CALL FOR EVIDENCE

JOINT COMMITTEE ON THE DRAFT DEREGULATION BILL

In my capacity as a solicitor who has specialised in public rights of way matters for more than 10 years and who therefore has considerable experience of both the legal intricacies and the procedural issues associated with this area of work, I have been asked by the Alternative Stakeholders Working Group for my opinion on the section of the Draft Deregulation Bill that deals with 'Use of Land'. My comments are therefore limited to sections 12-18 and Schedule 6 of the Draft Deregulation Bill.

Overview

Deregulation

1. While it is acknowledged that it is imperative that the legislation relating to public rights of way is reformed, it is questionable whether the Deregulation Bill is the appropriate forum for such reform. If the aim of deregulation is to reduce and simplify legislation, reduce the burden on business, organisations and individuals, and improve cost-effectiveness, this is unlikely to be achieved by the proposals. Overall there is very little reduction of legislation, if any; the proposed changes are if anything more complex; and although some provisions reduce the burden on one party, this burden is for the most part either transferred to another party, or another party's burden is increased.

Evidence based

2. The proposals only address how new applications for additions/changes to the Definitive Map are to be dealt with. Nowhere is the issue of current, undetermined rights of way applications considered. It is known that many local authorities have a significant backlog of applications waiting to be dealt with. For instance Somerset County Council has a backlog of over 200 applications, which at the current rate of dealing with 10 applications a year will take them 20 years to deal with. This issue will need to be addressed before any proposed changes can be put into force.

3. Many of the proposed changes increase the burden on local authority rights of way departments. As already noted, many of these departments already have backlogs. They are currently understaffed, under funded and inadequately qualified/trained. It is therefore unclear how they would be able to cope with the proposed extra work without a substantial increase in funding and training, which funding will ultimately come from taxpayers, the majority of whom would prefer their money to be spent on essential services.

Effective administration of justice

4. The Bill treats all landowners in the same manner and does not differentiate between those who have large landholdings such as many farmers and estate owners and those who are small private home owners. There is, thus, no provision made for those private home owners who are faced with an

application to add a public right of way which passes along their drive way, or through their garden, or even through their house. Such small landowners would not be able to agree to a diversion of the route (as proposed under para 5 of Schedule 6) as they would not own sufficient land. It would therefore seem just to include an exemption, similar to that in the CROW 2000 Act which provides that land covered by buildings or the curtilage of such land does not comprise access land, whereby applications for Definitive Map Modification Orders for routes crossing property owned by small private home owners (suitably defined) would not be accepted.

5. The Bill makes provision for cost recovery for certain orders under Highways Act 1980. However, no similar cost recovery is proposed for orders under the Wildlife & Countryside Act 1981. Introduction of a fee for all applications made for Definitive Map Modification Orders would go some way to addressing surveying authorities' lack of funds and would also discourage applications based on very little evidence and other frivolous applications. In this respect, it is noted that an application fee is required for all planning applications and all applications to Court.

Individual provisions

6. While many of the proposed changes will improve the current procedures relating to Definitive Map Modifications (even though they are not necessarily deregulatory), there are a number which would benefit from a re-examination as follows:

Clause 13

7. The intention behind the cut-off date was:

    - to provide certainty for landowners; and
    - to provide an incentive to complete the definitive map and statement before 2026

8. The cut off date was proposed 13 years ago and there are 13 years left before the date is reached. 26 years is more than enough time for applications to be made for all known unrecorded rights to be added to the Definitive Map, as it is also more than enough time for applications to delete or downgrade routes that are incorrectly recorded on the Definitive Map. In this context, provision of an additional year for surveying authorities to designate routes to be protected from extinguishment is unnecessary.

9. The reason for the inclusion of this provision cites concerns of duplication of effort between individuals and the voluntary sector and surveying authorities. Such concerns can be more simply addressed by liaison between individuals and voluntary groups and the surveying authorities as is now common practice.

10. Furthermore, as it is currently worded, this provision could completely defeat the point of the cut off date as there is no limit on the number of routes that can be designated as protected from extinguishment. Surveying authorities, in conjunction with individuals and the voluntary sector could therefore list every possible route that may be an unrecorded public right of way as designated protected from

extinguishment. Thus the incentive to make applications for modifications to the definitive map prior to the cut off date would be reduced.

Schedule 6, para 3

11. Precise definitions of 'administrative error' and 'obvious' will be required

Schedule 6, para 4

12. It is accepted that this proposal would reduce the burden on surveying authorities. However, it increases the burden on property buyers. If an application is not required to be registered under section 53 until it has undergone a preliminary assessment, which could take up to three months, any prospective buyer of land across which an application has been made to modify the Definitive Map would be unaware of such application and may proceed to purchase the land, only to discover at a later stage that such an application had been made prior to purchase, with consequential loss in value of the property.

Schedule 6, para 5

13. The purpose behind these provisions is to be welcomed. However, caution must be taken in applying this procedure if the landowner's rights are not to be prejudiced and he is not to feel pressured into consenting. In advising the landowner that in their opinion there is a reasonable basis for the applicant's belief that the definitive map and statement should be modified, the surveying authority must also advise the landowner that the application has only been preliminarily assessed based only on the evidence provided by the applicant (see below) and has not been through the full determination process. Further research may, thus, uncover evidence that does not support the application. The landowner should be further advised that before making a decision he may wish to consult a solicitor or specialist public rights of way consultant to obtain their view on the prospects of success of the application. Such advisory warning would serve the three-fold purpose of (i) ensuring landowners were properly advised; (ii) preventing landowners claiming they had been pressured into consenting to an order or a special order because they believed there was no alternative; and (iii) protecting surveying authorities from such claims.

Schedule 6, para 6 (2) (b) (3)

14. While this proposed change may reduce the burden on the applicant, it increases the burden on the surveying authority and affected landowners and any objectors. If documents referred to in the application are not included with the application itself, then in order to make a preliminary assessment, the surveying authority will need to visit the local records office in order to view the documents. In order to ensure that the burden on the landowner is not increased, they will also need to make copies of the documents so that they are available with the application should the landowner or any objectors wish to view it.

15. The reason cited for this proposal is to reduce the burden on the applicant. In my experience applicants from the voluntary sector are generally well funded, probably better funded than the surveying authorities. Furthermore, if the applicant has had access to the relevant documents for research purposes in order to make the application in the first place, it is very little extra work or cost to obtain copies of the documents.

Schedule 6, para 6 (3)

16. The wording of this provision implies that the surveying authority makes its preliminary assessment based only on the documentary evidence relied upon by the applicant in support of the application and not on any other evidence. Applicants, particular those from the voluntary sector user groups who are well funded and experienced in these matters, will only adduce evidence that supports their application. Consequently, if there is evidence that does not support the application it will not have been adduced with the application and will not be available to the surveying authority to consider unless they undertake further research (which they will not be doing at this stage). Consequently, all applications other than those which are speculative or frivolous will show that there is a reasonable basis for the applicant's belief that the Definitive Map should be modified accordingly and will pass the preliminary assessment.

17. As indicated above, in the interests of justice, it will be necessary to have a disclaimer on any paperwork that advises that an application has passed a preliminary assessment, that this assessment is based only on the documentation provided by the applicant and that further research may uncover evidence which does not support the application.

Schedule 6, para 6 (4)

18. While these provisions may decrease the burden on the Secretary of State, they increase the burden on the Magistrates' Courts which, in my experience, are ill-equipped and inexperienced in dealing with matters relating to the Highways Act 1980 and Wildlife & Countryside Act 1981. They also increase the burden on the surveying authority.

19. Furthermore, these provisions do not address how the surveying authority complies with the suggested timetable if they do not have the appropriate level of staffing, funding and training (see para 3 on p1).

Schedule 6, para 6 (8)

20. In theory this proposal appears to be deregulatory and to simplify and streamline matters so that a case is not submitted to the Secretary of State more than once. However, this is based on the assumption that the Schedule 14 Appeal would be upheld; an Order would be made; objections would be submitted; and a public inquiry would be held. If the Schedule 14 Appeal would not have been upheld, then by dealing with the objection process (to an Order that would **not** have been made) at the same time, actually increases the regulatory burden on the surveying authority, the Secretary of state and the landowner and any other objector.

21. I do not have the statistics on the percentage of schedule 14 Appeals that are upheld. However, I am aware that the majority of those upheld deal with applications under section 53(3)(c), where one of the grounds for making an Order is that the route 'is reasonably alleged to subsist'. As this ground is being removed under para 2 of Schedule 6 of the Deregulation Bill 2013 and consequently an order can only be made where the higher test of 'on the balance of probabilities the right of way subsists' is satisfied, it is likely that the number of Schedule 14 Appeals that would be upheld will decrease. Consequently, it would appear that rather than simplifying and streamlining the process, the provision under para 8 will in fact add to the regulatory burden for all parties.

Schedule 6, para 7(5)

22. The new provision in relation to para 12 of Schedule 15 will reduce the number of cases where the order-making process has to start over again. However, this will not necessarily reduce the administrative burden on either local authorities or the Secretary of State. While, under the current rules, local authorities may consider they have a duty to re-make the Order if it has been quashed, this is not always the case. There are instances where, having heard all the evidence at Inquiry and considered this on the balance of probabilities, the local authority is no longer of the opinion that an order should be made. In these circumstances, having the decision rather than the order quashed and having to re-run the order confirmation process will add to the administrative burden for both local authority and the Secretary of State.

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11 September 2013