) or return them to the applicant;
3. decide within 6 months of commencement of the legislation whether existing applications, for which an order has not been made, meet the “preliminary assessment”. If an existing application fails the assessment it may be removed from the Register of Applications;
4. contact landowners to inform them of the application, where it meets the “preliminary assessment”, and discuss the Modification Consent Order process;
5. determine applications within 12 months of receipt, or commencement in the case of existing applications;
6. provide timely decisions in respect of points 2, 3 and 4 above to prevent applications to the Magistrates Court which may result in costs being awarded against the County Council when decisions have not been made within the given timescale, or provide a robust Statement of Priorities as to why decisions have not been made;
7. attend the Magistrates Court when decisions have not been made within the given timescale;
8. make decisions in any timescales ordered by Magistrates Court;
9. decide whether diversion and extinguishment applications are duly made and where they are duly made, make a decision as to whether to make an order within 4 months;
10. ensure all applications are placed on the Register of Applications;
11. decide whether or not appeals to Devon County Council’s decision not to make an Order, or objections made to Orders are relevant; and
12. set the County Council’s scale of charges for cost recovery in respect of applications for Public Path Orders, depending on the new regulations.

The above will have implications and risks for the County Council’s Definitive Map Review Procedure, through which it currently carries out its statutory duty under the Wildlife and Countryside Act 1981 to keep the DMS under continuous review on a parish-by-parish basis. The current target for completion is 2020, prior to the 2026 cut-off date, but the impact of the new legislation will delay this progress.

Additionally, the County Council will need to decide whether:

1. Modification Orders need to be made as a result of administrative errors; and
2. in 2026, whether routes should be nominated as ‘designated routes’ to be exempt from extinguishment until the Authority has determined whether to make a Modification Order. Such designated routes would need to be kept in a separate part of the Register of Applications.

Landowners will be:

1. able to make applications for Diversion and Extinguishment Orders;
2. required to pay the Council’s costs for such applications;
3. contacted by Devon County Council when a Modification Order application is made, and informed about the process;
4. able to negotiate changes to the location of a route, whether arising from an application or through the parish-by-parish Review, but not its status, as part of a ‘Modification Consent Order’; and

5. able to make an appeal to the Magistrates Court where the County Council has not made a decision on a new Modification Order application within 12 months of receipt. This right of appeal will also apply to existing applications, which have passed the PA, and where the County Council has not made a decision within 12 months of commencement of the new legislation.

Landowners' rights to access their land will be retained even where this was formerly along an unrecorded public right of way, as these will be converted into private Rights of Way. The Act will also enable landowners to apply to the County Council to have gates across BOATs and restricted byways authorised, on agricultural land for stock control purposes.

Applicants for modification orders will be:

1. required to provide a statement as to why the evidence shows a reasonable basis for their belief that the DMS should be changed. This will not apply to existing applications;
2. able to appeal to Magistrates Court in respect of new modification order applications where the County Council has not carried out the PA within 3 months, or determined the application within 12 months of receipt. Transitional arrangements will enable this right of appeal to Magistrates Court to be applied to existing applications where the County Council has not carried out the PA within 6 months of commencement of the new legislation and/or not determined the application within 12 months of commencement; and
3. able to transfer responsibility for the application to another person.

9. Proposed changes to Devon County Council policies and procedures

As outlined at Section 4 above, currently all decisions on whether to make Modification Orders are made by the Public Rights of Way Committee, with the act of publishing and confirming orders then delegated to officers. The determination of proposals for modification of the DMS often involves difficult and sensitive decisions. It is therefore considered appropriate that most proposals should continue to be decided by the Public Rights of Way Committee.

However, new Regulations will enable the County Council to make Modification Orders to correct obvious administrative errors under a new, simplified procedure where the landowner, and applicant if applicable, agrees that it is an administrative error. Such orders would take effect on the date that they are made. The simplified procedure could not however be used to delete a route from the DMS. Examples of "obvious" errors may include drafting errors resulting from the original 1949 process of preparing the DMS or differences between the definitive map and statement. In the past year 8 such items were considered by the Public Rights of Way Committee.

It is felt that savings could be made in staff time if officers were authorised to make Modification Orders in such cases. This would avoid the need to prepare Committee reports and speed up the process of keeping the DMS up-to-date. It is therefore recommended that officers be given delegated powers to make Modification Orders in respect of obvious administrative errors where applicable, under the streamlined procedure and that, accordingly, a report be referred to the Procedures Committee in due course to approve the necessary change to the Council's Constitution. A schedule of such orders made under delegated powers would be included in the regular PROW Committee meetings.

As outlined in Section 7 above, the new Regulations will also require the County Council to establish whether a landowner(s) would consent to a Modification Order in respect of historic routes – a Modification Consent Order (MCO). This process would also enable landowners to negotiate changes to the location of the route. The County Council will be required to

seek such agreement within 12 months of first notifying or approaching the landowner that the process might apply in a particular case. If agreement is not reached within this time period the Authority would revert to the 'standard' procedure for considering whether to make a Modification Order. The Authority may confirm a MCO whether or not any representations or objections are made or abandon the MCO and again revert to the standard procedure.

It is again felt that savings could be made in staff time if officers were authorised to make and confirm MCOs. This would avoid the need to prepare Committee reports and would reduce the delays inherent in the Committee cycles, particularly given the limited timeframe within which such Orders must be made. This would also provide a quicker response to landowners and applicants, where applicable. It is therefore proposed/recommended that officers be given delegated powers to make Modification Consent Orders and that, accordingly, a report be referred to the Procedures Committee in due course to approve the necessary change to the Council's Constitution. A schedule of such orders made under delegated powers would be included in the regular meetings.

A draft showing proposed changes to the County Council's Definitive Map Review Procedure is attached at Appendix II.

It is not expected that the current scheme of delegations relating to Public Path Orders will need to be changed at this time. However, the 'Right to Apply' provisions, which introduce new statutory timescales and appeals process, are likely to have resource implications for the Authority and County Council policies and procedures may need to be reviewed once the necessary guidance and Regulations have been published. A further report will be brought to the Committee in due course as necessary.

10. Financial Considerations

There is a risk that the anticipated changes arising from the Deregulation Act 2015 and the subsequent impacts on current process and procedure cannot be contained within existing financial and staffing resources within the Public Rights of Way Team.

Particularly during the first 12 months following implementation, it is likely that the PROW team will not have sufficient staff resources to carry out the preliminary assessment and determine existing applications within the timescales as set out in the transitional arrangements. The County Council currently has over 200 applications on its Register of Applications.

There is a risk that applicants or landowners might appeal to Magistrates Court in cases where the County Council has not made a decision within the given timescales. Such applications will require officer time and potentially require legal representation and may result in awards of costs being made against the Council. Application costs may be in the region of £3,000 a time, although it should be noted that this figure will vary depending on the individual circumstances.

There is also a risk of appeals being made to the Crown Court or High Court where an applicant or landowner disagrees with the decision made by Devon County Council.

There is likely to be a cost saving in the region of £7,000 p/a as Order notices will no longer need to be advertised in local newspapers. This may help offset some of the additional costs associated with implementation of the new legislation. Notices will still need to be advertised but this will be on the County Council website.

It is difficult to predict the full implications on resources as a result of the 'Right to Apply' provisions but it is likely to have staff implications resulting from new statutory timescales for

making decisions on Public Path Order applications and the introduction of an appeals procedure.

The County Council will however, be able to recover its full costs associated with Public Path Orders, which may help offset some of the additional costs associated with the 'Right to Apply' provisions and could potentially go towards funding for additional resources.

11. Conclusion

As stated above, it is not expected that the necessary Regulations to implement the Deregulation Act 2015 will be brought into force before Autumn this year. The detail of specific regulations and guidelines relating to different parts of the Act are important and will determine the clarity of processes and the impact on staff and resources. However, the primary legislation sets out a number of new procedures which will come into effect as soon as the Act is implemented. It is expected that the current scheme of delegations and County Council procedures will need to be altered to ensure that the County Council is prepared for the implementation and to streamline the County Council's Rights of Way processes. The transitional arrangements which will apply to existing Modification Order applications within the first 12 months following implementation will also have significant implications for County Council resources. It is likely that the Council's Public Rights of Way policies and procedures will need to be reviewed further once the necessary guidance and Regulations have been published and the implications of the new legislation is fully understood.

12. Sustainability Considerations

None arising from the recommendation in this report.

13. Carbon Impact Considerations

None arising from the recommendation in this report.

14. Equality Considerations

None arising from the recommendation in this report.

15. Legal Considerations

Included in the body of this report, with reference to the Highways Act 1980, the Wildlife and Countryside Act 1981, the Countryside and Rights of Way Act 2000 and the Deregulation Act 2015.

16. Risk Management Considerations

There are risks to the County Council resulting from implementation of the PROW provisions of the Deregulation Act 2015, including financial, staff resourcing and reputation.

17. Public Health Impact

None arising from the recommendation in this report.

18. Options/Alternatives

None.

19. Reasons for Recommendation/Alternative Options Considered

To inform the Committee of the changes to public rights of way processes arising from the Deregulation Act 2015, and the implications and risks to the County Council which are likely to result from those changes.

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Electoral Divisions: All

Local Government Act 1972: List of Background Papers

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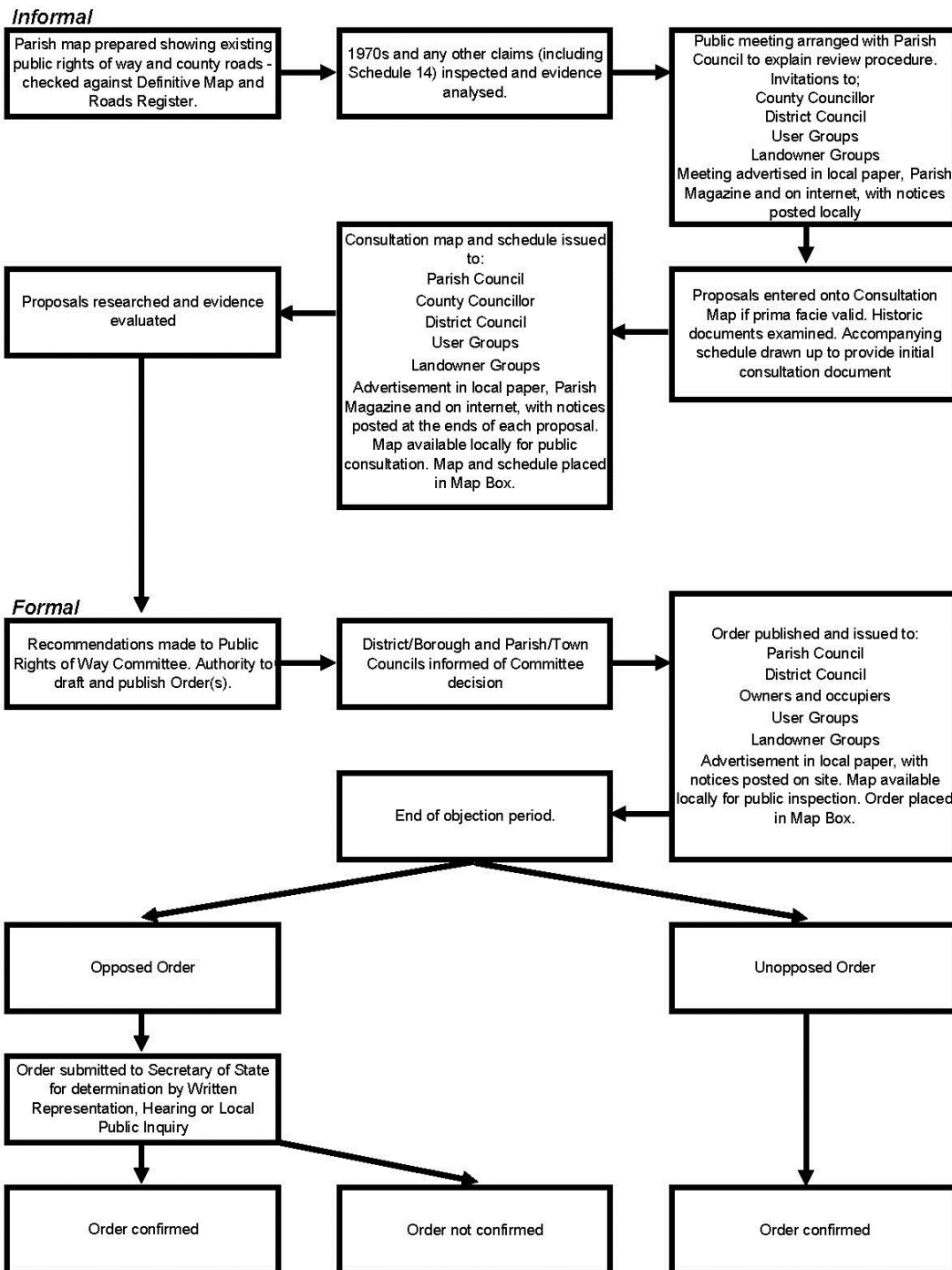
Tel No: 01392 382602

Background Paper	Date	File Ref.
1. Current Definitive Map Review Procedure		
2. Draft Proposed Definitive Map Review Procedure		

hc170616pra
sc/cr/implications of rights of way sections of the deregulation act 2015
02 280616

Definitive Map Review Procedure

The Definitive Map is the legal record of all public rights of way within the county. The County Council is legally required to keep the Definitive Map of public rights of way under continuous review and to make modifications where it appears that routes should be added, re-graded or deleted. The County Council achieves this by carrying out a parish-by-parish review across the county. Reports are taken to the County Council Public Rights of Way Committee.



Proposed Definitive Map Review Procedure

The Definitive Map is the legal record of all public rights of way within the county. The County Council is legally required to keep the Definitive Map of public rights of way under continuous review and to make modifications where it appears that routes should be added, re-graded or deleted. The County Council achieves this by carrying out a parish-by-parish review across the county.

