

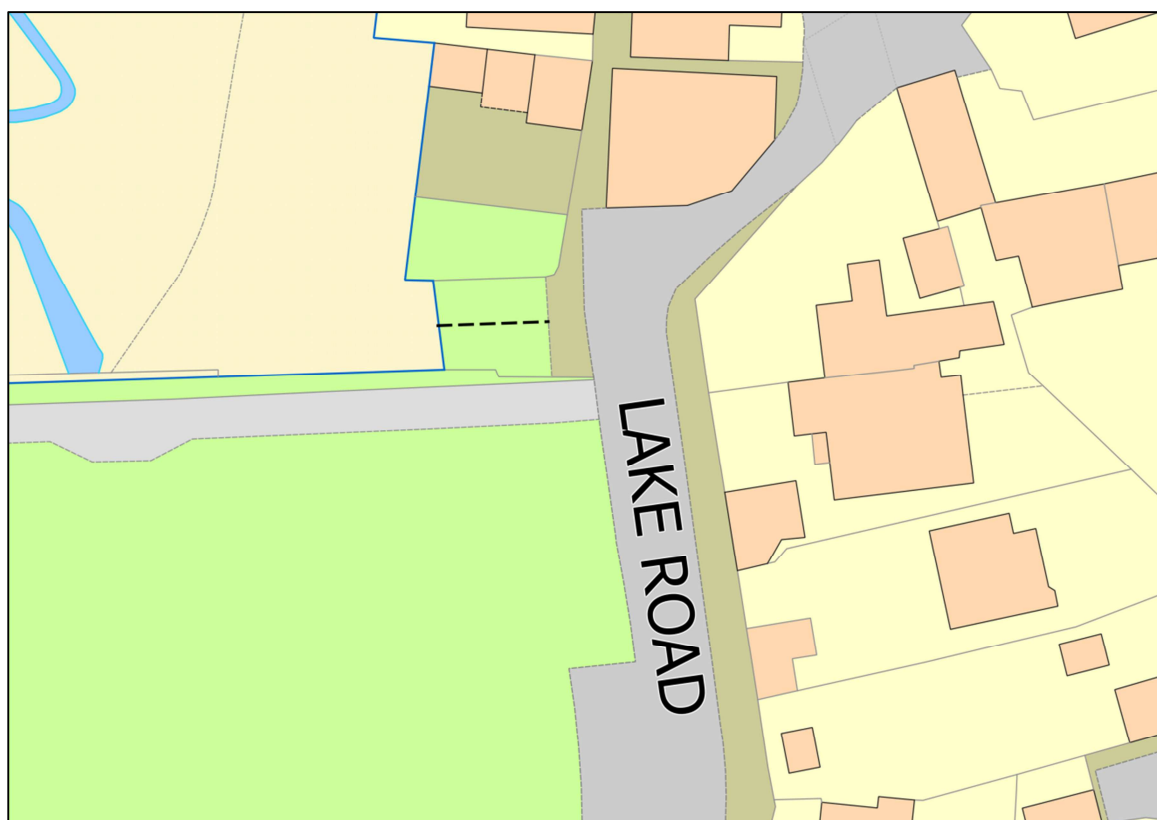
PLANNING COMMITTEE REPORT



Application Ref	WCA.004	Ward	Plymstock Radford
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Site Location	Slipway from Lake Road to Hooe Lake adjoining the Royal Oak public house
Proposal	Addition of a Byway Open to all Traffic
Applicant	Radford and Hooe Lake Preservation Association
Committee Date	12 January 2017
Case Officer	Robin Pearce
Recommendation	Refusal

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1. Description of site

- 1.1 The application route begins at Lake Road. It then runs in a generally westerly direction to reach the edge of Hooe Lake. It is bounded on its north side by the grounds of the Royal Oak public house, and on its south side by the embankment understood to have been constructed in the 1960s to facilitate the reclaiming of part of Hooe Lake. The embankment is on land owned by Plymouth City Council.

2. Proposal description

- 2.1 The Radford and Hooe Lake Preservation Association (the Applicant) has applied to have the Definitive Map and Statement modified on the basis it believes it to be currently incorrect. The applicants case is that the public record can be corrected by the addition of a byway open to all traffic from Lake Road, heading west over a slipway to Hooe Lake.

3. Background papers

- 3.1 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/parkingandtravel/walkingandrightsway/publicrightsway/changesrightsway>

4. Legislative Framework

- 4.1 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 byway open to all traffic. 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.
- 4.2 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 public or the impact on landowners and occupiers are not relevant to the decision on the application.
- 4.3 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.
- 4.4 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.

- 4.5 Because the application was for the recording of the way as a byway open to all traffic, two further tests have to be considered if it is concluded that the evidence shows that public vehicular rights existed in May 2006. The first is that, at that date, any such rights for mechanically-propelled vehicles were extinguished by section 67 of the Natural Environment and Rural Communities Act 2006 unless they were protected by one of the provisions in subsection (2) of that section. The second is that, if those rights were not extinguished, the nature of the way is such that it is, or is likely to be, used by the public mainly for the purposes for which footpaths and bridleways are used. That test is applied by section 66(1) of the Wildlife and Countryside Act 1981 to distinguish byways open to all traffic (which are eligible to be recorded on definitive maps) from 'ordinary' roads (which are not so eligible).
- 4.6 A further element in this case is that the aim of the applicant in submitting the application appears to have been a wish to protect the interests of those using the route for the launching of boats. The purpose of the recording of public rights of way on definitive maps is to record and thereby protect public rights of passage on foot, on horseback and driving or riding vehicles. There is no provision for the recording of any right to tow a trailer or to launch a boat from a trailer.

5. The Application

- 5.1 An application was received on 18 August 2007 from the Radford and Hooe Lake Preservation Association for the making of a Modification Order under section 53 of the Wildlife and Countryside Act 1981 for the addition of a byway open to all traffic over the slipway from Lake Road to Hooe Lake adjoining the Royal Oak public house in the Plymstock, Radford Ward. The application also claimed that the status of the route was "Slipway".
- 5.2 Prior to submitting the application the Association published a request for ownership details in its newsletter and also displayed a poster in local shops and the Plymstock library. The licensee of the Royal Oak public house is recorded by the Association as claiming ownership but the Association disputed that he had produced documentary evidence to support his claim.
- 5.3 The applicant relies upon the evidence of 13 users of the application route. No objection has been raised to the application in consultations undertaken by the City Council.
- 5.4 The application appears to have been prompted by the parking of cars on part of the route. However the use of the route has not been prevented by such parking, although it may have impeded use of the full width of the route.
- 5.5 Because the route is defined as running to Hooe Lake, a decision is needed as to its extent. The Council's marine officer has been consulted and has advised that the seaward limit should be taken to be mean high water mark [MHWM (spring)]. This has been assessed from current mapping as a point exactly 8.98 metres from the extent of the public highway at the top of the slipway. If an order is made, it should therefore be for a route of that length.
- 5.6 There is no evidence to suggest that any dedication of a way to the public has been subject to any limitation.

6. Summary of the evidence relied upon by the applicant

- 6.1 The evidence relied upon by the applicant is evidence of people who used the slipway for the purpose of launching boats from the slipway. Many evidence forms referred to use both on foot and with vehicles. A complication is that users who indicated that they had used the route with a vehicle also wrote on their form "Trailer". It is therefore not clear from the forms whether they had moved the trailer down the slipway while attached to a motor vehicle they were driving or whether it had been detached from that vehicle and moved down the slipway while the user was on foot. Users were asked to provide further information as to the nature and extent of their relative uses both on foot and in a vehicle. Only one did so, indicating that he had used the way, 5 or more times each year, both on foot and with a motor vehicle and trailer.

7. Summary of the landowners' views and any evidence they provided

- 7.1 The land crossed by the route is registered at the Land Registry as being in the ownership of Unique Pub Properties Ltd. They have been consulted, but have not provided any evidence.

8. Summary of the views of those consulted as part of informal consultations

- 8.1 Consultations have been undertaken with interested parties, such as the emergency services and user groups, but no comments or further evidence have been received.

9. 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 although there is evidence that the parking of cars on part of the route may have prompted the application there is insufficient evidence that it brought into question the public right to use the way.
- 9.3 In such a case section 31(7B) of the 1980 Act provides that the date on which the right of the public to use the way was brought into question was the date on which the application was made (18 August 2007). The relevant period (which, under section 31 of the Highways Act 1980, has to be counted back from the date of challenge) is thus 1987 - 2007.

10. Analysis 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. 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, or, in the case of a byway open to all traffic, section 53(3)(c)(i).
- 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. Sunningwell clarifies 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: -
- Mr R Farnell, 1940s-2006, 2-3 times a year
 - Miss Whyte, 1965-1992, intermittent
 - Mr Waters, 1980-2007, 6 times a year
 - Mr Evans, 2000-2006, 2 times a year
 - Mr Patrick, 1996-2006, frequently

¹ [1999] UKHL 28; [2000] 1 AC 335

Mr Demellweek, 1970-1999, 2 times a year
Mr Rossetter, 1969-2006, 4 times a year
Mr Harwood, 1976-2006, many times each year
Mr Catterall, 1990-2006, 10 times a year
Mr Hardy, 1990-2005 summer months, frequency not specified
Mr Hughes, 1994-2007, frequently
Mr Ford, 1979-2001, 3-4 times a year
Mr Gribble, 2005-2007, 20 times a year

If the 20-year period between 1987 and 2007 is divided into 2 10-year periods for the purpose of assessment, then in the first 10 years from 1987 to 1997 user evidence is as follows:-

Mr R Farnell, 1987-1997, 2-3 times a year
Miss Whyte, 1987-1997, intermittent
Mr Waters, 1987-1997, 6 times a year
Mr Patrick, 1996-1997, frequently
Mr Demellweek, 1987-1997, 2 times a year
Mr Rossetter, 1987-1997, 4 times a year
Mr Harwood, 1987-1997, many times each year
Mr Catterall, 1990-1997, 10 times a year
Mr Hardy, 1990-1997 summer months, frequency not specified
Mr Hughes, 1994-1997, frequently
Mr Ford, 1987-1997, 3-4 times a year

- 10.8 In the above list, the only user claiming to have used the route from 1987 onwards more than a few times each year is Mr Harwood, with other users claiming use at most 6 times a year. It is not considered that this is evidence to demonstrate sufficient use by the public throughout the 20-year period.
- 10.9 For the reasons given above, the evidence has been assessed on the basis that it is use by the public on foot. Although the evidence forms refer to use with a vehicle, they appear to be referring to the trailers used for the launching of boats as the vehicles in question.
- 10.10 A vehicle that is being pushed or towed, rather than being driven or ridden, does not in the view of officers count towards the acquisition of public rights of passage to drive or ride vehicles. Accordingly it is officers' view that the evidence also does not support the contention that there are, or were prior to May 2006, public rights of way over the route for mechanically-propelled vehicles.
- 10.11 It would also be officers' view that even if there has been such rights, none of the exemptions in section 67 of the Natural Environment and Rural Communities Act 2006 apply, and therefore rights for mechanically-propelled vehicles would have been extinguished.
- 10.12 No evidence has been produced of action on the part of landowners to demonstrate an intention not to dedicate.

11. Analysis of the evidence against the application

- 11.1 Each owner of land over which the claimed route subsists was invited to submit evidence. In this case no responses were received.

12. 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 the applicant has failed to meet this part of the test and that on this basis the application fails and no Order should be made.
- 12.2 The officer recommendation to Committee is that no Order be made and the applicant be advised of their right of appeal to the Secretary of State.