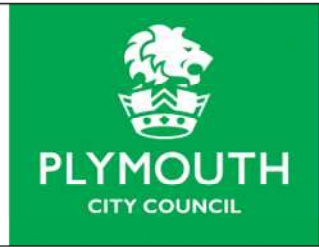


# PLANNING COMMITTEE REPORT



<b>Application Ref</b>	WCA.008	<b>Ward</b>	Moorview
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<b>Site Location</b>	From Estover Close to National Trust Land Adjacent to Elizabeth Cottage
<b>Proposal</b>	Addition of a Public footpath
<b>Applicant</b>	Mrs Carol Launder
<b>Committee Date</b>	05 April 2018
<b>Case Officer</b>	Robin Pearce
<b>Recommendation</b>	Approval

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## 1. Description of site

- 1.1 The route being claimed runs north-east from Estover Close along a tarmac road down a hillside until it meets the line of a former tramway. This former tramway now serves as an access to a number of properties. The claimed route runs south-east past Elizabeth Cottage, where it is blocked by gates, to a former stile at the north-west corner of an area of land owned by the National Trust.

## 2. Proposal description

- 2.1 Mrs Carol Launder (the Applicant) has applied to have the Definitive Map and Statement modified on the basis she believes it to be currently incorrect. Her case is that the public record can be corrected by the addition of a footpath linking the public highway network with a stile adjacent to Elizabeth Cottage which allows access to National Trust land.

## 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 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.
- 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 a public footpath 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.

## 5. The Application

- 5.1 An application was received on 17 December 2009 from a Mrs Carol Launder for the making of a Modification Order under section 53 of the Wildlife and Countryside Act 1981. The application sought to record a footpath between Estover Close and National Trust land adjacent to Elizabeth Cottages in the Moorview Ward.
- 5.2 At the time the application was made Mrs Launder 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 on each and every owner and occupier of land over which the route being claimed subsists, those being: -
- Mr I Harrison
  - Mr J Eccles
  - Mr D Daley
  - Winmill Developments Ltd
- 5.3 The route being claimed runs north-east from Estover Close along a tarmac road down a hillside until it meets the line of a former tramway, and then south-east along this former tramway route past Elizabeth Cottage to a stile at the north-west corner of an area of land owned by the National Trust.
- 5.4 Mrs Launder relies upon the evidence of 36 users of part or all of the application route whose evidence is set out in the appendices to this report. The application has been opposed by solicitors acting on behalf of Mr Harrison, owner of Elizabeth Cottage, and by Forresters Management Co Ltd, the owners of the western part of the tarmac road.
- 5.5 The south-western end of the application route does not join with the publicly-adopted road known as Estover Close. For the purposes of dealing with the application the City Council has therefore extended the route under consideration to meet the public highway.

## 6. Summary of the evidence relied upon by the applicant

- 6.1 The user evidence relied upon by Mrs Launder shows use to a varying extent by 36 users over a period starting in the 1930s. Some of the users claim only to have used part of the route all their life.
- 6.2 Many evidence forms refer to the erection of gates by Mr Harrison in 2009.

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

- 7.1 Forresters Management Co Ltd, which has owned the land crossed by the western part of the tarmac road route since 2006, completed a landowner evidence form. The company argues that the road is subject to private rights of way for the properties to which it provides access, and that those rights were defined when it purchased the land from the City Council.
- 7.2 Mr Gareth Pinwell of Ashfords, acting for Mr Harrison, wrote to object to the application. Mr Pinwell considered that if the application were to be approved it would amount to a breach of his clients' human rights, in that they would be unable to use and enjoy their property, as with a public right of way through the lane adjacent to the property this would seriously compromise its use and possibly lead to an unsafe situation for occupiers of the property.
- 7.3 He claimed that his clients had, since they moved into the property in 2007, continually challenged anyone entering onto their property and erected signs on the gates.
- 7.4 He also enclosed correspondence from a previous owner relating to correspondence with Devon County Council (at the time the surveying authority) in the early 1980s, and argued that this provided evidence that a claim that a route called "Stoggy Lane" was not considered at the time to have been a public right of way.
- 7.5 He also claimed that successors in title prior to Mr Harrison had also taken action to prevent dedication, but provided no evidence in support.

## 8. Summary and outline of any documentary evidence discovered not submitted by interested parties

- 8.1 Research was undertaken in the Plymouth and West Devon Record Office, the National Archives and the Parliamentary Archives. The only evidence possibly relevant to the application was a deduction claimed by the owner of the fields crossed by the road for a "right of way cart track" under the Finance Act 1910. This does not provide any evidence of the believed status of the route, other than such deductions are normally made for public rights of way, and it does not cover the whole of the route applied for.

## 9. Summary of the views of those consulted as part of informal consultations

- 9.1 Consultations have been undertaken with interested parties, such as the emergency services and user groups.
- 9.2 Councillor Bridgeman commented that she felt the application was detrimental to the current owner's home life, private land, and an invasion of their privacy and she felt that given there is a perfectly acceptable access available just a few hundred meters away without crossing privately owned and maintained land she could not understand why anyone would feel the need to walk through an Industrial Estate in order to access Plym

Bridge Woods. She personally felt the residents of Elizabeth Cottage were being victimised for no apparent reason and she felt this was unjust. There was no public parking available in the area whereas there was ample free parking in Plymbridge Lane and alongside Plym Bridge.

## 10. The date that public rights were brought into question

- 10.1 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.
- 10.2 The evidence of the applicant and many of those who completed user evidence forms is that public use was prevented in 2009. This appears to have prompted the submission of the application. Although Mr Harrison's solicitor claims that his client took action after moving into his property in 2007, this is not substantiated by the evidence of users and was not sufficient to bring the challenge to the attention of users sufficient to allow them to rise to meet that challenge.
- 10.3 It is considered, therefore, that the date on which the right of the public to use the way was brought into question was 2009, and the relevant period, which, under section 31 of the Highways Act 1980, has to be counted back from the date of challenge, is 1989 - 2009. 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.
- 10.4 The evidence from the previous owner, supplied by Mr Harrison's solicitor, but also supplied in part by the applicant, does suggest that the right to use the way was also brought into question in the 1980s, but prior to 1989, and thus not interrupting the 20-year period.

## 11. Analysis of the evidence in support of the application

- 11.1 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.
- 11.2 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.

- 11.3 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.
- 11.4 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.
- 11.5 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*<sup>1</sup> (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 confirmed that the state of mind of the user is an irrelevant consideration.
- 11.6 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.
- 11.7 Taking the above into account we aid committee by offering our assessment of each of the users evidence in turn (users walked the whole route, except in those cases marked 'tramway route only' where the user walked only the easternmost part of the route): -
- Mrs C A Launder (applicant), 1945-2009, 12 times a year
  - Mr C M Launder, 1964-2009, 15 times a year
  - Mr D G Tyler, 1936-2009, 3-4 times a year
  - Ms S Tyler, 1970-2009, 3-4 times a year
  - Mr J Tucker, 1986/7-2009, 8-10 times a year
  - Mr D A Launder, 1966-2009, at least 20 times a year
  - Ms A H Shepherd, 1977-2009, 10 times a year
  - Mrs N Bishop, 1960-2009, 6 times a year
  - Mr A G Rumsby, 1980-2009, 6 times a year
  - Mrs P Rumsby, 1980-2009, 6 times a year
  - Mr W Launder, 1967-2009, 20 times a year
  - Ms J D Beaver, 1959-2009, 3-4 times a year
  - Mr N R Beaver, 1934-2009, 3-4 times a year
  - Ms C Vernon, 1977-2009, 6 times a year
  - Mr E C Beaver, 1950-2009, 6 times a year

Ms A J Launder, 1989-2009, 20+ times a year  
Mr S Heath, 1989-2009, 30-40 times a year  
Ms P Winchester, 1975-2009, 10 times a year  
Ms R Launder 1989-2009, 12 times a year  
Mr L D Launder 1969-2009, 12 times a year  
Ms S Britton, 1990-2009, 20 times a year  
Mr J Skinner 1975-1983 once or twice a year  
Mr M Northey 1986-2009, 1-2 times a week, tramway route only  
Ms L Donovan, 2006-2009, 20 times a year, tramway route only  
Mr S Hill 2005-2009, 20 times a year  
Ms C Hart, 2003-2009, 20 times a year  
Mr R Kitteridge, 2005-2009, 50 times a year  
Ms S R Lord 1996-2008, 10 times a year, tramway route only  
Mr A T Lord, 1996-2008, 10 times a year, tramway route only  
Ms J K Wotton, 1999-2008, 8 times a year, tramway route only  
Mr P Wotton,, 1999-2008, 8 times a year, tramway route only  
Mr H T Turner, 1975-2010, several times a year  
Ms J Hocking, on foot 1978-2010, cycle 1984-2010, 10 times a year (method not specified)  
Mr C Hocking, 1978-2009 on foot, 1982-2007 cycle, 4 times a year (method not specified)  
Dr P Robbins, 2008-2012, cycling 20-30 times a year, tramway route only  
Dr S Dudnikov, 2001-2009, walking and cycling, 50 times a year

11.8 This is considered to be sufficient evidence to give rise to a presumption of dedication.

## 12. Analysis of the evidence against the application

12.1 Each owner of land over which the claimed route subsists was invited to submit evidence to support their view. In this case responses were received from two owners. Their evidence is set out in section 7 above. It seems apparent that Mr Harrison's actions either were insufficient to make clear his intentions to the public or occurred after the relevant date – his actions which did bring the matter to the attention of the public being the catalyst for the making of the application and the use by the public occurring before his ownership.

- 12.2 Although the landowner claims to have provided evidence of an intention not to dedicate, officers do not consider that this is sufficient evidence of action on the part of landowners to demonstrate an intention not to dedicate.

### 13. Officer Recommendation

- 13.1 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 route and that on this basis the application succeeds and an Order should be made.
- 13.2 I further conclude that the landowners at the relevant time have taken insufficient steps to prevent a public right of way accruing and that the application also succeeds in respect of this test.
- 13.3 The officer recommendation to Committee is that an Order be made to add to the definitive map a public footpath along the route applied for.