

## **Rights of Way Committee**

**Date: 3 November 2020**

**Definitive Map Modification Order No 1.19 – The addition of a Footpath from footpath 2704-1 and bridleway 2714 crossing Mouse Lane past Charlton Court Farm to footpath 2713 in the Parish of Steyning CP to the definitive map for Chanctonbury.**

**Report by Tony Kershaw Director of Law and Assurance**

**Electoral division/s: Bramber Castle**

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## **Summary**

An application, received on 27 February 2019, was made by Steyning Parish Council to add a new footpath in the parish of Steyning CP. It is supported by thirteen public way user evidence forms from eleven different postal addresses attesting to use from 1976 to the present from 3 times a year to daily.

The Landowner, tenant farmer and adjoining landowner's contest the evidence, arguing that the claimed route has only been used with permission and prior to a permissive path being established in 2009 that public use of the route was not permitted.

The establishment of a permissive path in 2009 is the act which brought use by the public into question and therefore the relevant 20 year period, taken back retrospectively from this date, is 1989 to 2009.

Letters found in the County Council's path/parish files and from the landowner indicate use of the claimed route may have been withdrawn from the public in the 1990's but it is not clear as to whether the interruption was to use on foot or on horseback. In addition, while the letters indicate the route was used by the public, it is unclear if use was "as of right" and tolerated by the landowner or with permission.

The user evidence from eleven users attests to frequent use of the claimed route "as of right" during the relevant period. While there is some evidence of an intention not to dedicate on the part of the landowner, it is not considered that this defeats the claim, given there is no evidence that the landowner communicated an intention not to dedicate the claimed route or that use was interrupted by the landowner. Where an applicant for a DMMO produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, but there is a conflict of apparently credible evidence from the landowner in relation to one or other issues arising under Section 31 of the 1980

Act; then the allegation that the right of way has been reasonably alleged to subsist is used.

It is concluded that the reasonable user would have believed they were using the claimed route "as of right" during the relevant period. Therefore, it is concluded that it can be reasonably alleged the claimed route subsists and meets the relevant statutory tests set out in Section 31 Highways Act 1980 on the lower test of a reasonable allegation.

## **Recommendations**

It is recommended that a definitive map modification order to add a footpath from footpath 2704-1 and Bridleway 2714 crossing Mouse Lane past Charlton Court Farm to footpath 2713 in the Parish of Steyning CP for the Definitive Map for Chanctonbury should be made.

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### **1. Introduction**

- 1.1 The application, made by the Steyning Parish Council, was received on 27 February 2019 to add a new footpath in the parish of Steyning CP. It is supported by thirteen public way user evidence forms from eleven different postal addresses.
- 1.2 This application is made under Section 53 (3) (c)(i) Wildlife and Countryside Act 1980 (WCA), being the discovery by the County Council of evidence which shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land.
- 1.3 The application is based on user evidence only. The requirements for the presumed dedication of a public right of way under statute are set out in Section 31 of the Highways Act 1980. This requires use of the claimed route by the public to be as of right and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public.
- 1.4 In considering the application it must be determined whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a right of way exists, or in the alternative that it can be reasonably alleged to subsist, which is a lower test. The lower test requires that a reasonable person, considering all relevant evidence available could reasonably allege a public right of way subsists over land. The burden of proving this falls to the applicant.
- 1.5 Matters relating to suitability and condition of a way and possible nuisance or need are irrelevant and cannot be taken into account when reaching a decision.

## **2. Characters and Features of the claimed route**

The claimed route commences at the junction of footpath 2704\_1 and bridleway 2714 heading in a northerly direction crossing Mouse Lane and then heading up a farm track past Charlton Court Farm for approximately 300 metres until reaching footpath 2713 as shown on plan 01788 and location plan 01789.

## **3. Land Ownership**

- 3.1 The owner of the land over which the claimed route passes is Richard Harry Goring of the Wiston Estate, under HM land registry title WSX305500. Charlton Court Farm is leased to the occupier, John Goring of Fairbank Farm.
- 3.2 James Foottit and Camilla Foottit also have private rights of access to the drive/farm track over which the claimed route passes as owners of Charlton Court Farm under HM land registry title WSX104550.
- 3.3 Nicola Makepeace of 3 Charlton Court Cottages also has a private access right along the drive/farm track to Charlton Court over which the claimed route passes under HM land registry titles WSX413259 and WSX355817.

## **4. Consultations**

- 4.1 Before making a Definitive Map Modification Order, the County Council is obliged to consult the relevant District or Borough and Parish Councils and in this case the SDNP Authority. Consultations have also been carried out with other interested bodies/ standard consultees. Responses received to the consultations carried out can be found in the evidence file of background papers in the member's room. In considering the result of the consultations, members are reminded that when determining this application they can only take into account evidence which demonstrates whether or not the legal tests have been satisfied. The following comments were received;
- 4.2 **Cllr D Barling**  
Cllr Barling stated that he supports the application and has used the route personally over the years without difficulty.
- 4.3 **Mike Charman, Ramblers West Sussex Area Footpath Officer**  
Mr Charman stated that after visiting the route the Ramblers support the application. Mr Charman states that the addition would greatly enhance the footpath network in the area and allow a number of circular walk alternatives.
- 4.4 **Horsham District Council (HDC) Planning Department**  
HDC stated that they can see no evidence from planning histories to suggest the public have not been able to use the path for this period.

## **5. Evidence submitted in support of the application.**

- 5.1 The application is supported by thirteen public way evidence forms, testifying to the use of the claimed route on foot by individuals from 3 to 364 times per year from 1983 to the present day.
- 5.2 All of the user evidence submitted with the application claims the route has been used on foot, either walking or jogging.
- 5.3 One user claims to have also used the route on horseback from 1987-2001. Four of the users claim they have also seen others using the route on horseback and three of the users claim they have seen cyclists using the route.
- 5.4 All users claim to have seen others using the route whether that is on foot, horseback or bicycle.
- 5.5 None of the users report to having been turned away whilst using the route or to have seen any notices stating they could not use the route on foot.
- 5.6 Eight users state there was a gate across the route, however, all but one of these users state the gate was unlocked or had pedestrian access to the side of the gate so it did not prevent use of the claimed route. Another user states that there was a "gate at times unlocked".
- 5.7 Two users note a sign on the gate saying "no bikes or horses dogs must be kept on a lead" and provide photos of the sign. They also provide photos of a notice providing information of a permissive footpath access provided under the Higher Stewardship Scheme with Natural England.
- 5.8 Two Users state that they had sought permission to use the route from Mrs Brine, an occupier of the route at the time and one user notes that they knew Mrs Brine had a private legal right. From letters/notes in the County Council's path and parish file it was established that Mrs Brine was a previous occupier of Charlton Court Farm. These two users also state they used the route to access Charlton Court.

## **6. Evidence submitted by Landowners and adjoining Landowners**

### **6.1 Richard Goring, Land Owner**

Richard Goring stated that the evidence of long term use was interrupted as the footpath was currently open by permission under a Higher Level Stewardship Scheme.

Mr R Goring explains that in 2013 a landowner deposit was made to the County Council, and this does not show the route in question.

Mr R Goring also provides a letter from George Cockman dated the 22nd March 1999 to his father asking if a permissive bridleway would be considered past Charlton Court Farm (along the claimed route) and then east to allow access to the Downs. This proposal was thought to be for the benefit of horse riders and motorist's as it would avoid horse riders using

a dangerous bit of road. In this letter Mr Cockman also states that he understands the access to this route has been withdrawn as a local resident abused the freedom to use the route. A note is provided by Mrs Marlene Carman, a Steyning Parish Councillor, providing a map of the proposed route and further comments. Mrs Carman states that many people already use this access for horses when using fields towards Wiston Pond and Charlton Court for grazing.

Mr R Goring also states that previously the land was tenanted by the How family who were extremely clear on not allowing members of the public on their land due to livestock farming and a desire for privacy.

Mr R Goring states that in their view the route does not meet the requirements to be dedicated as a PROW as the access has either been not available to the public or has been granted by permission.

The route is no longer a permissive path as funding under the Countryside Stewardship scheme for permissive paths has been taken away; the owner is currently in discussion with DEFRA the CLA and SDNPA.

#### **6.2 John Goring, tenant farmer**

Mr J Goring has been a tenant farmer for 36 years and prior to that was farm manager. Mr J Goring states that a permissive path was created in 2009 under the Countryside Stewardship Scheme but prior access along the path was not permitted and it was not used regularly prior to 2009. Mr J Goring states that prior to 2009 he stopped members of the public trying to use the route. The gate along the route has been kept locked at all times unless there is someone working on the farm and has been in place for at least 15 years.

Mr J Goring provided pictures of the gate showing the narrow path taken around the side of the gate as well as pictures of the sign approved by Natural England showing the permissive path.

Mr Goring states a section of the driveway shown between points A and B on the annotated plan provided is access for himself and farm staff and Mrs Cooper who is an equestrian tenant. Between points B and C is shared access for Mr J Goring and his staff, Mr and Mrs Footit, Sally Johnson and Nicky Makepeace and their families.

#### **6.3 James Foottit occupier/owner of Charlton Court Farm**

Mr Foottit has been an adjoining property owner for 10 months. Mr Foottit notes that he was informed by his solicitor it was not a public right of way but currently a permissive path. Mr Foottit states the gate is locked and he has seen members of the public use the route daily. Mr Foottit notes that tenant farmers and tenants at the Standings have a private right to use the route.

#### **6.4 Mrs Susie Cooper, tenant**

Mrs Cooper stated that she has been a tenant for 22 years. She does not consider the route to be a public right of way but a permissive path only and has never known or been informed otherwise. Mrs Cooper uses the route daily by foot or car to access her horses and also sees members of

the public using the route daily. She states the five bar gate is padlocked and there is a sign stating "No vehicles, cyclists or horse riders, Dogs to be kept on leads". Mrs Cooper has stopped and turned back cyclists from using the route in the past. Lastly, Mrs Cooper states that people accessing her horses and employers of Wiston estate have had private rights to use the route.

**6.5 Mrs Sally Johnson, Standings Mouse Lane**

Mrs Johnson is a tenant of an adjoining property for the last 35 years and she uses the route to access her horse. She does not consider the route to be a public right of way but a farm track with access to three properties. Mrs Johnson has been informed by previous farmers that the route is not public and she frequently sees members of the public using the route on foot. Mrs Johnson states there is a locked gate along the route and a sign saying "no cycling, horse riding or vehicular access" and she has turned back cyclists using the route. People have had a private right to use the route to access the horses.

**7 Other evidence**

**7.1 The County Council's Records and Mapping evidence**

**Legal Services Path file No 2713**

- 7.1.1 A letter dated 24 July 1991** to the County Secretary from Gillian Turner on behalf of RH Goring following a complaint to the state of footpath 2713 which falls across Mr R Goring's land. In this letter Mrs Turner states that *"Up to now I understand the farmer has allowed local people to walk through the farmyard itself. This brings them back into Mouse Lane which makes a round route. I suspect that this privilege is likely to be withdrawn which will be a great pity."*

The route through the farm yard to footpath 2713 appears to be the current claimed route. This letter potentially implies that in 1991 the footpath was used by the public. It is not possible to determine from this letter whether the landowner allowed the public to use the route or merely acquiesced in such use.

- 7.1.2 A letter dated 5 May 1994** from a Mrs S Ford suggests the "footpath through Charlton Court" would provide a good diversion for a Bridleway suggesting that the route is currently used by the public on foot as she refers to the route as a footpath.

These letters indicate that a route was used by the public from 1991, however, it is unclear from these letters whether the route was used 'as of right' or with permission.

**Parish File Steyning CP**

- 7.1.3 Letter dated 23 May 1990 from BJ O Sullivan, Clerk Steyning Parish.** The letter puts forward new footpaths in Steyning Parish, the claimed route being one. The landowners are stated to be Wiston Estate and Mr and Mrs Brines of Charlton Court Farm. The County Council

responded to explain the process of how to apply to add a route to the definitive map. There appears to be no more correspondence on this matter on file. The letter does not indicate whether or not the route is currently being used by the public.

- 7.1.4 **Letters from Mrs Olive Oldham 1973.** Mrs Oldham wrote to the County Council asking for something to be done about the condition of footpaths along Mouse Lane and Charlton Cottages following a letter she received from Penelope How asking her not to trespass

#### **Draft and Provisional Definitive Map**

- 7.1.5 No Public Right of way is shown on the draft or provisional map

#### **S31 (6) Deposits under the Highway Act 1980**

- 7.1.6 A Section 31(6) Deposit was made in 2013 by Richard Goring of Wiston estate, no footpath is shown along the claimed route.

In the pre-2013 register an entry for J Goring, Wiston, Horsham has been made at entry number 22 but no date is provided and there is no document saved for entry number 22 therefore it is unclear if this deposit was ever made.

#### **Mapping evidence**

- 7.1.7 **West Sussex County Council local view Ordnance Survey (OS) map 1863-95**

There is no indication of a public right of way along the claimed route although a road to Charlton Court is shown. This is most likely the private drive leading to Charlton Court. It is possible a public route is indicated by double dashed lines running in a north easterly direction and joining today's FP 2713, however this does not follow the line of the claimed route. In conclusion, it is considered the claimed route is not shown.

- 7.1.8 **West Sussex County Council local view OS map 1896-90, 1909-46**

Charlton Court is shown in a similar way to the previous local view except no north easterly route is shown through Charlton Court to footpath 2713. As above the claimed route is not shown.

- 7.1.9 **West Sussex County Council Local view OS map 1930-46**

No data

- 7.1.10 **Adcock's Survey 1894**

A road is marked going into Charlton Court Farm but it is not marked as a publicly maintainable highway and is most likely the access drive. There is a dashed line indicating a route going from the road into Charlton court following the line of today's footpath 2713. There is no indication of a route following the line of the claimed route.

## **7.2 West Sussex Records Office**

### **7.2.1 Inclosure awards and maps, Estate Map 1825 (Wiston Ms 5622)**

There is no indication of a public right of way through Charlton Court, some other rights of way are shown on the map but it is unclear if they are public or not

### **7.2.2 Tithe Map**

There is no indication of a right of way or route along the claimed route

### **7.2.3 Quarter Session QR/W543 July 1778**

A highway (bridleway) is mentioned between Wiston parsonage & Washington common but there is no mention of Charlton Court and it is not shown on accompanying map

### **7.2.4 Quarter Session QR 594**

There is no useful information relevant to the claimed route.

## **8. Consideration of claim- Archive Evidence**

- 8.1 Considering all of the evidence outlined in section 7, only the letters found in the County Council's path and parish files indicate use of a route through Charlton Court Farm in the 1990's. Documentary evidence predating these letters and mapping evidence do not indicate that historically the claimed route existed. Therefore, in order to consider the claim, user evidence will be relied on with the support of some documents found in the archive materials as set out below.

## **9. Consideration of the claim -The 20 year period**

- 9.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established in order to establish the 20 year period. The relevant date is determined as the period when the land has actually been enjoyed by the public as of right and without interruption for a full period of 20 years taken back retrospectively from the first date of challenge.
- 9.2 The application was made following the expiration of the permissive use of the route under a Higher Level Stewardship Scheme; the permissive path was created in 2009 and therefore is taken as the act which brought the public's right to use the route into question. The relevant 20 year period, taken back retrospectively from this date is 1989 to 2009.
- 9.3 Use of the route has been between 3 to 364 times per year by thirteen users during the relevant period. Three users claim to have used the route over 100 times a year, eight users between 15 and 100 times a year and one user 3 to 4 times a year. All users claim to have used the right in its entirety either as a circular route from Mouse lane or to access Wiston Pond, the rifle range or the leisure centre except one user who used the route to access horses she had stabled at Bayards and two users used the

route to access Charlton Court amounting to the use being considered to be with permission as visitors to Charlton Court rather than "as of right".

9.4 Nine users claim to have used the route throughout the entire relevant period with use ranging from 15-364 times a year. The four other users claim to have used the route for the majority of the relevant period from 1990, 1991 and 1994 to the present day from 3-100 times a year.

9.5 Use of the route was on foot by all users, however, one user also mentions using the route on horseback and several mention having seen people use the route on horseback during the twenty year period.

## **10. Consideration of the claim - As of right and without interruption?**

10.1 "As of right" means use without force, secrecy or permission. It is irrelevant whether the users actually knew they were not entitled to use the route or were indifferent as to whether they could use it. What is important is that looked at objectively they appeared to be using the path as of right.

10.2 With regard to the issue of 'permission' a distinction needs to be drawn between toleration and permission. A landowner may be aware of the use of a path but chooses to do nothing to prevent that use. In those circumstances, even if he later makes it clear he did not support the use of the path during the relevant period, his actions could be regarded as toleration of the use during that period. This means the use could still be regarded as being as of right. However, the situation would be different if the landowner permitted the public to use the path but made clear (either expressly e.g. by a sign or through his conduct e.g. by closing the path occasionally) that his consent could be withdrawn in the future. In that case the use would be with permission and not as of right.

10.3 Two of the user's state they asked for permission to use the route from Mrs Brine, Occupier of Charlton Court. They also state the purpose of using the route was to access Charlton Court indicating they were using the access with permission to visit Charlton Court, therefore, these two users did not use the route 'as of right', leaving eleven users who have claimed to use the route as of right during the relevant period.

10.4 None of the eleven users claim to have been stopped from using the route. The fact that the eleven users regularly used the route during the relevant period and all state to have seen others doing so suggests the route was not used in secrecy. However, Tenant farmer Mr J Goring contests this as he states he turned people away from using the route prior to 2009. Several adjoining landowners who have private rights over the access track state that they have also turned away cyclists from using the route, although, this may have been during the period the route was a permissive footpath as dates are not provided.

10.5 Although the gate crossing the path was locked, walkers used the gap to the side of the gate for access. This was also the case during the time the route was a permissive path, therefore the users do not appear to have used force to use the route.

- 10.6 In a letter dated 18<sup>th</sup> May 2020 tenant farmer John Goring states "Prior to 2009 there was no permitted access down the path" and Mr G Goring also states in an email dated 27<sup>th</sup> May 2020 that anyone who did use the route did so with permission or the access was not available to the public. Mr G Goring also indicates that when the land was tenanted by the How family they were extremely clear on not allowing members of the public on their land which is also indicated in a letter found on the parish file from 1973 (para 7.1.4) , however, the How's tenancy falls outside of the relevant period.
- 10.7 Looking at the County Council's path and parish files there are several letters that indicate the route has been used by the public dated 1991 and 1994 (para 7), there is also a letter provided by Mr Goring from George Cockman to Mr G Goring's father in 1999 (para 6.1), however, it is unclear if use indicated in these letters was 'as of right' or with permission.
- 10.8 The letter dated 1991 sent on behalf of Mr R Goring to the County Council indicated that Mr R Goring currently allowed the public to walk through the claimed route although this privilege could be revoked. While this could indicate that the public were using the route with permission it could also suggest that until this point use of the route by the public had been tolerated by the farmer, which does not amount to expressly giving permission to the public, therefore the reasonable user may have believed they were using the route "as of right" during the relevant period.
- 10.9 The situation is however a little clearer from a letter in 1999 which is half way through the relevant period. In the letter dated 1999, provided by Mr R Goring, George Cockman asks Mr G Goring's father if they would consider allowing a permissive bridleway through Charlton Court Farm and then east to the Downs. In this letter Mr Cockman states that access to the route has currently been withdrawn. Again, while it is unclear from this letter if, before 1999, the public were given permission to use the route or use was tolerated and it is also uncertain if this use refers to use of the route by horse riders or use by pedestrians, whether use was on foot or on horseback this letter does indicate that use of the route was interrupted in 1999, which is during the relevant period (1989-2009). None of the users state that use of the route was interrupted at any point, however, intention to withdraw access to the public was also indicated in the letter dated 1991 (para 7).
- 10.10 There is some evidence provided by users of use of the route on horseback. However several adjoining landowners keep horses, therefore, it is likely use by horse riders may have been private use. Although, it seems that there have been requests to make the claimed route a Bridleway in the past (see para 6.1 and 7) these letters do imply the route was not being used at the time as a Bridleway, simply that there was a desire to create a Bridleway. Therefore, it is considered there is not sufficient evidence to establish use of the claimed route as a bridleway 'as of right'. Furthermore, the letter dated 1999 from George Cockman (para 6.1) indicates use of the route was interrupted although it is unclear if the use he is referring to was on foot or on horseback.

10.11 In summary, there is evidence of use on foot during the relevant period 1989-2009, which ended with the commencement of the permissive path arrangements. Use of the route on foot appears to be fairly high during the relevant period with most users claiming use for the entirety of the relevant period and using the route more than 15 times a year and several users using the route over 100 times a year. It can be concluded that the use has not been in secret or by force. It is not clear cut as to whether the route was used with permission or simply tolerated by the land owner. The letters on files held by the County Council indicate that there was an interruption to the use during the relevant period and therefore for that reason, on the balance of probability, it cannot be concluded that claimed route subsists over land. However, where an applicant for a DMMO produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, but there is a conflict of apparently credible evidence from the owner in relation to one or other issues arising under Section 31 of the 1980 Act; then the allegation that the right of way has been reasonably alleged to subsist is used. That is unless there is documentary evidence produced which must inevitably defeat the claim.

10.12 In considering the lower test of reasonably alleged: there is considerable user evidence attesting to use of the route during the relevant period and it is likely the landowner tolerated use of the claimed route. For this reason, it is concluded that use by the public was 'as of right'. There is a conflict of apparently credible evidence and so the lower test of reasonable allegation is used.

## **11. Consideration of the claim - Evidence of no intention to dedicate**

11.1 It is considered that the user evidence has met the statutory tests as set out in Section 31 Highways Act 1980. User evidence submitted in support of the application shows that the route has been used 'as of right' and without interruption for a period of 20 years or more. It is therefore necessary to further consider whether there is evidence of no intention to dedicate by the landowner.

11.2 Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.

11.3 Two users indicate a notice was put on site in December 2018 which states no access by bike or horseback, however, this is outside the relevant period 1989-2009. Several adjoining land owners also mention a notice of the similar nature but do not specify date. However, none of the notices described state no access is allowed by foot.

11.4 No other users report a notice being put on site during the relevant period indicating the route was private and the landowner had no intention to dedicate.

- 11.5 There was pedestrian access to the side of the locked gate across the route; the users do not note any obstructions that prevented them using the route.
- 11.6 There is communication held on County Council files which may suggest that there was no intention to dedicate the route to the public. In the letter dated 24 July 1991 it is indicated Mr R Goring, the landowner, may proceed to prevent the public using the route. The letter dated 1999 from George Cockman indicates access to the route had been withdrawn therefore suggesting there was no intention to dedicate at this point in time. As also mentioned above at Para 6.2 tenant farmer Mr J Goring indicates he turned people away when using the route which also suggests there was no intention to dedicate the route.
- 11.7 As outlined in para 7.1.6 a landowner deposit was submitted to the County Council in 2013 indicating there was no intention to dedicate the route, however, this is outside the relevant period. The evidence is finely balanced. Evidence suggesting there was no intention to dedicate includes; two letters on the County Council's path/parish files indicating use of the route by the public was to be revoked/or was revoked, tenant farmer Mr J Goring indicating he turned people away using the route on foot, and the landowners indicating the route has only ever been permissive. However, there were no signs placed along the route and none of the users claim to have been turned away or prevented from using the route during the relevant period. The only time an intention not to dedicate the route may have been communicated is when access to the route was indicated to have been revoked at some point in the 1990's as outlined in George Cockman letter. However, none of the users report being aware of access being removed and it is unclear if this revocation of use of the route was to those on horseback and/or pedestrians. Therefore, it is considered the landowner did not clearly communicate an intention not to dedicate so there is a lack of sufficient evidence indicating there was an intention on the part of the landowner not to dedicate the claimed route.

## **12. Consideration of the claim - Common Law**

- 12.1 At Common Law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to do so and that the public have accepted such dedication. Whilst there is no defined minimum period of continuous use to establish a right of way at Common Law, the use must be shown to have been as of right and must be long enough to justify an inference that there was an intention by the Landowner to dedicate.
- 12.2 For the public to raise an inference of dedication it must be sufficient to carry to the mind of a reasonable landowner the fact that a continuous right of enjoyment is being asserted and ought to be resisted. In this case it has been concluded it can be reasonably alleged the claimed route subsists over land with use of the claimed route being 'as of right' and insufficient evidence of an intention not to dedicate on the part of the

landowner Although use was potentially interrupted in the 1990's, the evidence of use is considerable during the 1980's from 15 times a year to daily by seven users. Evidence for dedication at common law is, however, not conclusive.

### **13. Overall Conclusion and Recommendation**

- a. It is considered that on the balance of probabilities a path has not been proven to subsist.
- b. However, while the evidence is finely balanced, it is concluded a public right of way has been reasonably alleged to subsist over land and a DMMO to add a footpath should be made.

### **14. Other options considered (and reasons for not proposing)**

- 14.1 Not applicable in this instance.

### **15. Consultation, engagement and advice**

- 15.1 See paragraph 4 above which details responses to the statutory consultations as well as responses to additional consultations that were carried out as part of the investigation process.

### **16. Finance**

- 16.1 The County Council is under a duty to investigate Definitive Map Modification Order applications and all costs associated with the consideration of the application by officers' falls within existing budgets.
- 16.2 Cost implications arise:
- i. In the event of an order being made and objected to, the matter may fall to be considered at a public local inquiry or a public hearing. All fees incurred after submission of the order are borne by the County Council. This includes but is not limited to fees relating to the venue hire, fees relating to advert
  - ii. Should an order be made and confirmed; if any works are necessary to ensure the path is open for public use.
  - iii. Should the decision of the committee be challenged by way of Judicial Review.
- 16.2 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on the application of strict legal tests and the above costs cannot be a consideration in the determination of the application.

### **17. Risk implications and mitigations**

- 17.1 The decision is one that must be taken on strict legal tests:

- i. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
  - ii. In the event that an order is made the landowner could appeal to the Secretary of State and the matter be considered by way of written representations, hearing or public inquiry.
  - iii. In the event that an order is not made and the applicant disagrees with the decision then they have a right of appeal pursuant to Schedule 14 of the Wildlife and Countryside Act 1981 to the Secretary of State. The Secretary of State may direct the County Council to make an order, which if objected to could be considered by way of written representations, hearing or public inquiry.
- 17.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

## **18. Policy alignment and compliance**

### ***Equality and Human Rights Assessment***

- 18.1 The County Council has a duty to have regard to the impact of any proposal on those people with characteristics protected by the Equality Act. Officers considered the information provided by the applicant, together with the responses from consultees and other parties, and determined that the proposal would have no material impact on individuals or identifiable groups with protected characteristics.

### ***Human Rights Act 1998 Implications***

- 18.2 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.
- 18.3 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.
- 18.4 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference of it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.
- 18.5 The Committee should be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for

rights of way matters, the decision making process as a whole, which includes the right of review by the High Court, complied with Article 6.

### ***Crime and Disorder***

- 18.6 The Definitive Map Modification Order process involves the application of legal tests, which mean that it is not possible to give weight to any effect on crime and disorder.

### ***Climate Change***

- 18.7 Enhancement of the public rights of way network is a positive contribute towards the Council stated ambition of being carbon neutral by 2030, however such considerations are not matters that can be taken into account when consideration applications against the strict legal tests.

### ***Public Health***

- 18.8 The addition of public rights of way through the definitive map modification order process could assist in enhancing the general health and wellbeing of the communities served by the Council. However, such considerations are not matters that can be taken into account when considering applications against the strict legal test.

### **Tony Kershaw**

Director of Law and Assurance

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### **Appendices**

- Appendix 1 - Location Plan 01789
- Appendix 2 – Site Plan 01788a

### **Background papers**

- a) Application and Plan
- b) Consultation responses
- c) Evidence in support of the application
- d) Evidence submitted by and owners
- e) Archive evidence