

Rights of Way Committee

5 March 2019

Henfield: Application for a Definitive Map Modification Order (Application No: 1/17) to add to the Definitive Map and Statement a public footpath along Dagbrook Lane

Report by Director of Law & Assurance

Executive Summary

The application has been submitted by Michael Wright and seeks to modify the Definitive Map and Statement for Henfield by adding a footpath from FP 2563 heading east along Dagbrook Lane to an unmarked track in the Parish of Henfield.

All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

1. The application was submitted with 34 user evidence forms, claiming use of the route from 1945-2017
2. Six objections were submitted by the landowners, tenant farmers and adjoining land owners.
3. Archive evidence is inconclusive on its own and so the application has been considered under S.31 HA 1980. The twenty year period for the purpose of determining this claim is 1995-2015.
4. The user evidence forms attest that the route has been continually used by members of the public from 1945-2017.
5. Evidence submitted by the landowners is in direct conflict with the use being "as of right" and without interruption.
6. The nature of the claimed route, being a cul-de-sac, with no continuation at one end to the public highway, is inconsistent with the characteristics of a public highway.

Recommendation

That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981, to add a footpath from FP 2563 and then east along Dagbrook Lane to an unmarked track in Henfield be not made.

1. Characters and features of the route

- 1.1 The claimed route is shown on the plan attached to this report (appendix 1), running between points A to C.
- 1.2 The claimed route begins at the western end of Dagbrook Lane (point A, appendix 1) which joins definitive footpath 2563 and continues in an easterly direction passing under the Downs Link footpath 3513 (point B appendix 1) along Dagbrook Lane ending at point C (appendix 1) where an unrecorded track heads north to join with definitive footpath 2567.
- 1.3 The route claimed is a cul-de-sac route, connecting only at its western end with a public highway, being definitive footpath 2563. At the eastern end of the claimed route there is no claimed continuation to the public highway.
- 1.4 The route follows a lightly wooded well-trodden track from point C (appendix 1) on the plan to where it passes through an old railway bridge passing under the Downs Link at point B (appendix 1). There is a gate under the railway bridge and a further metal gate about 50 yards further which opens up into fields and following along these towards footpath 2563.

2. Land ownership

- 2.1 Land registry searches confirm that all of the land crossed by the claimed route is unregistered; however, documentary evidence has been provided which is claimed to show that the land is owned by a Mr Elsam.
- 2.2 Due to the land being unregistered, notice of the application was erected on site in accordance with the Regulations. Should the County Council determine to make an order, dispensation for the serving of the required notices will need to be obtained from the Secretary of State.

3. Consultations

- 3.1 Before Making a Definitive Map Modification Order, the County Council is obliged to consult the relevant District or Borough and Parish Councils. Consultations have also been carried out with other interested bodies. Responses received to the consultations carried out can be found in the evidence file in the members' room.
- 3.2 In considering the result of the consultations, members of the Committee are requested to bear in mind that, when determining this application they can only take into account evidence which demonstrates whether or not the tests in Section 53 have been satisfied.
- 3.3 The following consultation responses were received.
 - 3.3.1 Henfield Parish Council
 - i. The Parish council stated that they have no conclusive evidence on this matter
 - ii. At least one Councillor stated that he has used the track in question well back into the last century.
 - iii. Another Councillor was told by the landowner that he and his family have frequently put up notices saying that the track is private.

- iv. The Parish Council also stated that it seemed to them that at least one other track would need to be similarly converted to secure access to both ends of the section in this application.

3.3.2 WSCC PROW Ranger

The only comment highlighted the fact that the claimed route does not connect to an existing public highway i.e. its cul-de-sac nature.

4. Evidence in support of the application

- 4.1 The application was submitted on 14 February 2017 by Michael Wright who since submitting the application gave consent for Ms Elizabeth Claxton to act on his behalf. The application is supported by 34 user evidence forms from 27 individual addresses, claiming use of the route from 1945-2017. The evidence provided by these "users" is summarised below;
- 4.2 All users claim to have used the route on foot, either walking or dog walking with their use ranging from two to 400 times plus a year. Four witnesses confirm using the route over 350 times a year. 21 of the witnesses claim to use the route 50 times or more a year and only three witnesses claim to use the route ten times a year or less.
- 4.3 All but one of the users claim to have seen others using the route on foot and one user, L Hornwell, states sighting of users on horseback.
- 4.4 Four witnesses claim to have sought and obtained permission from the occupier of "Dunstalls" to use their meadow. It is unclear from the user evidence forms the exact location of this meadow, however, Dunstalls is a property located to the north of point C. The unmarked track from point C runs through Dunstalls title and the application route does not pass into Dunstalls boundary and therefore it is considered these four users are making reference to having permission to use this unmarked track rather than the application route. In addition, the applicant later explained that some of the users have been granted permissive rights by the land owner of Dunstalls to use a track connecting the claimed route to the definitive footpath 2567.
- 4.5 Only one user, C Brown, commented on their public user evidence form that they were personally told the route was not public by the owner or occupier in 2016. However, M Wright stated on his public evidence form that although he has never been stopped from using the route or turned back he has heard of others being turned back by recent provisions of barbed wire blocking the Downs Link access.
- 4.6 Twenty users mention an obstruction on the route which varies from a gate, a gate and barbed wire, trees and barbed wire and a fence and hedge. Sixteen users mention a gate always being present, however, five state the gate being locked since 2016 or in recent years and only one user states the gate was locked prior to 2016. Mr and Mrs Lewis state the gate appeared in 2016. Two users report trees and barbed wire as an obstruction, again since 2016. One user mentions a fence and hedge to control stock and one mentions barbed wire on its own as an obstruction but does not provide details. Of these 20 users, pre-2016, only one user, A V Barwick, states that the gate under the railway bridge appeared roughly in 1986/7 and was kept locked. Only two other users mention another obstruction other than a gate but do not without specifying dates.

- 4.7 Twelve of the users report to have seen notices saying 'Private', 'No Public Access' or 'Right of Way' and 'Surveillance Area' all of which have been reported by users to have been put up since 2016, except for one user who does not specify a date the notices appeared.
- 4.8 Users M and P Cusack state this route is marked as a RUPP (Road used as a public path) on old maps. A letter was sent to Mr and Mrs Cusack for more details but no response was received. In addition, Mr Barwick describes the route being denoted as an occupation road in "Henfield tithe map 1845".
- 4.9 E Claxton provided pictures from a book "a tour of our commons by old and a young inhabitant the Henfield parish magazine February - August 1916" describing the routes use as a common.
- 4.10 One of the 34 users, A V Barwick, in a letter states the following;
- i. In the 1950s and early 60s when he used the route as a child there was no gate or fence.
 - ii. He believes in about 1986/7 a gate appeared at the railway arch to contain livestock, it was believed to be locked at this point and kept locked. Barbed wire was added at a later date. However, Mr A V Barwick does not state that this prevented him using the route.
 - iii. A wire fence is described to be put up across the lane towards point C of the application route again to control livestock grazing in adjacent fields in the 1990s. A V Barwick states there were never any notices and it was easy to duck under so believes it was not intended as a means of stopping people to use the lane.
 - iv. A V Barwick states that the lane was classed as an occupation road on the Tithe map. It is stated it was used as access to Pokerlee (demolished in the Edwardian period) farm and to the original site of Brookside Farm until the railway was constructed in 1861.
- 4.11 In summary, users claim to have used the route frequently on foot since 1945. It is clear from the user accounts the route was obstructed and notices put on site since 2016. A couple of users reported signs and obstructions along the route prior to 2016 but do not specify a date.

5. Evidence submitted by landowners and adjoining landowners / in opposition to the application

5.1 Mr Elsam

- 5.1.1 Mr Elsam states that his family have occupied and owned Brookside farm since the 1940s and that he "objects in the strongest possible terms". Mr Elsam's comments on the application and supporting evidence are summarised below:
- i. Mr Elsam highlights an inconsistency in accounts on the user evidence forms. Conversely, he also alludes to collusion by the users as the plan used is the same in nearly all user evidence forms submitted.
 - ii. The route is said to be regularly impassable due to flooding, which Mr Elsam states is supported by a nearby and necessary footbridge on FP 2563 which crosses Dagbrook Lane.
 - iii. The route is also stated to have, in the past, been overgrown to the point it was impassable which Mr Elsam states he can provide pictures

to demonstrate this was 1993 and also claims is supported by OS map First edition 1875 and the fact that sections were only cleared by his family after the great storm of 1987 (this further supported by Caroline McKenna's letter). The fact that it was so overgrown would have made it unlikely to have been used by so many people so frequently.

- iv. Mr Elsam also states the barrier described across Dagbrook Lane made reference to by A V Barwick in his public evidence form is supported by Map TQ2015 (1956) and TQ21NW (1963) (discussed in section 6.1.3 and 6.1.4).
- v. Mr Elsam states that in 2½ years of permanent occupation he has never seen anyone walking on the lane.
- vi. Mr Elsam claims that TDW157 Tithe Map recorded Dagbrook Lane as "Occupation Road" not a public highway which is supported by submission of the Tithe Map (see section 6.2.6), he has found no map to show the lane as a public right of way. In the past the occupation road was used to link parcels from Pokerlea, Brookside and Rye Farms all of which formed part of the Streatham Manor Estate.
- vii. Mr Elsam also highlights that the route is of great significance to wildlife and dogs walking through the area would disturb wildlife and habitat preservation.
- viii. Mr Elsam highlights the historic issue the family have had stopping people trespassing describing his father's, who moved to the farm as a young child, trouble with this. He claims that his family, since 1955, have been putting up signs and locking gates which were regularly broken or removed. Since Mr Elsam inherited the farm he reports of the gate being damaged.

5.5.2 Mr Elsam has submitted several photos of the site these include:

- i. Photos from 1993 showing the route looking quite overgrown. It is difficult to tell where on the claimed route these pictures are. The pictures include the gate under the railway bridge. Although the gate is closed you cannot clearly see from this whether or not the gate is locked.
- ii. A series of photos from January 2016 to October 2017 showing the gate under the railway bridge being locked and a series of photos in which Mr Elsam states shows the lock being forced open, cut open or removed altogether. From February 2017 the pictures show barbed wire along the gate and from January 2016 pictures show a notice on the gate stating "you're on cctv".
- iii. There is a picture of a sign just adjacent to the gate under the railway bridge in May 2016 stating Brookside Farm as a conservation area and not a public right of way.
- iv. There are two pictures which Mr Elsam claims to show was an old fence line (including concrete posts) running across the Lane near to the eastern end of the application route.
- v. There are numerous pictures from April 2015 to March 2016 showing notices stating "No Public Right of Way" at three points along the claimed route; where the Lane meets FP 2563, just after the Railway Bridge heading eastward and at the far east end of the claimed route. Some of the pictures show broken signs including bits of the signs in shrubbery.
- vi. Pictures from Jan 2016 to October 2016 show a gate at the far east end of the claimed route. The gate does not have a lock on it and has

been moved aside in some of the pictures. From one of the pictures (Jan 2016) you can see evidence of a track made from regular walking.

- 5.1.2 Mr Elsam has reported criminal damage and theft on his land on the claimed route in question but this cannot be considered as evidence.
- 5.1.3 Five police reports were submitted as evidence by Mr Elsam dated from the 17/08/2016 to the 20/10/2017 stating that the investigation was closed.
- 5.1.4 In addition to the above Mr Elsam also submitted the following historical maps of the area:
 - i. OS map 1st edition 1875 (XXXVIII/ 13)
 - ii. Early Ordnance Survey Sussex Map 1938 4th edition (XXXVIII.13)
 - iii. National Grid Arundel and Shoreham Map 1956 (TQ 2015)
 - iv. Arundel and Shoreham Map 1963 (TQ21 NW)
- 5.1.5 Mr Elsam claims that no historical maps of the area show the claimed route as a public right of way and that the presence of the feature across the route on the maps supports his assertion that the claimed route is private.
- 5.2 Alec Griffiths of Farmhouse, Tortington Drive, Small Dole, BN5 9XZ
 - i. Mr Griffiths describes keeping cattle in the section of Dagbrook Lane which includes the railway arch approximately 12 years ago and running them in the area for the previous 10 years (approximately 1994-2004).
 - ii. Mr Griffiths points out that the area was prone to flooding which made it impassable and also describes a metal gate under the old railway which was kept locked.
 - iii. Mr Griffiths lastly mentions that he also made hay in the adjoining fields and rarely saw anyone using the area but he does remember some people being told to keep to the footpaths if they strayed off the Footpath at Dunstalls (located to the north of Dagbrook Lane) by Mrs Sparks. He states that he has only ever known the area to be used for farming.
- 5.3 Mr P Turner of Brookside Cottage, Dagbrook Lane, Henfield, West Sussex, BN5 9SH.
 - i. Mr Turner and his family have lived at Brookside Cottage (a property on Brookside Farm) since 2001. Mr Mike Elsam was the owner of Brookside Farm at the time.
 - ii. Mr Elsam granted Mr Turner and his family permission to walk anywhere on the farm and so they state they knew the area well. He states that in all the years they lived there the area was not used as a footpath, mainly as there was livestock in the area. When the livestock were not there his children would play under the railway bridge and he does not recall anyone walking through when they were down there.
 - iii. Mr Turner also stated that the gate under the railway bridge was from time to time kept locked and there was a handwritten notice here saying not to walk there. As mentioned above his children often played in the area and Mr Turner has supplied pictures from 2010 and 2013 to show that the gate was closed. Mr Turner does not recall seeing anyone walk through.

- iv. Mr Turner claims that in the winter the area was prone to flooding making it impassable.

5.4 D Elsam, mother of Mark Elsam

- i. Mrs Elsam opposes the establishment of a footpath and states Brookside Farm has been under ownership of her late husband and now son since 1940.
- ii. Mrs Elsam has been a regular visitor to the farm from 1955 and states that over the years many signs have been put up, access has been barred and gates locked. Mrs Elsam states that she put a hand written notice stating it was private on the gate under the railway bridge thirty years ago along with other signs that were removed. On occasions it would not be locked as the lock was removed without their knowledge. Her husband did not farm on site but whenever present they would be shut and locked or secured and periodically signs were put up.
- iii. Mrs Elsam states that when her husband became ill her son took over the farm from 2012. They had a discussion at the time about people trespassing and her husband informed her son it was difficult to prevent despite physical barriers and signs being put in place. Since taking over the farm her son, Mark, has worked hard to continue to keep people on the rights of way.
- iv. Mrs Elsam states that since her son has lived on site the amount of trespassing has reduced and consequently the wildlife thrived. Lapwings have been seen on site for the first time and Mrs Elsam fears a footpath would prevent them becoming more established.

5.5 C McKenna, 75 Wannock Lane, Eastbourne BN20 9SG

- i. Brookside Farm was the home of her aunt Mary, and so she has visited the farm throughout her life, she was born in 1943.
- ii. Her Aunt Mary died in 1970 and then her cousin Michael inherited the farm and ran the farm as an absentee farmer.
- iii. Describes the farm being run down and neglected with Dagbrook Lane being particularly overgrown. She describes a gate adjacent to the old railway line often being left open as people ignored "PRIVATE- NO ACCESS" notices or similar. She mentions other similar signs on the farm being vandalised.
- iv. Describes staying on the farm in the 1990s for 3-4 weeks each spring to help with lambing and remembers unaccompanied dogs being a problem.
- v. Highlights that before the Hurricane of 1987, when Dagbrook Lane was cleared to rescue sheep trapped by floodwater, the lane would have been impassable.

5.6 S and P Haworth-Booth

- i. S and P Haworth-Booth lived and farmed Rye Farm for 34 years and took over grazing rights on Brookside in 1990 in order to manage Brookside, Pokerlea and Rye Farm as a whole under a Countryside and Stewardship scheme. They point out that the area is still under a countryside stewardship scheme and walkers not sticking to the footpath and dogs disturb ground nesting birds which the scheme is aimed at protecting.
- ii. They go on to highlight that dogs have been a continuous problem over the years causing injuries and losses to sheep and Neospora in

cattle caused by dogs. In addition people leaving gates open has caused problems in the past.

- iii. They state that Dagbrook Lane was the original access to Rye Farm as an occupation road but it was never cleared as they were aware people might use it and wanted to discourage this to prevent the possibility of livestock escaping onto the A2037.
- iv. Finally they state that the gate under the railway has over the years been wired up, chained and padlocked to keep cattle in and trespassers out.

6. Archive and other evidence

6.1 The following historical maps are further evidence examined as part of the research by WSCC.

6.1.1 Ordnance Survey Mapping Sussex Series 1 – 4 dating from 1863 – 1946

All of the Ordnance Survey maps mark Dagbrook Lane as such and the lane is shown enclosed with double black lines. The inclusion of a way on Ordnance Survey mapping gives no indication of its status.

6.1.2 Draft and Provisional Definitive Maps

The claimed route was not claimed as a public right of way during the process for recording public rights of way under the provisions of the National Parks and Access to the Countryside Act 1949.

6.1.3 Tithe Map Henfield 1845

This record was made before the old railway line was constructed. Dagbrook Lane can be seen depicted in the same way as today's maps, enclosed by solid black lines. An apportionment further along the lane from the application route is labelled as "Occupation Road" (Apportionment 485) supporting the private nature of the claimed route.

6.1.4 Deposited Plans Great Southern Railway 1834

As the above map did not show the old railway line the deposited plans were reviewed to ascertain if any information on Dagbrook Lane was given, however, there was no useful information provided by this plan.

6.1.5 Henfield parish magazine February -August 1916 provided by applicant

Describes Dagbrook Lane to the south of the Dag Brooks common, however does not specify the Lane's status as public or private.

7 Consideration of claim

7.1 Archive evidence

7.1.1 As part of the investigation, several pieces of archive information have been considered. It appears that the claimed route has been a feature on a number of maps, from as early as 1845. However, whilst the claimed route does appear as a feature on many of the maps and in some cases named as "Dagbrook Lane", none of them provide any details of status and whether or not the route is public or private. Many of the OS maps show a feature across the claimed route, which is considered to be a strong indication of the private nature of the claimed route and inconsistent with the route being a public right of way. On balance, it is considered that the archive evidence is not strong enough alone to recommend that an order be made, therefore it is

necessary to consider the evidence of use submitted under Section 31 Highways Act 1980.

7.1.2 Therefore, in determining the application the Committee has to decide whether the user 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 that it is reasonable to allege the existence of a public right of way. The burden of proving this falls to the applicant.

7.2 User Evidence

7.2.1 Section 31 of the Highways Act 1980 requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

7.2.2 The application is supported by 34 user evidence forms which attest that the use of the claimed route spanned from 1945 to 2017

7.2.3 As mentioned above it has been highlighted that the route is a cul-de-sac ending at point C, appendix 1, and providing no continuation to a public highway. While the law does not state that the termini of a right of way has to end at another public right of way or highway, case law has established that the cul-de-sac should end at a place of special interest or have a purpose such as lead to a view point, park or other. The claimed route does not appear to meet this criteria, ending at a point to which only certain individuals have permissive rights to use (see section 4.4).

7.3 The 20 year period?

7.3.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established in order to establish the 20 year period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, the first date of challenge.

7.3.2 As mentioned above in section 4, several users mention notices being put in place and the gate being locked in recent years or since 2016. However, Mr Elsam has provided photographic evidence of a notice from as early as April 2015. The photograph of the notice from April 2015 is considered to be the act that first brought the public right to use the route into question. The twenty year period for the purpose of determining this claim is therefore from 1995-2015.

7.3.3 All 34 users claimed to have used the route on foot during the relevant period, 1995 – 2015. 32 of the users report to have used the route prior to 1995. Therefore usage of the route by the public extends well beyond the 20 year period. Whilst it is not necessary for all users to demonstrate continuous use throughout the 20 year period, they must demonstrate that the use has been made by the public continually during that period. The user evidence forms attest that the route has been continually used by members of the public from 1945-2017.

7.3.4 There is, however, evidence submitted by the landowner, landowners relatives, previous farmers/ tenant farmers and neighbours which suggests the route was never intended to be dedicated as a right of way as gates were locked, notices put up, as well as other obstructions. Furthermore, at certain points in the past it is asserted that the claimed route was impassable due to flooding and overgrowth. This evidence is in direct conflict with most of the user evidence presented.

7.4 As of right and without interruption?

7.4.1 "As of right" means without force, secrecy or permission. The user evidence must show that the public have enjoyed use over the land "as of right" and without interruption for the full 20 year period.

7.4.2 As outlined in sections 7.3.3 all users claim to have used the route continuously throughout the relevant period 1995-2015. Only one user mentions an obstruction to the route during the twenty year period. Mr A V. Barwick believes the gate under the railway bridge was locked from 1986/7, he also mentions a wire fence near point C of the claimed route, which he believes was for control of livestock. Mr George Hunt also recalls a fence or hedge across the entrance to the old railway tunnel, but has not provided any evidence in relation to dates. In addition C Simmons mentions barbed wire but again does not specify a date. All other obstructions mentioned by users either mention an unlocked gate or have stated that obstructions have only been present since 2016 or in "recent years".

7.4.3 Evidence from Mr Elsam and his mother D Elsam state that the family have kept the gates locked but these have regularly been broken or removed, police incident reports throughout 2016-17 were submitted to support this. Mr Elsam has also produced photographic evidence of locks since 2016. Mr Griffiths, a tenant farmer, describes the gate under the Bridge being kept locked when he kept his cattle there from approximately 1994-2004. Mr Turner also states that from 2001 the gate was kept locked from time to time. S and P Haworth Booth state that the gate under the railway bridge has been wired up, chained and padlocked to keep cattle in and trespassers out.

7.4.6 Four users make reference to having permission from the occupier of "Dunstalls" (the property located to the north of Dagbrook Lane) who was reported to be "quite happy for walkers to use her meadow". However, as outlined in section 4.4, the occupier of Dunstalls is not the owner of the land on which the claimed route passes and the applicant has advised that the occupier of Dunstalls has provided permission for applicants to use the track which joins the claimed route at point C. It is concluded that this is what the users are referring to and therefore not relevant to the claimed route and so would not lead to a conclusion the claimed route was used with permission. Having said this, Mr P. Turner stated that his family were given permission to walk through Dagbrook Lane suggesting the claimed route was also not used "as of right".

7.4.7 One user reports knowledge of others being turned back or stopped from using the claimed route and only one user reported to have been personally turned back. Mr Griffiths, a tenant farmer, also reports remembering people being told to keep to the footpath by Mrs Sparks, the owner of Dunstalls.

- 7.4.7 Twelve users have reported signs/ notices being put up, of which 11 have been reported to be in place since 2016. Contrary to this, it has been asserted by the landowners that signs have continually been put up by the family since as early as 1955, photographic evidence of notices from April 2015 has been provided. During the site visit, evidence of the notice at point C was found, albeit the notices appear to have been torn/fallen down as they were on the ground.
- 7.4.9 It is clear that the evidence of use submitted in support of the claimed route directly conflicts with the evidence against use having been established 'as of right'. There is also inconsistency among accounts from users regarding notices and obstructions along the route.
- 7.4.10 Considering Mr Barwick's account of a locked gate since 1987 and occupiers accounts of locked gates and notices being on site, it seems reasonable to conclude that throughout time, including the relevant period, the land owners have attempted to prevent the public using the route and therefore the claimed route has not been used "as of right". In addition, Mr P Turner's account of obtaining permission to use Dagbrook Lane during the relevant period suggests the claimed route has been used with permission. Given the direct conflict of evidence it is concluded that use of the claimed route has not been "as of right" and without interruption.

7.5 Nature of the way

- 7.5.1 Notwithstanding the above and the conclusion that the legal tests for making an order have not been met, the cul-de-sac nature of the application must be addressed.
- 7.5.2 In certain circumstances cul-de-sac routes can be highways, however, this is usually in special circumstances. More often than not, this is the case where a cul-de-sac is the only way to and from a place of public interest or a special view point. It is not considered that the claimed route meets this requirement. The claimed route does not lead to a place of public interest or a special view point. It does lead to a connecting route, but this has no clear status as it is a permissive track used with permission and not 'as of right'.
- 7.5.3 Although in *Eyre v New forest Highway Board* 1892 it was determined that 2 cul-de-sacs were created as a linking section had questionable status, in this instance the connecting route has a clear status as a permissive track used with permission and not 'as of right'.
- 7.5.4 It is therefore considered, that this application does not have the characteristics of a public highway.

8 **Conclusion**

- 8.1 Evidence has shown that use of the claimed route throughout the relevant period has not been "as of right" therefore failing the relevant tests necessary for presumed dedication under Section 31 Highways Act 1980.
- 8.2 In addition to this, the nature of the way, being a cul-de-sac, is inconsistent with the route being a public highway.

8.3 In consideration of this and all of the evidence set out in the report, it is considered that the applicant has not shown that on the balance of probability a right of way exists, or that it is reasonable to allege the existence of a public right of way.

8.4 It is therefore recommended that an order to add a public footpath to the Definitive Map and Statement be not made.

9 Resource Implications and Value for Money

9.1 The County Council is under a duty to investigate applications. The consideration of the application by officers falls within existing budgets.

9.2 Cost implications arise:

- 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.
- Should an order be made and confirmed;
 - if any works are necessary to ensure the path is open for public use.
- Should the decision of the committee be challenged by way of Judicial Review.

9.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on legal tests and the above costs cannot be a consideration in the determination of the application.

10. Risk Management Implications

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

- the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
- 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.

9.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

10. Crime and Disorder Act Implications

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.

11. Human Rights Act 1998 Implications

11.1 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.

11.2 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.

- 11.3 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.
- 11.4 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.

12. Equality Act 2010 – Equality Impact Report

- 12.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision making processes to the need to:
- a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
 - b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
 - c) Foster good relations between those who share a relevant characteristic and those that do not share it.
- 12.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
- 12.3 An Equality Impact Report has been undertaken and is detailed below/ attached as an Appendix.
- 12.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

Background Papers

- (a) Application plan and map (DMMO 1/17)
- (b) Evidence submitted in support of the application
- (c) Evidence submitted against the application
- (d) Archive evidence

Appendices

Appendix 1 Location Plan
Appendix 2 Site Plan

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