

PLYMOUTH CITY COUNCIL

Subject: Modification Order Application – Addition of a footpath from Hooe Road to Westcombe Crescent with a spur from that route to junction with existing footpath ref I15/7/6

Committee: Planning Committee

Date: 20 November 2014

Cabinet Member: Cllr Mark Coker

CMT Member: Anthony Payne (Strategic Director for Place)

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Ref: WCA.005

Key Decision: No

Part: I

Purpose of the report:

To determine an application for an Order under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement of public rights of way by the addition of a footpath from Hooe Road to Westcombe Crescent and a spur from that route to junction with existing footpath ref I15/7/6.

The Brilliant Co-operative Council Corporate Plan 2013/14 -2016/17:

The report is considered in the context of the priorities set out in the Local Transport Plan 2011 – 2026 for addressing the Council's requirement to comply with relevant legislation.

Implications for Medium Term Financial Plan and Resource Implications: Including finance, human, IT and land:

None

Other Implications: e.g. Child Poverty, Community Safety, Health and Safety and Risk Management:

None

Equality and Diversity:

Has an Equality Impact Assessment been undertaken? No

Recommendations and Reasons for recommended action:

It is recommended that the Committee agree to make a Modification Order. The evidence submitted by the Applicant is robust enough to support the view that public rights subsist or can be reasonably alleged to subsist.

Alternative options considered and rejected:

Not to make an Order recording a public right of way if the Committee considers that the legal tests have not been met.

Published work / information:

All papers relevant to this report and as detailed can be found online at www.plymouth.gov.uk/wca005

Background papers:

Title	Part I	Part II	Exemption Paragraph Number						
			1	2	3	4	5	6	7
Appendix 1 – A copy of the application form, plan and certificate of service of notice (available online)	I								
Appendices 2 – 27 – Copies of the user evidence relied upon by the applicant (available online)	I								
Appendix 28 – Letter from the Treasury Solicitor (available online)	I								
Appendix 29 - Draft Order Plan	I								

Sign off:

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1.0 Introduction

- 1.1 This is a report of an application for an Order to be made under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement of public rights of way by the addition of a public footpath. The definitive map and statement is a legal record held and maintained by the City Council in its capacity as surveying authority under the 1981 Act.
- 1.2 The test that applies to such an application is whether or not the evidence shows that a public right of way exists, or is reasonably alleged to exist: the Committee's role is therefore a quasi-judicial one. Factors such as the desirability of the route being a public footpath or the impact on landowners and occupiers are not relevant to the decision on the application.
- 1.3 If the Committee decides to make an order, it has to be publicised: if any objections are received, the order and objections have to be referred to the Secretary of State for Environment, Food and Rural Affairs on whose behalf the Planning Inspectorate makes the final decision on the order.
- 1.4 If the Committee decides not to make an order, the applicant has a right of appeal to the Secretary of State for Environment, Food and Rural Affairs on whose behalf the Planning Inspectorate decides whether or not to allow the appeal. If the appeal is allowed the City Council will be directed to make an order, although it is not then obliged to support such an order if there are objections.

2.0 Background Papers

- 2.1 Attention is drawn to the accompanying background papers which should be read in conjunction with, and are deemed to form part of, this report. Due to the size of those papers they are available online at www.plymouth.gov.uk/wca005 with the exception of Appendix 29 (Draft Order Plan) which is attached to this report.

3.0 The Application

- 3.1 An application was received on 01 November 2007 from a member of the public for the making of a Modification Order under section 53 of the Wildlife and Countryside Act 1981 for the addition of a footpath from Hooe Road to Westcombe Crescent and a spur from that route to junction with existing footpath ref I 15/7/6 in the Plymstock Radford Ward.
- 3.2 At the time the application was made the applicant certified that the requirements of paragraph 2 of Schedule 14 of the Wildlife and Countryside Act 1981 had been complied with in that a copy of the statutory notice had been served by the applicant on each and every owner and occupier of land over which the route being claimed subsists, those being: -
 - a) Mr Berger, C/o Mr J. Rothbart, 91b Osbaldeston Rd, London, N16 6NP
- 3.3 A copy of the application form and a map showing the route of the alleged footpath is set out in Appendix I to this report.
- 3.4 The route being claimed runs from Hooe Road to Westcombe Crescent and a spur from that route to junction with existing footpath ref I 15/7/6. The applicant relies upon the evidence of 26 users of the alleged route whose evidence is set out in Appendices 2 to 27 of this report. No objection has been received to the application.

- 3.5 Although the application form stated that the route being applied for ran from Hooe Road to Westcombe Crescent, the plan showed only a route running from Westcombe Crescent as far as the entry into a wooded area through which a track runs to Hooe Road (between points E, D and C on the plan at Appendix 29). The plan also showed a spur route running east from point D to point F, which is on an existing public footpath.
- 3.6 The user evidence supported the view that use had been made of a route running to/from Hooe Road, and so consideration has been given to the whole route A-B-C-D-E. Officers have also considered the route marked on the application plan between points D – F and, in addition, as some of the user evidence also referred to a route running directly between C and F, consideration has also been given to that route.
- 3.7 The land over which the alleged route runs between points A and B is owned separately from the remainder of the land, and the landowner concerned, Western Power Distribution (South West) Plc, has been consulted. The company has a sub-station accessed at point B. The remainder of the land has been owned since February 2014 by Lancrest Properties Ltd and they have also been consulted.
- 3.8 Neither landowner has raised any objection to the application nor provided any evidence.

4.0 Topography of the route subject to the application

- 4.1 The alleged route begins at Hooe Road at point A. It then runs along a track through a wooded area in a generally southerly direction to reach point C on the plan. The area crossed by the route south of C was for many years maintained as a grassed area. However since 2007 the route between D – E has been fenced off. The fencing appeared to indicate aspirations to realise a new infill plot along Westcombe Crescent.
- 4.2 The route A-B-C-F forms part of a promoted route, the Erme-Plym Trail, and signs relating to that route can still be seen. It has not been possible to find any records relating to the establishment of that route across the land which was believed to have been carried out in 1995 by Devon County and West Devon Borough Councils.
- 4.3 The application was prompted by the fencing off of the land in 2007. It is now not possible to walk the application routes or the other routes that have been considered, except that A-B-C can be used as a cul-de-sac route. It appears from further evidence forms completed in late 2013 and early 2014 that it became possible to use the routes again after the erection of the fencing in 2007, but that there were further blockages in late 2013.
- 4.4 The length A-B-C is a track well-defined on the ground. It appears from the evidence that the routes C-D-E, D-F and C-F were, prior to 2007, also well defined as trodden routes across a grassed area although the general character of the area has changed so significantly that any once defined route is no longer recognisable.
- 4.5 There is no evidence that would suggest that the routes, if recorded as public footpaths, should be subject to any limitations on the public rights such as gates.
- 4.6 The length of the routes being considered are as follows:
- a. A-B-C, approximately 77 metres.
 - b. C-D-E, approximately 48 metres.
 - c. D-F, approximately 82 metres.
 - d. C-F, approximately 75 metres.

5.0 Summary of the evidence relied upon by the applicant

- 5.1 Twenty-six user evidence forms (UEFs) have been submitted by the applicant. In relation to the route A-B-C-D-E between Westcombe Crescent and Hooe Road there appear to be at least twelve users who used it both for all or the greater part of the relevant period (see paragraph 9.3 below) and at least once a week, in some cases on most days. In relation to the route C-F, there is a similar level of use, and this route was, along with A-B-C, also part of the promoted Erme-Plym Trail, and can be expected to have received additional use by users of that Trail. For both these routes it is considered that the evidence is sufficient to give rise to a presumption of dedication.
- 5.2 Use of the route D-F, as distinct from C-F, appears to be less, having been used less frequently and by fewer people and in some cases the route people marked on their plan does not correspond exactly with the route shown on the application plan.
- 5.3 Several of the users refer to seeing cyclists use one or more of the routes. However of those who claim to have used the routes on a cycle only one (Mrs White) refers to use throughout the relevant period. Others (Mrs Halliday, Ms Richards, Mr and Mrs Fisher) have shorter periods of use.

6.0 Summary of the landowners views and any evidence they provided

- 6.1 Neither landowner has submitted any views or any evidence.

7.0 Summary and outline of any documentary evidence discovered not submitted by interested parties

- 7.1 Historical Ordnance Survey mapping has been examined. Maps published in the 1940s show that at the time there was no development in the area: there is no indication on historical mapping of a route on the ground. The conclusion is that there is no relevant documentary evidence.

8.0 Summary of the views of those consulted as part of informal consultation

- 8.1 Devon and Cornwall Police have no adverse comments to make.

9.0 The date that public rights were brought into question

- 9.1 If section 31 of the Highways Act 1980 is to be used for the grounds of the application it is necessary to establish a date that public rights were first challenged so that retrospective evidence of 20 or more years use, as of right and without interruption, may be considered to determine whether or not public rights have accrued and become established by presumed dedication.
- 9.2 In this case the application was clearly prompted by the fencing erected across the routes in 2007, and this, together with evidence contained in the UEFs submitted with the application, is considered sufficient evidence that the public right to use the routes was brought into question then. The erection of the fencing in December 2013 has no bearing at all on the date of first challenge despite the fact that there has been some subsequent use.
- 9.3 It is considered, therefore, that the date on which the right of the public to use the way was brought into question was 2007, and the relevant period (which, under section 31 of the Highways Act 1980, has to be counted back from the date of challenge) must be 1987 - 2007.

10.0 Officer Interpretation of the evidence in support of the application

- 10.1 The applicant relies almost exclusively on the evidence of users of the claimed route to support their case. There is no relevant documentary evidence submitted by the applicant or their witnesses and none discovered by Officers. Therefore the relevant tests for consideration by Members are set out under section 31(1) Highways Act 1980. If an Order were to be made it would be made under section 53(3)(b) Wildlife and Countryside Act 1981.
- 10.2 The test under section 31(1) Highways Act 1980 is a two part test. Firstly it is necessary for the applicant to provide evidence that the claimed route, which must be a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. If the applicant can meet that test the rebuttal applies which is a matter for the owners and occupiers of the land over which the alleged route subsists to engage. This is a section of the Highways Act which has helpfully been tested by the courts and so we can offer the committee clear guidance on how they should interpret the evidence before them.
- 10.3 Firstly the applicant must satisfy the committee that the claimed route has been *actually enjoyed*. This simply means that there must have been sufficient use of the claimed route and will vary depending on the circumstances of each case. What might constitute sufficient use in remote Dartmoor might not be considered sufficient use in urban Plymouth. The extent of use of the routes that have been considered is summarised in paragraphs 5.1 and 5.2 above
- 10.4 Secondly use must have been '*by the public*' which is to say the public at large rather than a particular class of the public such as employees of a particular company or customers of a particular shop. All the evidence in this case is of evidence of use by the public.
- 10.5 Thirdly use must have been '*as of right*' the meaning of which was helpfully clarified by the House of Lords in *R v Oxfordshire County Council ex parte Sunningwell Parish Council*¹ (Sunningwell). Before Sunningwell it was held that use which was as of right was use which was open, not by force and without permission and in addition users were required to hold an honest belief that they had a right to use the way in question. It was therefore necessary to prove the state of mind of the user. Sunningwell states that the state of mind of the user is an irrelevant consideration, user must simply be without stealth, force or secrecy. There is no evidence that public use was facilitated by means of stealth, force or secrecy and therefore the evidence of use in this case is evidence of use '*as of right*'.
- 10.6 Finally it is necessary for the applicant to prove that use of the claimed route occurred over a full period of 20 years without any interruption in that use. An interruption can be nothing more than the closing of the claimed route for a single day but may also include isolated acts of turning users back etc. The evidence in this case is that the public enjoyed use of the claimed route for a full period of 20 years ending on the date of first challenge.
- 10.7 Taking the above into account we aid committee by offering our assessment of each of the users evidence in turn: -

Mrs A Pestell: Used A-B-C-D-E from 1978-2007 approx weekly

Mr R Pestell: Used A-B-C-D-E from 1978-2007 approx weekly

Mrs K Ould: Used A-B-C-D-E and D-F, from 1986-2007 twice a month

¹ [1999] UKHL 28; [2000] 1 AC 335
Revised Jul 2013

Mr B J Robins:	Used A-B-C-D-E from 1984-2007 every week
Mr E Goad:	Used A-B-C-D-E and C-F and D-F (his plan shows routes not exactly as application routes) from 1983-2007 up to twice a day
Mrs J Goad:	Used A-B-C-D-E and C-F and D-F (his plan shows routes not exactly as application routes) from 1983-2007 up to twice a day
Mr T Eynon:	Used A-B-C-D-E and D-F from 1984-2007 almost every day
Ms C Robins:	Used A-B-C-D-E from 1984-2007 5 times weekly
Mr G Williams:	Used A-B-C-D-E from 1975-2007 every day up to 2004
Ms J Hanley:	Did not mark a route on her plan but appears to have used A-B-C-D-E from 1969-2007, and 300 times in 2005-6 (frequency of use not given for other years)
Mrs C Price:	Used A-B-C-D-E and D-F from 1980-2007 20 times a year
Ms P Gill:	Used A-B-C-D-E and D-F from 1980-2006 10 times a year
Ms R A Fisher:	Used A-B-C-D-E and C-F and route to the back of her house from 2009-2013 “nearly every day for some parts”. Use was on cycle as well as on foot.
Mr R G Fisher:	Used A-B-C-D-E and C-F and route to the back of her house from 2009-2013 “some parts 300 times a year”. Use was on cycle as well as on foot.
Mr P Skuse:	Used A-B-C-D-E and C-F and a route south from between C and F from 1997-2013 daily
Ms L J Richards:	Used A-B-C-F from 2005-2013 at least once a week, Her use was on cycle as well as on foot.
Ms P A Rogerson:	Used A-B-C-F and F-D-E from 1975-2013 60 times a year
Mrs T White:	Used A-B-C-F and a route running from between C and F to D-E from 1979-2013, “when growing up everyday and now 30 times a year”. After 1985 she used it on a cycle as well as on foot.
Mr P Barnes:	Used A-B-C-D-E from 1993-2013 350 times a year
Mr T Brighton:	Used A-B-C-F from 2006-2013 50-60 times a year
Mr C Bell:	Used A-B-C-D-E from 1984-2013 3-4 times a week
Mr B D R Steele:	Used C-F and C-D-E and possibly also A-B-C from 1973-2013 100 plus times a year
Mrs G P Halliday:	Used A-B-C and a route from between C-F to her house and also described other routes as used routes. Here use was every day from 1999-2013, including use on cycle but mainly on foot.
Ms E Henwood:	Used A-B-C-D-E and C-F and a route from the side gate of her house to D-E from 2013-2014 100 plus time/year. She used it on a cycle as well as on foot.
Mrs R Croyle:	Used A-B-C-D-E from 1996-2014 340 times/year

10.8 For the routes A-B-C-D-E and C-F it is considered that the evidence is sufficient to give rise to a presumption of dedication of a public right of way on foot. For the route D-F it is considered that there is sufficient evidence for a reasonable allegation of the existence of a public right of way on foot. The evidence is not considered sufficient to allege, or reasonably allege, the existence of a public right of way on a pedal cycle over any of the routes.

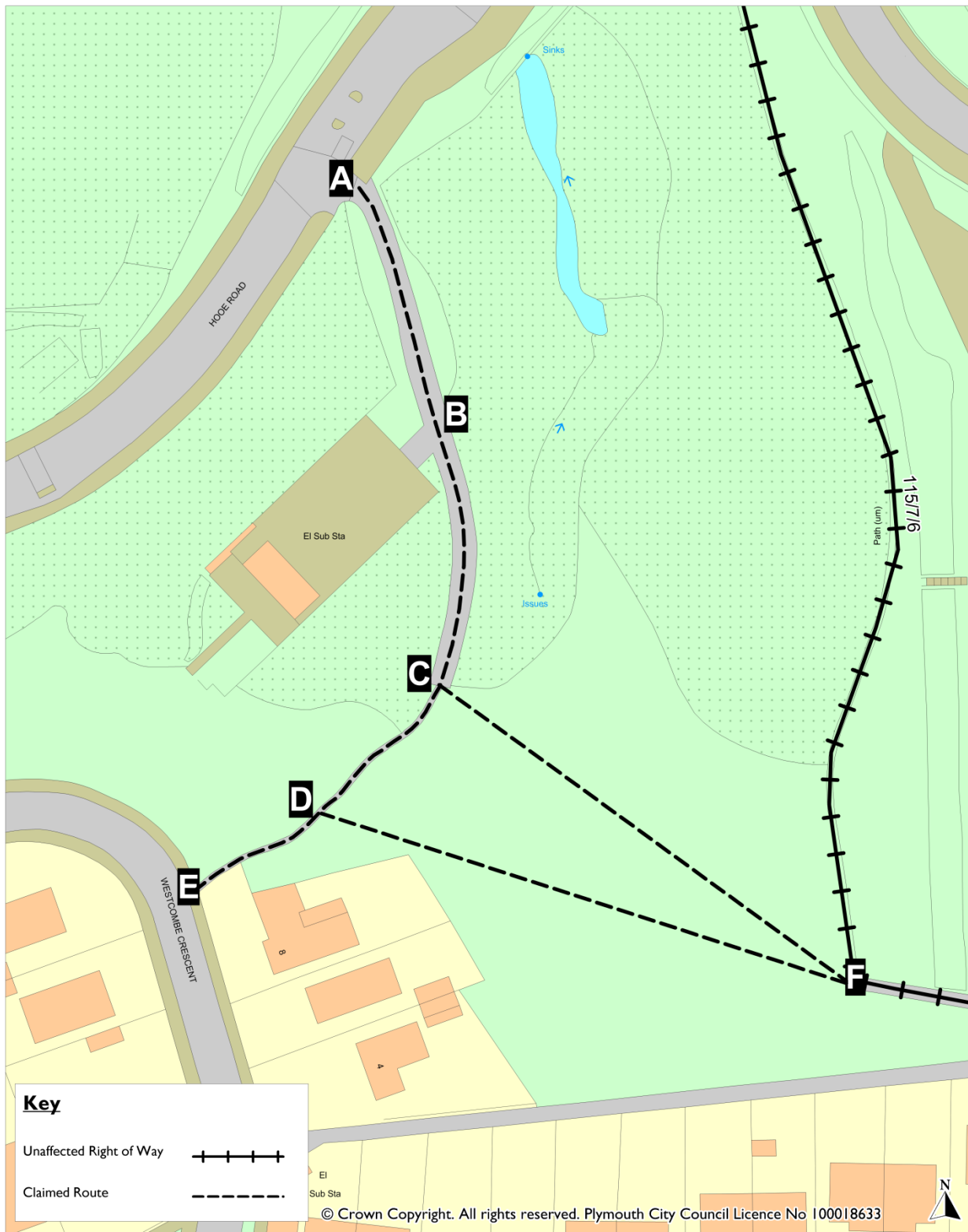
11.0 Officer interpretation of the evidence against the application

- 11.1 Each owner of land over which the claimed route subsists was invited to submit evidence to support their view. In this case no responses were received from either landowner.
- 11.2 It is therefore considered that there is no evidence to demonstrate an intention not to dedicate a public right of way over any of the land concerned.

12.0 Officer Recommendation

- 12.1 Members must be satisfied that two tests have been met. The first relates to the case made out by the applicant in establishing use, by the public, as of right and without interruption for a full period of 20 years. I conclude that this part of the test has been met in respect of the routes A-B-C-D-E , C-F and D-F and that on this basis the application succeeds and an Order should be made.
- 12.2 I further conclude that the landowners have taken insufficient steps to prevent a public right of way accruing and that the application also succeeds in respect of this test.
- 12.3 The officer recommendation to Committee is that an Order be made for both of the routes applied for and for an additional route not applied for as detailed above.

Appendix 29 – Draft Order Plan



WILDLIFE AND COUNTRYSIDE ACT 1981
 ADDITION OF A PUBLIC FOOTPATH FROM HOOE ROAD
 TO WESTCOMBE CRESCENT

Scale 1:734

