



## Report to Team Leader – Definitive Map and Highway Searches

**Date:** TBC

**Title:** Claimed public footpaths from Liston Court to New Court and Cromwell Gardens to New Court, Marlow

**Relevant councillor(s):** Councillor Alex Collingwood, Councillor Carol Heap and Councillor Neil Marshall

**Author and/or contact officer:** Helen Francis, Senior Definitive Map Officer

**Ward(s) affected:** Marlow

**Recommendations:** That the 20 year relevant period for the section F-B-C-D-E and A-B (Appendix 2) is 1996 to 2016.

That the routes shown between F-B-C-D-E and A-B (Appendix 2) be ACCEPTED on the grounds that there is sufficient evidence to show on the balance of probabilities that the route subsists under Section 31 Highways Act 1980 and should be shown on the Definitive Map and Statement as a Public Footpath.

That the routes shown between B-C-D, E-F-G, K-L-M-A-N-O and K2-M (Appendix 1) be REJECTED on the grounds that there is insufficient evidence to show on the balance of probabilities that the route subsists or is reasonably alleged to subsist.

**Reason for decision:** The decision is based on the available evidence in consideration with relevant legislation.

### Executive summary

1.1 The purpose of this report is to determine applications for a Definitive Map Modification Order to show routes between Liston Court and New Court to Cromwell Gardens and Liston House, Marlow. The application routes are shown between points A-B-C-D, E-F-C-G-H-I-J, K-L-M-A-N-O and K2-M on the plan [Appendix 1].

- 1.2 On the 8 January 2016 two applications were made to modify the Definitive Map and Statement by adding the routes described in paragraph 1.1. The applications were made by Ms Annie Jones on behalf of Marlow Town Council [Background Papers; Bundle 1, pages 2-7, Bundle 2, pages 2-1413 and Bundle 3, pages 2 - 213].
- 1.3 On the 14 January 2016 Ms Jones requested that the application be modified to only include the route F-B-C-D-E on the plan [Appendix 2]. Despite this request, all of the user evidence that was submitted with the application will be considered to determine whether public rights of way should be recorded on any of the routes applied for.
- 1.4 At later dates, four additional applications were made for similar routes to those already applied for and connecting with the high street. These were made by:
- K. Warne dated 11 December 2020 [Background Papers; Bundle 1, pages 8 – 16]
  - R. Parker dated 20 December 2020 [Background Papers; Bundle 1, pages 17 – 25]
  - M. Blunkell of the Marlow Society dated 29 April 2021 [Background Papers; Bundle 1, pages 26 - 43]
  - S. and B. Ward dated 5 February 2022 [Background Papers; Bundle 1, pages 44 - 55]
- 1.5 The applications detailed in paragraph 1.4 have not all been duly made, however the evidence contained with them will be considered alongside the evidence submitted with Marlow Town Council’s applications. Some of the applications consisted of just one user evidence form.
- 1.6 The applications were supported by over 160 user evidence forms claiming use of the routes between 1960 and 2016. The applications were made on the basis that the routes had been used by the public as public footpaths without let or hindrance for many years and residents would like to protect them by officially registering them on the Definitive Map and Statement for Buckinghamshire.

## Legal Background

- 1.7 The Council as the Surveying Authority has a duty under section 53(2)(b) of the Wildlife and Countryside Act 1981 (WCA 81) to keep the Definitive Map and Statement under continuous review and to make such modifications to the Definitive Map and Statement that appear to be requisite in consequence of events described in section 53(3).

### Section 53(3) events

- 1.8 The relevant events referred to in section 53(3) which are applicable in the context of the present application are:

*“(3)(b) the expiration in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises*

*a presumption that the way has been dedicated as a public path or restricted byway.”*  
*[Referred to below as test (a)]*

and/or

*(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-*

*(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to 54A, a byway open to all traffic.” [Referred to below as test (b)]*

1.9 In relation to section 53(3)(b) the decision maker must consider whether, on the balance of probabilities, enjoyment by the public of the way over a period raises a presumption that the way has been dedicated as a public footpath.

1.10 In relation to section 53(3)(c)(i) the decision maker must consider whether the evidence produced by the applicant, together with all the other evidence available, show that either (a) a right of way subsists or (b) that it is reasonable to allege that a right of way subsists. These tests were considered in *R v Secretary of State for the Environment ex p. Bagshaw and Norton* and *R v Secretary of State for Wales ex p. Emery* in the context of section 31 of the HA 1980.

1.11 On test (a), it is necessary to find on the balance of probabilities that the right subsists. This will be the case where there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public.

1.12 On test (b), it is necessary to find on the balance of probabilities that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. The evidence necessary to establish that a right of way is reasonably alleged to subsist over land is less than that which is necessary to establish that a right does subsist. In relation to test (b), whether an allegation is reasonable or not will depend on a number of circumstances. If the evidence from witnesses as to user is conflicting, but reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it is reasonable to allege such a right. Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under section 31, then the allegation that the right of way subsists is reasonable, unless there is documentary evidence which inevitably defeats the claim (for example by showing that the landowner had no intention to dedicate).

1.13 Where there is no credible evidence of 20 years' user, or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, then the decision should be that the allegation that a right of way subsists is not reasonable and that no right of way as claimed subsists.

#### Presumption of dedication

1.14 Section 31 of the Highways Act 1980 (HA80) provides for the presumption of dedication of a public right of way following 20 years continuous use as of right, without interruption, unless there is sufficient evidence that there was no intention during that period to dedicate it. Sub-section (1) states:-

“where a way over any land, other than a way of such 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, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

1.15 The period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question: section 31(2) HA 1980. Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) clarified that the submission of an application to modify the Definitive Map was sufficient to call the use of the route into question by inserting subsections 7A and 7B into Section 31 HA80.

1.16 Bringing into question the public's right to use a particular route will require an act where the landowner challenges by some means sufficient to bring home to the public that he is challenging their right to use the way, so they may be apprised of the challenge and have a reasonable opportunity of meeting it, for example putting up a notice that makes it clear to the public that he is challenging their right of way. Such evidence may consist of notices which call into question the rights of the public to use a particular way, the erection of physical barriers such as by locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under HA80 section 31 (6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit. The relevant question is when did the landowner make it clear to the public that he was challenging their right to use the way: *Fairey v Southampton County Council*.

1.17 Once the decision-maker has determined the date upon which the public's right to use a particular way is brought into question, the decision maker must consider the evidence of use in the twenty-year period and then evidence that the landowner had no intention to dedicate.

## User Evidence

1.18 There is no statutory minimum level of users required to show sufficient use to raise a presumption of dedication, however, use of a way must be use by the public or the community. Use of a way by different persons, each for periods of less than 20 years may be sufficient if taken together they total a continuous period of 20 years. The number of users must be such as might reasonably have been expected if the way had been a public highway: *Mann v Brodie*. Use “as of right” must be without force, secrecy or permission.

## Lack of intention to dedicate

1.19 Once use is established as of right and without interruption, the presumption of dedication arises. Consideration must then be given to evidence that there was no intention to dedicate on the part of the landowner. “Intention to dedicate” was considered in *Godmanchester*, which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgment, Lord Hoffmann approved the obiter dicta of Denning LJ in *Fairey v Southampton County Council* [1956] who held “*in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path....that he had no intention to dedicate*”.

1.20 It is clear from *Godmanchester* that actions satisfying the proviso will, usually, also bring the public’s right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.

1.21 Lord Hoffmann held that “*upon the true construction of Section 31(1), ‘intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to ‘disabuse’ [him] of the notion that the way was a public highway*”.

1.22 For a landowner to benefit from the proviso to s31(1) there must be ‘sufficient evidence’ that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous, and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify action which will be regarded as “sufficient evidence”, they are not exhaustive; s31 (2) speaks of the right being brought into question by notice “or otherwise”.

## Common Law

1.23 A right of way can come into existence under common law. This occurs when the public use a way “for so long and in such a manner that the [landowner]...must have been

aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.” (Mann v Brodie 1885 10 App Case 378 Lord Blackburn). No minimum period of use is required. The greater the evidence of use (which is acceptance by the public at large of a public right of way) the greater the implication of dedication.

#### Role of decision maker in determining the application

1.24 In determining the rights of way application, the decision maker must act in accordance with the following overriding principles set out in R v Isle of Wight County Council, ex p O'Keefe [1989] JPL 934.

- a. The decision maker must make a careful and properly informed decision as to whether all the evidence shows that a right of way subsists or is reasonably alleged to subsist.
- b. The decision maker must determine the application with a proper appreciation and weighing of the available evidence and any legal principle which might have to be applied.
- c. The decision maker must arrive at their own conclusion on the evidence and whilst the decision maker may have regard to the recommendation of the relevant Officer they must determine the application for themselves and not simply adopt the view of the relevant Officer without analysing the evidence.
- d. The decision maker must actually make a decision on the application in light of the relevant evidence and legal principles and must not rely upon the possibility of an appeal or an inquiry at a later date.

1.25 All the relevant statutory provisions and competing rights and interests have been considered in making this report. The recommendation is in accordance with the law and proportionate, having regard to individuals' rights and the public interest.

#### User Evidence

1.26 The applications were accompanied by over 160 witnesses claiming use of the routes from 1960 – 2016. Graphs identifying the periods of use are attached to this report at Appendix 3 and 4. In addition, officers invited all those with at least 20 years use to be interviewed and carried out interviews with twenty-three of the users [Background Papers; Bundle 1, pages 56 - 115].

1.27 It was apparent from investigations that the route from Liston Court to Cromwell Gardens was shown on a different alignment to what Buckinghamshire Council had initially thought was being applied for [Background Papers; Bundle 1, pages 2 - 7]. The

correct alignment of the route which is supported by witnesses is shown on Appendix 2 from F-B-C-D-E.

- 1.28 The evidence listed in Appendix 3 was submitted in support of the route F-B-C-D-E (Appendix 2 – referred to in the application as Route A). The evidence listed in Appendix 4 was submitted in support of the route A-B-C-D (Appendix 1 – referred to in the application as Route B). It was apparent from the interviews that some witnesses only claiming use of one route had actually been using parts of both routes.
- 1.29 The section of route from C-D (Appendix 1) did not appear to be in frequent use by the witnesses who were interviewed. During interviews one of the witnesses (Witness 22 – Appendix 4) stated there was a sign near to point C leading to D which stated restricted access for people in the old people home. The witness believed the notice had been up for approximately 20 years.
- 1.30 The majority of witnesses accessed the routes on foot, with some on bicycle for access to the shops / doctors / post office and other local amenities.
- 1.31 The section from A-B on both plans is an alternative route used by the majority of people. From point A witnesses would sometimes be accessing Liston Court shops or using it as a cut through to the High Street.
- 1.32 Over 90% of the witnesses provided details of the period during which they used the route, with most using the route frequently. None of the witnesses asked for permission or felt that they needed permission to use the route. A small number of witnesses assumed that because there were “no cycling” signs this implied, they could use the routes by foot.

## Documentary Sources

- 1.33 Documentary sources have been checked, the findings of which can be found below:-

### Aerial Photos

- 1.34 Aerial photos taken in 1999, 2003, 2006 and 2020 (Bundle 1, pages 171 - 173) show the routes as shown on Appendix 2. A clear surface route is visible in places where tree cover is not obstructing the view.

***Comment:*** *Aerial photos do not provide any indication of the status of a route but only show what was on the ground at the time of the survey.*

### Land ownership

- 1.35 The six different applications for a definitive map modification order cross the land of four different owners with one piece of land changing owners quite recently.

- 1.36 These include:

- R.G. Securities from 28 March 2019 (previously Lennox Estates Limited)

- Liston Court Limited
- Buckinghamshire Council from 1 April 2020 (previously legacy Wycombe District Council)
- Lennox Estates Limited

1.37 The Land Registry title for Liston Court Limited [Background Papers; Bundle 1, pages 137 - 142] refers to the land being subject to rights reserved by a conveyance dated 27 March 1986. The conveyance states there will be an unrestricted right at all times and for all purposes to pass and re-pass on foot only over and along the pedestrian access from High Street to Liston Road, Marlow. Therefore, any use over the land would have been “by right”.

1.38 The Liston Court Limited conveyance affects the routes from K-L-M-A-N-O & K2-M on Appendix 1.

1.39 No further documentary sources were found.

### Other options considered

1.40 The pros and cons should not be considered when determining the application based on the available evidence.

### Legal and financial implications

1.41 Financial implications should not be considered when determining these applications as the Council has a statutory duty to make an Order if it believes that there is sufficient evidence to support it. Officer time is involved in investigating the applications and dealing with a public inquiry if an Order is made and there are objections to it.

### Corporate implications

1.42 Corporate implications should not be considered when determining these applications for the same reasons detailed in 1.41.

### Consultation and communication

1.43 Consultation was carried out with the Local Member, Marlow Town Council and the list of prescribed organisations and statutory undertakers for the area. No feedback was received.



## Representations from landowners

- 1.44 In an email dated 29 August 2018 Mark Haines from Red Kite Housing [Background Papers; Bundle 1, pages 119 – 120] stated he objected to the application because the proposal affects their land/buildings with the footpath marked C-D (Appendix 1) not being appropriate because it directs the public towards private land/sheltered scheme.
- 1.45 In an email dated 5 September 2018 Alexander Gilford from Lennox Estates [Background Papers; Bundle 1, pages 121 – 126] stated he objected to the application because the plan does not reflect the way in which these paths have been used over the years. He stated it's clear the public have used the route J-I-H-G-B-A (Appendix 1) which leads from Cromwell Gardens to the High Street.
- 1.46 Mr Gilford states that C-E (Appendix 1) does not follow a pathway but instead across the middle of a piece of grass behind a flowerbed. He goes on to state there is a pathway which runs behind this which is regularly used and leads out to Liston Road.
- 1.47 Mr Gilford also attached some photos to his email. One of the photos which the Council understands is on the section of route between C-D (Appendix 1) is of a Red Kite Community Housing sign which states:
- “Red Kite Community Housing*  
*PRIVATE GARDENS FOR RESIDENTS ONLY”*
- 1.48 In a letter dated 24 September 2018 Mr Peter Steward from Liston Court Limited [Background Papers; Bundle 1, pages 127 – 128] stated that the footpaths within their ownership have been used by the public for many years and no action has been taken to prevent or deter the use. Mr Steward has also questioned the positioning of the route between C-E and that C-D is for private access only (Appendix 1).
- 1.49 In a letter dated 19 October 2018 Mr Adrian Thompson (Property Solicitor) from the now legacy Wycombe District Council [Background Papers; Bundle 1, pages 129 – 130] also questioned the location of the route between C-E (Appendix 1). He stated there is vegetation and a lamppost between C and E which would obstruct everyday access.
- 1.50 In a letter dated 29 October 2018 Ms Penelope Tollitt (Head of Planning and Sustainability) and on behalf of the now legacy Wycombe District Council [Background Papers; Bundle 1, pages 131 – 132] raised concerns about the application route differing to the existing route and it's close running through trees within a conservation area.
- 1.51 In a letter dated 31 October 2018 Mr Robert Martyr from Red Kite Community Housing [Background Papers; Bundle 1, pages 133 – 136] objected to the application with particular focus on the route C-D (Appendix 1). The route is owned by Red Kite Community Housing and is not a path for the public as it only serves the residents of the sheltered housing scheme.

1.52 Mr Martyr refers to the Notice of Application only showing one of the claimed routes. The route E-C-G-H-I-J (Appendix 1) is shown bisecting the lawn at the front of New Court rather than following the paved route around the lawn. There is a brick wall at point E making it impossible to commence the route at this location.

1.53 Mr Martyr refers to the Marlow Society web site regarding the history of New Court House. The land which the application relates to was part of the private garden of New Court House which belonged to Mrs Nesta Sybil Forbes Liston. In 1970 the property and the grounds were gifted to Marlow Urban District Council. The bequest is understood to have read "I DEVISE my property known as New Court Marlow aforesaid to Marlow Urban District Council absolutely but express it as my wish that the Council should set aside a substantial part of the property as a public open space or garden for the enjoyment of the people of Marlow and that the Council should maintain it as such".

## Comments

1.54 The claimed routes were brought into question by the submission of an application in 2016 to modify the Definitive Map and Statement by adding the routes to the Definitive Map as public footpaths. Therefore, the relevant period is from 1996 to 2016.

1.55 The correct alignment for the route between Liston Road and Cromwell Gardens is shown on Appendix 2 between points F-B-C-D-E. The Council agrees with the representations received that the route shown on Appendix 1 does not correctly show the route being used by members of the public or the route claimed by witnesses.

1.56 The conveyance dated 27 March 1986 detailed in the title deeds for Liston Court Limited gives members of the public a right to pass and re-pass between the High Street and Liston Road. Therefore, witnesses using these sections were doing so 'by right' rather than 'as of right'. This affects the routes K-L-M-A-N-O and K2-M.

## Conclusion

1.57 There is a substantial amount of witness evidence which indicates members of the public have been using the route between Liston Road and Cromwell Gardens with a spur leading to the Liston Court shops (F-B-C-D-E and A-B – Appendix 2) by foot, as of right, for 20 years. This has not been disputed by the representations received from landowners.

1.58 The routes from the High Street to Liston Road (K-L-M-A-N-O & K2-M – Appendix 1) have been used 'by right' therefore the presumption of dedication has not been raised.

1.59 The route from C-D (Appendix 1) is not supported by the witnesses who were interviewed, and the representations received from landowners further indicates that this is a private section of path leading to New Court sheltered housing.

## Next steps and review

1.60 If the application is accepted an Order to modify the Definitive Map and Statement will be made and open to objections. If objections are received the Order and the objections will be sent to the Planning Inspectorate for determination. If the application is rejected the applicant can appeal the decision to the Planning Inspectorate.

## Appendix

Appendix 1 – Claimed public footpaths (E-F-C-G shown incorrectly)

Appendix 2 – Claimed public footpath routes to be accepted

Appendix 3 -User evidence for route A

Appendix 4 – User evidence for route B

## Background papers

### **Bundle 1**

2 – 7 Applications from Marlow Town Council dated 8 January 2016

8 – 16 Application and evidence from K. Warne dated 11 December 2020

17 – 25 Application and evidence R. Parker dated 20 December 2020

26 – 43 Application and evidence M. Blunkell of the Marlow Society dated 29 April 2021

44 – 55 Application and evidence S. and B. Ward dated 5 February 2022

56- 115 Witness interviews

116 – 118 Consultation letter and plan

119 – 120 Mark Haines from Red Kite Housing dated 29 August 2018

121 – 126 Alexander Gilford from Lennox Estates dated 5 September 2018

127 – 128 Mr Peter Steward from Liston Court Limited dated 24 September 2018

129 – 130 Mr Adrian Thompson (Property Solicitor) legacy W.D.C dated 19 October 2018

131 – 132 Ms Penelope Tollitt (Head of Planning and Sustainability) legacy W.D.C dated 29 October 2018

133 – 136 Mr Robert Martyr from Red Kite Community Housing dated 31 October 2018

137 – 170 Land Registry documents

171 – 173 Aerial photos

### **Bundle 2**

2 – 1413 Evidence to support application from Marlow Town Council dated 8 January 2016  
for Route A

**Bundle 3**

2 – 213 Evidence to support application from Marlow Town Council dated 8 January 2016  
for Route B

Your questions and views

For further information please contact Mrs Helen Francis  
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