

PLYMOUTH CITY COUNCIL

Subject: Modification Order Application to record three lengths of public right of way in St Budeaux.

Committee: Planning Committee

Date: 17th December 2015

Cabinet Member: Cllr Mark Coker

CMT Member: Anthony Payne (Director for Place)

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Ref: WCA.009

Key Decision: No

Part: 1

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 three lengths of public footpath in St Budeaux.

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 2011-2016 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 for a part of the route applied for.

The evidence submitted by the Applicant is robust enough to support the view that public rights subsist or can be reasonably alleged to subsist over those parts. However in relation to the remaining parts, the use by the public was with the permission or licence of the owner, or the owner has demonstrated a sufficient lack of intention to dedicate, and no public rights have arisen.

Alternative options considered and rejected:

To make an Order recording a public right of way over the northern section and/or whole of the southern section if the Committee considers the legal tests have been met.

Not to make an Order recording a public right of way over the middle section and northernmost part of the southern section if the Committee considers the legal tests have not been met.

Published work / information:

All papers relevant to this report and as detailed can be found online at

<http://www.plymouth.gov.uk/wca.009>

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)	1								
Appendices 2 – 42 – Copies of the user evidence relied upon by the applicant (available online)	1								
Appendix 43 – Evidence relied on by the Owners(s)/Occupier(s) of land over which the claimed route is alleged to subsist (available online)	1								
Appendix 44 - Documentary evidence discovered by the local Authority - (available online)	1								

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 <http://www.plymouth.gov.uk/wca.009>.

3.0 **The Application**

- 3.1 An application was received on 13 September 2010 from a member of the public for the making of a Modification Order under section 53 of the Wildlife and Countryside Act 1981. The application sought to record three sections of path those being: -
- a. the addition of a footpath between Wolseley Road and a war memorial (the "Northern Section");

- b. the addition of a public footpath between Normandy Hill and Wolseley Road (the “Middle Section”); and
- c. the addition of a footpath from Wolseley Road to Fegan Road over Kinterbury Creek with a spur.

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 (according to the certificate): -

- a. Leverton Trust, Lower Town House, Landrake, PL12 5EA

3.3 A copy of the application form and a map showing the route of the alleged footpaths are set out in Appendix 1 to this report.

3.4 The applicant submitted evidence forms from himself and 11 other users of the claimed routes whose evidence is set out in Appendices 2 - 13 of this report. An additional 30 user evidence forms were received subsequently. The applicant also submitted copies of three old Ordnance Survey maps in support of the application.

3.5 The application has been opposed by:

- a. the City Council (Head of Operations and Finance), as owner of the land crossed by the northern section, and part of the southern section
- b. the Secretary of State for Defence as owner of the land crossed by part of the southern section
- c. three owners (Mrs Ware, Mrs Price, Mr Treeby), who between them own land crossed by the middle section

4.0 **Topography of the route subject to the application**

4.1 The northern section This follows a paved route through the American War Memorial at the riverside, starting at the southern end and ending at the south-western side of the Memorial.

4.2 The middle section This follows a defined route mainly on the western side of the railway line. The initial section passes through recent development. The section through the property known as 'The Kloof' has been the location of notices and gates.

- 4.3 The southern section This runs down a flight of steps from Wolseley Road into the Kinterbury Creek Nature Reserve. The main route follows a surfaced track south-east through the reserve to end on Fegen Road. A spur runs a short distance west from the bottom of the steps to the waterside at Kinterbury Creek.
- 4.4 The application appears to have been prompted by the erection of signs at 'The Kloof' in 2010 and proposals for development of the adjacent land known as Little Ash Farm. User evidence forms submitted in 2014 indicate that further signs and a gate may have been erected since.
- 4.5 The lengths of the route are :
- a. Northern section : approximately 55 metres.
 - b. Middle section : approximately 300 metres.
 - c. Southern section (including spur to the creek) : approximately 250 metres.
- 5.0 **Summary of the evidence relied upon by the applicant**
- 5.1 The user evidence relied upon by the applicant shows use of some or all of the three routes to a varying extent by 42 users over a period starting in the 1930s. Some of the users claim not only to have used the route all their life, but also to have used it frequently.
- 5.2 The three Ordnance Survey plans supplied by the applicant show the middle section as a physical feature. They do not show either the northern or southern sections as existing at the time.
- 6.0 **Summary of the landowners views and any evidence they provided**
- 6.1 Northern section: The City Council accepts that the route has been used, but is of the opinion that as the land is public open space, there is a licence for public use. Accordingly any use of the route by the public has been by virtue of this licence, and not 'as of right'.
- 6.2 Middle section: Mr Treeby, who has owned his land since 2009, claims to have stopped people, and has also erected signs. Mrs Ware, in whose family the land has been since 1912, claims that signs were erected in 1960, and that the way has always been private. Mrs Price, who has owned her land since 1975 but whose grandfather bought the farm in the early 1900s, claims that dog users have been stopped, and that signs indicating that it was private property were erected between 1965 and 1975, and gates between 2000-2004. She claims to have contacted both the City Council and the police about flytippers using the route.

6.3 Southern section: The City Council accepts that the route has been used by the public, but is of the opinion that the land was purchased specifically for public use as public open space and that use is by licence. Accordingly any use of the route by the public has been by virtue of this licence, and not 'as of right'. The Secretary of State of Defence, whose land has been licensed to the City Council since 1976 for use as a public park, has made a number of deposits and declarations under section 31 of the Highways Act 1980 to the effect that there are no public rights of way over the land.

6.4 The City Council and the Secretary of State for Defence between them own the land from the bottom of the steps to the southern end of the route at Fegen Road, including the spur. The owner on the eastern side (South West Water) has not responded.

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

7.1 Archive research was undertaken on behalf of the Council in the Parliamentary Archives, the National Archives and the Plymouth and West Devon Record Office.

7.2 This showed that a track as a physical feature approximately on the alignment of the middle section was marked on the St Budeaux Tithe Map (1840s), but with no indication of public status. The research also showed that the authorisation of the railway line in 1883 involved the realignment of that track to its present route. The records of land ownership related to the railway line gave no indication that there was a public right of way over the track.

7.3 The records compiled of land and property ownership for valuation purposes under the Finance Act 1910 were also examined: none of them record any deduction by the landowners for public rights of way over their land.

7.4 Historic Ordnance Survey maps were also examined. The earliest also show the middle section on its pre-railway alignment: others show the middle section as a physical feature, mostly as a through route. None show either the northern or southern sections.

7.5 The evidence from the archive research, which encompasses the map evidence supplied by the applicant, is not considered by officers to provide documentary evidence of the existence of a public right of way,

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

8.1 The required informal consultations have been undertaken but no comments or further evidence have been received.

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 there is no evidence of any action that could be said to have brought rights into question on either the northern or southern sections. For those the alternative provision, also in section 31, is that the date of the application (2010) for the modification order is used as the date on which the 20-year period ended.

9.3 For the middle section, although there are claims by two landowner that signs had been in the 1960s and 1970s, this is not supported by the evidence of the applicant or users. There is evidence that signs were erected in 2010: as that appears to have prompted the submission of the application, it is considered that their erection brought into question the right to use the way.

9.4 It is considered, therefore, that the date on which the right of the public to use the way was brought into question was, for all parts of the route, albeit for different reasons, 2010, and the relevant period (which, under section 31 of the Highways Act 1980, has to be counted back from the date of challenge) is 1990 - 2010. Evidence of use prior to the earlier date, although not directly relevant for the purposes of section 31, is relevant to the extent that it provides evidence of the reputation of a way used over a long period of time, with the use during the relevant period being seen as a continuation of that use.

10.0 **Officer Interpretation of the evidence in support of the application**

10.1 The applicant relies on the evidence of users of the claimed route to support their case. 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.
- 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.
- 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. The principle established by Sunningwell is that the state of mind of the user is an irrelevant consideration.
- 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.
- 10.7 Taking the above into account we aid committee by offering our assessment of each of the users evidence in turn (the forms from users from Mr Hammond down to Miss Jennings were submitted in 2010, the remainder in 2014): -

Mr E Hammond, 1987-2010, 200+ times a year

Mrs J M Williams, 1999-2010, every week

Ms S Short, 2003-2010, weekly

¹ [1999] UKHL 28; [2000] 1 AC 335

Mrs G Marnier, 1957-2010, approx once a month

Mr J Slater, about 1980-2010, weekly

Mrs J Kelcey, 1964-2010, every day

Mr P Sargent, 1947-2010, 2-3 times a week

Mr G J Jennings, 1936-2006, 30 times a year

Mr A Lang, 1989-2010, 100 times a year

Mr B L Brown, 1989-2010, twice daily

Mr Peter Clarke (senior), 1984-2010, 2-300 times/yr

Miss R Jennings, 1980-2010, approx 400 times a year

Ms T-J Lowe, 1972-2014, up to 3 times a week

Mr E Bark, 1992-2014, approx 250 times a year

Ms J E Pollard, 1992-2011, twice a year

Mr L Pollard, 1992-2011, twice a year

Mr I P Williams, 1999-2014, 3 times a year

Ms C Lond, 1971-2014, sometimes daily

Mr R W Floyd, 1962-2014, "various" times a year

Ms F Johnson, 2010-2014, at least 3 times a week

Mr N Gigg, 1989-2014, 250 times a year

Mr M Gigg, 1996-2014, 100+ times a year

Ms M Harrison, 2010-2014, 60+ times a year

Ms J Sargent, 1998-2014, 25+ times a year

Mr G Ivey, 2000-2010, 30 times a year

Ms A Cook, 1983-2014, 60-70 times a year

Mr T Kelly, 1951-2008, approx 200 times a year

Mr L E Raspison, 1956-2014, between 1982 and 1989 250 times a year

Ms C Clarke, 1988-2014, 150 times a year

Mr Peter Clarke junior, 1988-2014, 150 times a year

Mr M Clarke, 1988-2014, 100 times a year

Mr K Gibbons, 1994-2014, 50 times a year

Ms A Gibbons, 1986-2014, 50 times a year

Ms B J Howett, 1981-2014, many times a year

Mr R Howett, 1997-2014, at least 20 times a year

Mr K Hitchens, 2009-2014, 20 times a year

Ms J M Hitchens, 2009-2014, 20 times a year

Mr S Elvin, 2009-2014, 10-20 times a year

Ms S Elvin, 1993-2014, most evenings and mornings

Mrs S J H Elvin, 1983-2014, up to once a week

Ms J Cook, 1983-2014, most evenings Monday to Friday and for pleasure at weekends

Ms M Shaw, 1976-2014, approx 4 times a week

10.8 For the middle section (between Point C – D) there was significant public use throughout the relevant period of 1990-2010, together with other less frequent users. This is considered to be sufficient evidence to give rise to a presumption of dedication.

10.9 However, in the case of the northern section (between Points A – B), and part the southern section (between Points E-F-G and F-H) use by the public was by licence or permission and thus not as of right.

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. Their evidence is set out in section 6 above and appendix 43 to this report.

11.2 Officers consider that in the case of the middle section, the evidence submitted by Mrs Ware and Mrs Price runs counter to the evidence of users that over many years their use

of the way on foot was known to the then owners and not objected to. Mr Treeby's actions took place only after he acquired his property, and as officers have concluded that his actions contributed towards bringing public use into question that set an end date for the 20-year period, his actions do not show any intention not to dedicate during the relevant period.

11.3 Part of the southern section is owned by the Secretary of State for Defence. Section 31 does not apply to Crown land, including land owned by the Secretary of State for Defence, unless an agreement has been entered into between the relevant government department and the City Council, or its predecessor highway authority prior to 1996, Devon County Council. Officers have seen no evidence of any such agreement. The conclusion is that Section 31 cannot apply to the MOD land. The deposits and declarations made by the Secretary of State for Defence therefore have no effect for the purposes of section 31. However, as section 31 does not apply to that land in its entirety, the statutory test for dedication in section 31 does not apply either. Instead the question whether a right of way has been dedicated over the land owned by the Secretary of State for Defence has to be considered at common law. Officers consider that the deposits and declarations made by the Secretary of State for Defence demonstrate a sufficient intention by the Secretary of State for Defence, as landowner, not to dedicate a right of way over the land.

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. The second is that the landowner has taken sufficient steps to prevent a public right of way accruing and that the application also succeeds in respect of this test.

12.2 Officers' conclusions are as follows:-

12.3 Northern section Use by the public was by licence or permission, and thus 'by right' not 'as of right'. No public right of way has come into being, and no order should be made.

12.4 Middle section There has been sufficient use by the public, and insufficient evidence of a lack of intention to dedicate on the part of the landowners. A public right of way has come into being, and an order should be made for this route.

12.5 Southern section The use of the route over the land owned by the City Council was by licence or permission, and thus not as of right. Section 31 either does not apply to MOD land and therefore there can no route recorded over the land or if by the landowners

conduct (that of submitting statutory declarations as if Section 31 did apply) those statutory declarations serve to defeat the claim

- 12.6 The officer recommendation to Committee is thus that an Order be made to add to the definitive map a public footpath along the middle section between Points C – D.