

Herefordshire Council Highway Records Protocol

Background:

Herefordshire Council may periodically receive requests to recognise and record highway rights. Where the applicant wishes the rights to be recorded on the legal record of public rights of way, the Definitive Map and Statement (DMS), there is a statutory process to follow (Schedule 14, Wildlife & Countryside Act 1981). However, where the applicant wishes the route in question to be recorded on either the s36 Highways Act 1980 List of Streets (LoS) or in another document such as the Street Works Register (SWR), then there is no statutorily prescribed procedure for achieving this nor any mechanism by which such documents should be amended, updated or corrected.

The following protocol establishes a standard application process to be followed when members of the public wish Herefordshire Council (HC) to add a pre-existing route to a highway record other than the DMS or amend that record in some way with regards to a pre-existing route or otherwise to record a highway that may not be maintainable at public expense.

The protocol mirrors many of the aspects of the Definitive Map Modification Order (DMMO) process, reflecting the fact that essentially the same issues are being considered, namely whether or not highway rights exist over the land in question. It also reflects the fact that the staff trained to carry out this assessment are those within the PROW Team who deal with DMMO applications.

The protocol is primarily intended to address situations where a route has been wholly omitted from any highway record or alternatively and more rarely that such a route has been included in error. It is not intended to be used in the following situations:

1. To record newly constructed / created highways on the LoS where for instance they are being formally adopted as part of a new development. Such routes shall continue to be added to the LoS as an administrative exercise when the legal adoption process is complete.
2. To clarify the lateral extent (width) of an already recorded highway. Such issues are routinely dealt with by the Council's Senior Engineer (Searches & Adoptions) as part of conveyancing enquiries.
3. Where the amendment being sought is one that could be achieved by means of a DMMO. Where this appears to be the case, the applicant will be advised to remake their application as formal Schedule 14 DMMO application.

The requirement for the List of Streets (LoS) is set out in section 36(6), Highways Act 1980 which states:

“The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.”

However, the act does not prescribe a format in which such a list should be kept nor how it should be updated.

Principles:

To add a pre-existing route to the LoS, the following criteria must be met:

1. There must be sufficient evidence that the route is a highway
2. There must be sufficient evidence that the highway is maintainable at public expense

The legal test to be satisfied is "on the balance of probabilities". Similar but converse tests apply to applications to remove routes from the LoS but applicants should be aware that evidence of some weight will be required to overcome the presumption that the route was properly recorded on the LoS in the first place (*"the presumption of regularity"*).

In addition to the criteria above, it will also be best practice to reach a conclusion on the following issues:

1. the status of the highway - e.g. full carriageway, restricted byway, cycle-way, bridleway, footpath.
2. the lateral extent (width) of the highway

The SWR is broadly derived from the LoS and the DMS. However, it should also record highways that are not maintainable at public expense. Currently, there is no statutory record of such routes (sometimes called "private streets") but there is a clear public benefit to having such ways listed somewhere. Nonetheless, it will still be necessary for the applicant to prove, on the balance of probabilities, that the route concerned is a highway in a similar manner to tests for routes to be added to the LoS or DMS.

The onus is on the applicant to provide sufficient evidence to justify the amendment sought, not for HC to prove / disprove the allegation nor to have to carry out extensive (positive) research itself. Nonetheless, it will be necessary for HC to carry out some research and to generally satisfy itself that the amendment is reasonable. The issue of lateral extent, in particular, may require accurate site surveys which would normally be unreasonable to expect an applicant to complete.

For routes where vehicular rights are alleged, applicants should take into account the impact of the Natural Environment and Rural Communities Act 2006 which had the effect of extinguishing rights over some routes for mechanically propelled vehicles (MPVs). Further guidance on this is available online at <http://webarchive.nationalarchives.gov.uk/20130403041427/http://archive.defra.gov.uk/rural/countryside/prow/nerc06.htm> and applicants will need to submit evidence to support any claimed exemption from the extinguishment of rights for MPVs.

Process

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| <p>1 The member of the public completes the application form and submits it to Herefordshire Council. The form must be accompanied by a map that adequately shows the amendment required and copies of or details of the evidence that the applicant relies upon to justify the amendment. Further details of the evidential requirements are included on the application form.</p> | <p>Application form submitted</p> |
| <p>2 The application will be summarily assessed by Herefordshire Council. A priority category will be allocated according to the criteria used at the time of the application for Definitive Map Modification Orders. The assessment will normally consider LoS/SWR applications along with DMMO applications in the order dictated by this prioritisation process. Within each priority category, applications will normally be considered in chronological order of receipt</p> | <p>Assessment of the application</p> |

although there will be discretion to vary this for instance to ensure efficient use of resources or the achievement of other Herefordshire Council objectives.

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| <p>3 The assessment of the application will only consider the submitted evidence.</p> | |
| <p>4 If there is reasonable evidence for adding the route to the LoS or recognising it as a Private Street, a summary report will be prepared and, as a general rule, a consultation arranged with the applicant, affected landowners, Ward Member, Parish Council and other organisations that would normally be consulted prior to the making of a DMMO, for comments to be received within two months.</p> | <p>Summary report prepared and circulated</p> |
| <p>5 As an exception to the general rule in 4 above such consultation may not take place where the question of highway status has previously been determined through other procedures and the only issue in question is whether the route is maintainable at public expense.</p> | <p>Consultation not undertaken if status as a highway has been determined and maintainable at public expense is the remaining question.</p> |
| <p>6 Following the end of the consultation period, any comments received will be considered, additional research carried out, if necessary, and a final report and recommendation drafted.</p> | <p>Report and recommendation drafted and submitted to appropriate council lead officer for approval.</p> |
| <p>7 The report will be submitted to the appropriate Herefordshire Council officer for approval and, if approved, the LoS and amended in line with the recommendation.</p> | <p>Herefordshire Council's service provider acts on recommendation.</p> |
| <p>8 The applicant and consultees at 4 above will be formally notified of the outcome.</p> | <p>Notify applicant and consultees of outcome</p> |
| <p>9 Where an amendment is made that requires recording on the Definitive Map and Statement, a copy of the report and decision will be retained by the PROW Team for a DMMO to be made at an appropriate time.</p> | <p>Amend records accordingly.</p> |

Prioritisation

Applications will be prioritised according to the same criteria used by Herefordshire Council to prioritise Schedule 14 DMMO applications. Further information on these criteria is available on the Council's website. Nonetheless, applicants should be aware that public benefit and strength of evidence are likely to be relevant and they are invited to recognise these within their applications. "Public Benefit" may take into account various factors, including but not only, potential recreational or utility use of a route, network connectivity and efficient use of resources. Applicants will be able to submit additional evidence at a later date to enable their application to be reprioritised.