

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A PUBLIC FOOTPATH – Maypole Close, Clutton

(Ward Division: **Clutton**)

1. The Issue

- 1.1 An application has been received for a Definitive Map Modification Order (“DMMO”) to be made under section 53(2) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) to modify the Definitive Map and Statement of Public Rights of Way (“the DM&S”) by adding a public footpath near Maypole Close in Clutton.

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) does not make a DMMO to record the Application Route as shown by a solid green line on the plan contained at Appendix 1 (“the Decision Plan”), on the DM&S.

3. Financial Implications

- 3.1 Financial implications are not a relevant consideration which may be taken into account under the provisions of the 1981 Act. The costs associated with making a DMMO and any subsequent public inquiry, public hearing or exchange of written representations would be met from the existing public rights of way budget.

4. Human Rights

- 4.1 The Human Rights Act 1998 (“the 1998 Act”) incorporates the rights and freedoms set out in the European Convention on Human Rights (“the Convention”) into UK law. So far as it is possible all legislation must be interpreted so as to be compatible with the Convention.
- 4.2 The 1981 Act does not permit personal considerations to be taken into account. A decision relating to a DMMO would be lawful without taking account of personal considerations, as provided by section 6(2) of the 1998 Act, as it would be impossible to interpret the legislation in such a way that it is compatible with section 3 of the Convention. Further details of Human Rights considerations can be found in the Planning Inspectorate’s Public Rights of Way Advice Note No. 19.

5. Legal Framework

- 5.1 The Authority, as Surveying Authority, is under a statutory duty, imposed by section 53(2) of the 1981 Act, to keep the DM&S under continuous review. Section 53(2)(b) states:

“As regards every definitive map and statement, the surveying authority shall...keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence...of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event”

- 5.2 The ‘events’ referred to above are set out in section 53(3) of the 1981 Act. The ‘event’ to which this Application relates is set out in section 53(3)(c)(i) of the 1981 Act which states that:

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows 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 section 54A, a byway open to all traffic”

- 5.3 The meaning of ‘reasonably alleged’ was considered in *Bagshaw and Norton* [1994]¹ where Owen J. stated that:

“Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to uses is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist then, it would seem to me, to be reasonable to allege such right.”

- 5.4 Evidence of use by the public can be sufficient to raise a presumption of dedication under section 31 of the Highways Act 1980 (“the 1980 Act”) or at common law. Section 31(1) of the 1980 Act states that:

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

- 5.5 For a way to be deemed to have been dedicated as a public right of way at common law it must have been used by the public for a period which is sufficient to constitute evidence of an intention by the landowner to dedicate the way as public. The facts, taken as whole, must be such that the rightful inference to be drawn from them was

¹ R v SSE ex parte Bagshaw and Norton [1994] 68P & CR402

that there was an intention to dedicate the way as public. Use must be without force, secrecy or permission (i.e. 'as of right') and each case turns on whether the facts indicate an intention to dedicate.

- 5.6 Documentary evidence should also be considered in determining applications for DMMOs. Section 32 of the 1980 Act states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

- 5.7 Anyone may apply to the Authority for a DMMO to modify the DM&S and such applications must be determined in accordance with the provisions of schedule 14 of the 1981 Act. If, after consideration of an application, the Authority decides not to make a DMMO then the Applicant may appeal to the Secretary of State within 28 days of the service of notice of that decision. The Secretary of State will then re-examine the evidence and direct the Authority accordingly.

6. Background and Application

- 6.1 On 17 August 2018, Rosemary Naish (“the Applicant”) applied to have a public footpath added to the DM&S (“the Application”). The Application was accompanied by 25 User Evidence Forms.
- 6.2 The route shown on the plan appended to the Application commences from a junction with public footpath CL6/10 at grid reference ST 6235 5930 (point A on the plan contained at Appendix 1 (“the Decision Plan”)) and proceeds in a generally easterly direction for approximately 39 metres to another junction with CL6/10 at grid reference ST 6239 5930 (point B on the Decision Plan). This route is hereafter referred to as “the Application Route.”
- 6.3 Public footpath CL6/10 is currently obstructed by a post and rail fence between points A and C on the Decision Plan and members of the public have instead been using the Application Route and passing through a wooden kissing gate in the same fence line between points A and B on the Decision Plan. However, it’s important to note that this is a DMMO application seeking to record a second footpath through the same field and not a PPO diversion order seeking to divert one route onto the other.

7. Consultations

- 7.1 In May 2024, the Authority consulted on the Application with the Applicant, the known landowners, the parish council, local and national user groups and the ward member. A notice was posted on the Authority's website and on the kissing gate located between point A and B on the Decision Plan.
- 7.2 The Application Route passes over a thin parcel of unregistered land which runs between the post and rail fence and Maypole Close. The Authority was initially unable to determine the ownership of this unregistered land but the landowners ("the Unregistered Landowners") came forward as a result of the consultation and they were given a further four weeks to respond to the consultation.
- 7.3 The owner of the western section of the Application Route responded to say that they had amended an unrelated planning application to show the currently recorded alignment of public footpath CL6/10. One of the Unregistered Owners stated that they were "*not in support of [the Authority] crossing my land for the proposed access.*" Clutton Parish Council responded stating that they support the Application and asserted that the Application Route "*has been the route used ever since number 9-17 [Maypole Close] were built.*"

8. Documentary Evidence

- 8.1 Extensive archival research was undertaken in the Somerset Heritage Centre ("SHC") in Taunton and in the Authority's own records. The following documents did not provide any evidence in respect of the Application Route:
- Day and Masters' map from 1782 (SHC Ref: D\B\wsm/38/6)
 - Greenwood's map from 1822 (SHC Ref: A\AUS\60)
 - Clutton Tithe Map and Apportionment from c.1840-1842 (SHC Ref: D/D/rt/M/31 and D/P/clut/3/2/1)
 - Finance Act documents from 1910 (SHC Ref: DD/IR/7/14 and DD/IR/B/21/1)
- 8.2 The Parish Survey, Draft Map and Definitive Map all record public footpath CL6/10 running in an east-south-easterly direction to point A on the Decision Plan and then continuing to point C and then point D on the Decision Plan. The Definitive Map records do not make any reference to the Application Route.
- 8.3 The section of public footpath CL6/10 between points C and D on the Decision Plan was diverted onto the current alignment between points C, B and E on the Decision Plan on 7th September 1999 to allow for the construction of Molly Close. The Diversion Order does not make any reference to the Application Route.

9. User Evidence

- 9.1 The Authority received 25 user evidence forms detailing use of the Application Route on foot between 1969 and 2018. The Authority attempted to carry out short telephone interviews with each of these individuals to clarify any ambiguities in their evidence. All users who were contactable stated that the legally recorded alignment of public footpath CL6/10 was obstructed throughout their period of use and that they instead used the Application Route.
- 9.2 None of the users state that their use of the Application Route ceased as a result of actions taken by the landowner and none of the landowners have stated that they took actions which would constitute a challenge to use by the public prior to the Application being submitted. Section 31(7B) of the 1980 Act states that in the absence of the landowner taking any positive steps to call into question the right of the public to use a route then the 'date of challenge' will be the date which the DMMO application was duly made (i.e. 17 August 2018). Therefore, the relevant 20 year period of use for deemed dedication under section 31(1) of the 1980 Act runs from 17 August 1998 to 17 August 2018 ("the Relevant Period").
- 9.3 Four individuals² stated their use of the Application Route spans the whole Relevant Period and a further 13 individuals³ stated that their use of the Application Route spans at least three-quarter of the Relevant Period. 11 users⁴ state that they used the Application Route on a daily basis, eight users⁵ state that they used the Application Route on a weekly basis, three users⁶ state that they used the Application Route on a monthly basis and three users⁷ state that they used the Application Route less than once a month.
- 9.4 None of the users state that the Application Route was obstructed during the Relevant Period, that they were challenged by one of the landowners or saw signs deterring public use. However, for long use of a route to result in the deemed dedication of public rights, either under section 31(1) of the 1980 Act or at common law, that use must have been 'as of right'.
- 9.5 In *Stacey v Sherrin* [1913]⁸ it was held that there is an undoubted right to deviate on to other land belonging to the same landholder in order to get around an obstruction. Given that, as stated in paragraph 9.1 above, all users who were contactable stated that the legally recorded alignment of public footpath CL6/10 was obstructed throughout their period of use they enjoyed a legal right to use at least a section of the Application Route.

² Users 2, 23, 24 and 25

³ Users 1, 3, 4, 5, 6, 8, 13, 17, 18, 19, 20, 21 and 22

⁴ Users 2, 3, 4, 5, 6, 7, 8, 17, 19, 20 and 21

⁵ Users 1, 11, 12, 14, 15, 18, 24 and 25

⁶ Users 9, 10 and 16

⁷ Users 13, 22 and 23

⁸ *Stacey v Sherrin* [1913] 29 TLR 555

- 9.6 In *Barkas*⁹, Lord Neuberger confirmed that ‘as of right’ means ‘as if by right’. If use is in fact pursuant to a legal right (e.g. the common law right to deviate on to other land belonging to the same landholder in order to get around an obstruction) then the use is ‘by right’ which is effectively the antithesis of ‘as of right’. The fence which is obstructing the legally recorded alignment of public footpath BA6/10 is owned by the Unregistered Landowners. The members of the public who walked over the section of the Application Route over their land were doing so pursuant to a right; this use does not therefore give rise to deemed dedication of a public rights of way across this unregistered land.
- 9.7 The remainder of the Application Route runs over land owned by other parties who are not responsible for the obstruction of public footpath CL6/10 and use of these sections may have been ‘as of right’; however, this in principle would only create two cul-de-sac routes which terminate either side of the unregistered land. While it is possible for cul-de-sac routes to be created by deemed dedication, in *Moser v Ambleside UDC* [1925]¹⁰ Atkin LJ makes it clear that this termination must be a “*place of popular resort*” and the unregistered land does not satisfy this requirement.
- 9.10 Although public footpath CL6/10 was not the subject of the Application, it should be noted that no evidence was discovered that suggests the footpath runs on any other alignment other than that shown in purple on the Decision Plan.

10. Conclusion

- 10.1 There is not documentary evidence that the Application Route is a public right of way.
- 10.2 Use of the Application Route has been ‘by right’, rather than ‘as of right’, and this does not give rise to a presumption of dedication either under section 31(1) of the Highways Act 1980 or at common law.
- 10.3 The Authority should therefore resolve to reject the Application on the grounds that there is not a reasonable allegation that the Application Route is a public right of way.

⁹ *R (Barkas) v North Yorkshire County Council* [2012] EWCA Civ 1373

¹⁰ *Moser v Ambleside UDC* (1925) 23 LGR 533 540

AUTHORISATION




Under the authorisation granted by the Authority on 21st July 2022, the Authority resolves to formally reject the application to modify the Definitive Map and Statement in respect of the Application Route.



Dated: 11th July 2024

Craig Jackson
Team Manager – Highways Maintenance and Drainage

APPENDIX 1: Decision Plan

Application Route **A**  **B**
Unaffected public footpath 
Previous alignment of CL6/10 **C**  **D**

