

## Appendix 1

In 2011 Cabinet adopted (and full Council later endorsed) the policy to take a neutral stance on the majority of modification orders made by the Authority under section 53 of the Wildlife and Countryside Act 1981. The report considered by Cabinet was entitled 'Public Inquiries regarding public rights of way'. I have set out below some background notes to the report which explain in greater detail past and present policy.

### Background Notes

Previously at Public Inquiries, this Authority would act as 'lead party' and field an Advocate (Solicitor or Barrister) to explain the background to the case, to put forward witnesses to support the Authority's Order, to cross examine the objector's witnesses, to present the legal arguments and make a closing statement. Norfolk County Council followed this procedure in the past but changed, in 2011, to a system which encouraged applicants for these orders to take responsibility for their own applications and play a greater part in the proceedings. The County Council no longer automatically promotes orders at Inquiry and instead generally takes a neutral stance, leaving the applicant for these orders to play a far more active part. The County Councils Case Officers still attend Inquiries to set up the venue in accordance with guidelines, provide opening statements and assist the Inspector appointed by the Planning Inspectorate and the general public, as required.

There is no legal requirement for an Authority to promote its own Order at a public inquiry. Mindful of the costs of sending an Advocate to a public inquiry (c£1500 per day) the Council chose only to promote future Orders if the circumstances of the case satisfied the policy criteria (see below). If cases did not, then a neutral position would be adopted at inquiry. Although Case Officers attend inquiries, the Council does not field a Council witness (or send an Advocate to conduct cross-examination). The Council does not answer questions on the evidence.

In deciding whether to promote the Order, the Council considers as 'policy criteria' firstly the significance and quality of the evidence received, secondly the extent of evidence to the contrary, thirdly the nature of objections received and fourthly the connectivity with the existing rights of way network. By making a case by case decision whether to actively promote the Order the Council will allow for situations where it would seem perverse or invidious of the Council not to actively promote the case beyond referral to the Planning Inspectorate. This individual case approach ensures that the Council does not fetter its discretion by the imposition of a blanket ban on promotion. It is already the case that if the Council has been directed to make an Order by the Secretary of State on appeal it usually takes a neutral stance at any public inquiry.

If an Authority does not promote its own Order there is an expectation from the Planning Inspectorate that someone else (ideally the applicant) will. Although this necessitates further work by the applicant, it encourages a greater participation in what is, to some extent, a free service and provides the applicant with a greater sense of responsibility. It is open to the applicant to adopt the Authority's Statement of Case as his/her own, which has been found to assist in terms of presentation of arguments.

The Council could also have chosen to continue to promote all Orders and field an Advocate and witnesses at every Public Inquiry. However the significant costs of continuing with this practice were considered to be unsustainable (estimated advocacy costs alone for preparation for and attendance at an average public inquiry (lasting between 1 and 2 days) range from £3,000 to £10,000. This was brought into sharp focus on cases where, although the lesser evidential legal test was met to justify the making of the Order (that the way 'is reasonably alleged to subsist') there was insufficient additional evidence to meet the higher ('that the way subsists') confirmation test. It should be remembered that the current statutory duty is to make an Order where the evidence shows that a way is reasonably alleged to subsist. The function of an inquiry however, in these situations, is to find out whether there is additional evidence to satisfy the higher confirmation test. It has been difficult for the Council in the past to promote Orders in such circumstances and was often seen as unduly favouring the applicant at the expense of the public purse. Such criticism was frequently and somewhat justifiably made at public inquiries.

The 2011 policy has been well received and is viewed as being an equitable process. Planning Inspectors expressed reservations at first but, mindful of the fact that there is no statutory duty to promote modification orders beyond referral to the Planning Inspectorate and their experience of handling inquiries under this system, have confirmed that it works and is fair to all parties.