



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

**Date:** 24 October 2023

**Title:** Claimed public footpaths over three fields at Terriers Farm, Kings Hill Road, Hazlemere

**Relevant councillor(s):** Councillor Ron Gaffney, Councillor Ed Gemmell and Councillor Catherine Oliver

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

**Ward(s) affected:** Hazlemere

**Recommendations:** That the routes shown between A-B-C-D-E-F-G-H-I-J-K-L-M-N (Background Papers; pages 11) 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.

### 1.0 Executive summary

- 1.1 The purpose of this report is to determine an application for a Definitive Map Modification Order to show routes over three fields at Terriers Farm, Kings Hill Road, Hazlemere. The application routes are shown between points A-B-C-D-E-F-G-H-I-J-K-L-M-N on the plan [Background Papers; page 11].
- 1.2 On the 23 April 2016 an application was made to modify the Definitive Map and Statement by adding the routes described in paragraph 1.1. The application was made by [REDACTED] [Background Papers; pages 13-18].
- 1.3 The application was supported by 31 user evidence forms claiming use of the routes between 1975 and 2016, a period of 41 years. The application was 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.

1.4 The application was investigated by external consultant Mr R Carr on behalf of the then County Council in 2019, who produced an investigation report setting out various conclusions to assist the Council with either accepting or rejecting the application. The report authored by Mr Carr is in the Background Papers; pages 2-9 along with a set of background papers [Appendices 1-13 in the Background Papers; pages 10-345] and gives further context to this report.

## **2.0 Legal Background**

2.1 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

2.2 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)]

2.3 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.

2.4 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.

- 2.5 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.
- 2.6 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).
- 2.7 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

- 2.8 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.”
- 2.9 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.
- 2.10 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 appraised 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*.

- 2.11 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

- 2.12 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

- 2.13 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*".
- 2.14 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.
- 2.15 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".*

2.16 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

2.17 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

2.18 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.

2.19 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.

### **3.0 User Evidence (Highways Act 1980, Section 31)**

3.1 The application is supported by 31 user evidence forms with witnesses claiming use of the routes between 1975 and 2016. A graph identifying the periods of use is included in the Background Papers at pages 318-321.

3.2 The majority of witnesses claim frequent use of the routes for recreational purposes (e.g walking, running and dog-walking).

3.3 From the user evidence the routes across the fields have been used without interruption, without force, secrecy or permission, and therefore "as of right".

#### Character of the Application Routes/Nature of the Use

3.4 A public right of way is a linear route running between two other highways of equal or higher status, or it runs from one highway to a place of public resort. There is no general right to wander at will over enclosed land. As outlined in The Sixth Edition of Highway Law (Sauvain, 2022, p. 15, 1 - 27) "*The common law did not recognise any public right to wander across countryside*"

3.5 In relation to this application, witnesses have used a significant number of specific and defined routes within a very confined area. When considering the evidence, it is reasonable to assume that the use is indicative of general wandering around and across the three fields.

#### Date of bringing into question and relevant twenty-year period

3.6 The application was triggered by the erection of fencing in May/June 2015. This would suggest that the relevant twenty-year period for the purposes of Section 31 of the Highways Act 1980 is 1995 – 2015.

### **4.0 Common Law**

4.1 For rights to be established under common law there would need to be evidence to show it can be inferred that the owner of the land intended to dedicate the application routes as public rights of way.

4.2 Any dedication under common law faces the same issues that prevents presumption arising under Section 31 of the Highways Act 1980. The use of so many routes in such a confined area is considered to be wandering anywhere on the land, rather than the use of specific linear routes.

### **5.0 Documentary Sources**

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

## Ordnance Survey Maps

5.2 Ordnance Survey maps have been checked and suggests that the current use is not historic in nature, with only the acknowledged footpaths which are already on the Definitive Map being shown.

5.3 No further documentary sources were found.

### **6.0 Other options considered**

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

### **7.0 Legal and financial implications**

7.1 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.

### **8.0 Corporate implications**

8.1 Corporate implications should not be considered when determining these applications for the same reasons detailed in 7.1.

### **9.0 Consultation and communication**

9.1 Consultation was carried out with the Local Member, Hazlemere Parish Council and the list of prescribed organisations and statutory undertakers for the area. No feedback was received.

### **10.0 Representations from landowners**

10.1 The previous landowners indicated they would object if an Order were to be made, however they did not indicate on what grounds or submit any evidence to support their position.

### **11.0 Comments and Conclusion**

11.1 The claimed routes were brought into question by the erection of fencing in May/June 2015. Therefore, the relevant period is from 1995 to 2015.

11.2 In conclusion, witnesses have used a significant number of specific and defined routes within a very confined area. The evidence indicates the public have generally wandered anywhere over the land, rather than using linear public rights of way. Therefore, the case establishing public rights has not been properly made.

## **12.0 Next steps and review**

12.1 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.

### **Background papers**

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2-9	Investigation Report by Robin Carr Associates
10-11	Appendix 1; Plan of claimed routes
12-18	Appendix 2; Application form
19-79	Appendix 3; User evidence forms
80-109	Appendix 4; User evidence forms
110-142	Appendix 5; User evidence forms
143-184	Appendix 6; User evidence forms
185-213	Appendix 7; User evidence forms
214-253	Appendix 8; User evidence forms
254-297	Appendix 9; User evidence forms
298-317	Appendix 10; User evidence forms
318-321	Appendix 11; Bar chart showing user evidence
322-337	Appendix 12; Emails sent to applicant
338-340	Appendix 13; Letter from landowner solicitor
341-345	Appendix 14; Correspondance with Cllr K Wood

### **Your questions and views**

For further information please contact Mrs Helen Francis

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