

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A PUBLIC FOOTPATH – Park Copse, Compton Dando

(Ward Division: **Saltford**)

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 running from Peppershells Lane in Compton Dando through Park Copse to public footpath BA8/65.

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) does not make a DMMO to record the Peppershells Route as shown by a dotted orange line on the plan contained at Appendix 1 (“the Decision Plan”), the Application Route as shown by a dotted blue line on the Decision Plan or the Alternative Route as shown by a dotted red line on 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,

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

must be such that the rightful inference to be drawn from them was 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 16th December 2020, Compton Dando Parish Council (“the Applicant”) applied to have a public footpath added to the DM&S (“the Application”). The Application was accompanied by eight User Evidence Forms. Following receipt of the notice served under schedule 14(2)(1) of the 1980 Act, the affected landowner submitted a Landowner Evidence Form and written statements from five local residents.
- 6.2 The route shown on the plan appended to the Application commences from a junction with the carriageway of Peppershells Lane at grid reference ST 6428 6481 (Point A on the Decision Plan) and proceeds in a generally west south-westerly direction for approximately 18 metres to grid reference ST 6418 6492 (Point B on the Decision Plan) and turns in a generally southern direction through Park Copse for approximately 210 metres to a junction with public footpath BA8/65 at grid reference ST 6419 6476 (Point D on the Decision Plan). The section shown by a dotted orange line between points A and B on the Decision Plan is hereafter referred to as “the Peppershells Route” and the section shown by a dotted blue line between points B and D on the Decision Plan is hereafter referred to as “the Application Route”.
- 6.3 The majority of the Application Route isn’t physically evident on the ground; however, there is also a worn path through Park Copse which commences from a junction with Peppershells Lane at grid reference

ST 6418 6492 (Point B on the Decision Plan) and proceeds in a generally southerly direction for approximately 222 metres to a junction with public footpath BA8/65 at grid reference ST 6419 6476 (Point D on the Decision Plan). This route is shown on the Decision Plan with a red dotted line and is hereafter referred to as “the Alternative Route”.

- 6.4 During a site visit by the Authority in January 2021, Heras fencing which was not obstructing passage was found at point A on the Decision Plan and a locked metal field gate blocking the Application Route and Alternative Route was found at point B on the Decision Plan. A rusted and illegible sign was found attached to a tree approximately 3 metres from point B on the Decision Plan (“the Metal Sign”); the Metal Sign was affixed 4 metres above the ground facing point A on the Decision Plan.

7. Consultations

- 7.1 In August 2022, the Authority consulted on the Application and the Alternative Route with the Applicant, the affected landowner, local and national user groups and the ward members. Notices were posted on the Authority’s website and on site at points A and D on the Decision Plan.
- 7.2 The Authority received 10 further User Evidence Forms and three emails from members of the public. The Applicant and Landowner both stated that they did not wish to submit any further evidence at that point.

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. A route approximating the section of the Application Route between points B and C on the Decision Plan is shown with a single dashed line on the 2011 revision of the Ordnance Survey’s 1:25,000 map. The following documents did not provide any evidence in respect of the Peppershells Route, the Application Route or the Alternative Route:
- Day and Masters’ map from 1782 (SHC Ref: D\B\wsm/38/6)
 - Greenwood’s map from 1822 (SHC Ref: A\AUS\60)
 - Compton Dando Tithe Map and Apportionment from c.1840-1842 (SHC Ref: D\D/rt/M/407 and D\D/rt/A/407)
 - Finance Act documents from 1910 (SHC Ref: D\IR\B\13\9 and DD\IR\B\13\10)
- 8.2 Google Street View images taken in March 2009 show the Peppershells Route, and a short distance beyond, from Peppershells Lane’s carriageway. At point A on the Decision Plan there is a metal field gate and adjacent gap and no furniture or obstructions can be seen at point B on the Decision Plan. The Metal Sign can be seen but the sign does not appear to contain any legible writing.

- 8.3 A Landowner Statement was submitted under section 31(6) of the Highways Act 1980 on 20th November 2012 in respect of the land over which the Application Route and the Alternative Route run; neither the Application Route nor the Alternative Route are admitted as existing public rights of way. The landowner followed up the statement with a Landowner Declaration on 15th October 2021 which stated that during the intervening period there was no intention to dedicate new rights in addition to those admitted in 2012. If the Landowner Deposit is taken as the date of challenge then the relevant 20 years period of use under section 31(1) of the 1980 Act would run from 20th November 1992 until 20th November 2012 (“the Relevant Period”).
- 8.4 On the List of Streets maintainable at public expense which the Authority is required to keep pursuant to section 36 of the 1980 Act, the section of the Peppershells Route is shown as part of Peppershells Lane, which is recorded as Class 4 highway (unclassified county road). The Application Route and the Alternative Route are not shown.
- 8.5 The Peppershells Route, the Application Route and the Alternative Route are not shown on the Parish Survey, Draft, Provisional or Definitive Map and Statement or the List of Streets maintainable at public expense. The Authority is not in receipt of a legal order which has diverted or stopped up these routes.

9. Landowner Evidence

- 9.1 There is no registered owner of the Peppershells Route; however, as detailed in paragraph 8.4 above, this land forms part of Peppershells Lane as recorded on the List of Streets and, consequently, the surface of the highway is vested in the Authority, in its capacity as the highway authority. The Application Route and the Alternative Route run over land owned by the same individual since 13th May 1969 (“the Landowner”). The Landowner has completed a Landowner Evidence Form and five local residents (“LW”) have submitted written statements detailing their knowledge of the Application Route and Alternative Route.
- 9.2 The Landowner states that he is aware that the Alternative Route has been used by members of the public but that he does not regard it to be public. It is stated that members of the public were challenged but the only occasion which the Landowner is able to recall specific details about was on 9th January 2004 when he was on site with the Authority’s then Public Rights of Way Officer; that officer has since retired and has declined to give evidence in respect of the Application. LW 1 has been involved with the Woollard Shoot, whose area included Park Copse, since the early 1980s and it is stated that he turned people back but is unable to provide further details about who they were or when this took place.
- 9.3 The Landowner states that a sign reading ‘*PRIVATE SHOOT KEEP OUT*’ was erected, most likely, in 1980 and replaced in a higher position on the same tree a few months later after the first sign was removed. It is stated that this was the Metal Sign which is still present and that it

remained fully legible until 2000/01 and partially legible for a further two to three years thereafter. LW 1 states that the Metal Sign was legible when he got married in 1991 and read '*Private Shoot Keep Out*'; the sign was legible for approximately 10 years thereafter. LW 2 recalls that the Metal Sign was a 'keep out' sign and was legible when he was building on the immediately adjacent land in 2002. LW 3 states that the Metal Sign was hand-painted and legible when he moved into his current property in 1999. LW 4 states that he joined the Woollard Shoot in 1975 and recalls that the Metal Sign said something to the effect of '*Private shooting. Private woodland*' but was not able to provide evidence regarding the dates when the Metal Sign was erected or legible. LW 5 states that the Metal Sign had black letters on a white background and was legible when he moved to Compton Dando in 1996 and that it remained legible for approximately a further seven years.

- 9.4 The Landowner states that a gate was present at point B on the Decision Plan in 1971, that a new gate was installed at the same location in the mid-1970s which remained in situ until the early 1980s and that another gate was erected at some point after 2004. LW 1 states that barriers were repeatedly erected and removed over the years.
- 9.5 The Landowner states that a row of Rolled Steel Joints ("RSJs") were inserted vertically into the ground at this same location, but they disappeared in the earlier 2000s. LW 2 states that the RSJs were installed c.1990-1992. LW 3 states that the RSJs were installed to stop both people and cars entering Park Copse. LW 5 states that the RSJs were present in 1996 and that the last ones were removed in c.2005/6.
- 9.6 The Landowner also refers to the woodland bring used by BMXers in the early 2000s but this use ceased after the jumps they constructed were dismantled.

10. User Evidence

- 10.1 The Authority received 21 user evidence forms and emails detailing use on foot of the Peppershells Route and the Alternative Route by 21 members of the public between 1967 and 2022. The Authority attempted to carry out short telephone interviews with each of these individuals and those that were contactable stated that they used the Alternative Route and that they did not use the Application Route. Given that none of the users state that the route they have used through Park Copse has changed over time, it is reasonable to assume that the individuals who were not contactable also used the worn Alternative Route, rather than the Application Route. Consequently, there is no evidence that the Application Route has been used by the public.
- 10.2 Six individuals² stated their use of the Alternative Route spans the whole Relevant Period. However, user 3 states that they only used the Alternative Route approximately six times over a 40 year period and

² Users 1, 3, 5, 12, 15 and 18

User 18 states that on average they used the Alternative Route once every two to three years; consequently, neither were able to say whether they used the Alternative Route during the early years of the Relevant Period. Of the four other individuals who have stated that they did use the Alternative Route during the early stages of the Relevant Period, the frequency of use varies from daily to two/three times per year³. A further 12 individuals⁴ state that they used the Alternative Route for a part of the Relevant Period; one individual⁵ used the Alternative Route 2-3 times a week, 3 individuals⁶ used the Alternative Route once a week and 8 individuals⁷ used the Alternative Route once a month.

- 10.3 User 1 stated that the Metal Sign was erected by his brother-in-law approximately 40 years ago when he was part of a shooting syndicate; the sign referred to a '*private shoot*' but they couldn't recall the exact wording or state for how long the sign remained visible. User 16 has seen the Metal Sign recently because someone mentioned it to them but they do not recall seeing it during their use of the Alternative Route. User 21 has seen the Metal Sign but states that it has not been legible since they started using the Alternative Route in 2007. No other users recall seeing the Metal Sign. User 21 disputes that Park Copse could have been used for shooting because it would damage the woodland.
- 10.4 Users 1 and 3 are the only users who recall the RSJs but they state that they did not prevent their use of the Alternative Route. None of the users recall gates or other obstructions preventing use of the Alternative Route prior to 2020. Although a number of users refer to a gate in their user evidence forms prior to 2020, it was clarified during their telephone interviews that they were actually referring to a kissing gate on public footpath BA8/65.
- 10.5 User 4 states that they were given permission to use the Alternative Route but the individual they name is not the Landowner and does not appear to have been acting on behalf of the Landowner. Several users refer to an annual Blue Bell Walk organised through Park Copse but User 8 states that they ran this event from c.2010 until 2015/6 and that they were not given permission by the Landowner. None of the users state that they took part in any of the Blue Bell Walks prior to 2010. User 3 states that they were turned back by the Landowner in 2020 but none of the other users refer to being turned back prior to this time. The user evidence does not give any indication that the Alternative Route was used with either force or secrecy.
- 10.6 Eight users⁸ state that the Alternative Route is 1 metre wide. The other users state a range of widths from 1 foot to 2 metres⁹.

³ Users 1 - once a month; user 5 - once a week; user 12 - 2/3 times a year; user 15 - daily

⁴ Users 2, 4, 6, 7, 8, 11, 13, 14, 16, 17, 20 and 21

⁵ User 20

⁶ Users 11, 17 and 21

⁷ Users 2, 4, 6, 7, 8, 13, 14 and 16

⁸ Users 1, 3, 4, 5, 6, 14 and 15

⁹ User 18 - 1-2 feet; User 2 - 2.5 feet; User 20 - 2-3 feet; User 17 - 1-2 metres; User 13 - 3 feet; Users 7 and 16 - 3-4 feet; User 11 - 4 feet; User 12 - 4-5 feet; User 8 - 6 feet; User 9 - 2 metres.

11. Analysis

- 11.1 The Peppershells Route forms part of Peppershells Lane, which is a Class 4 Highway (unclassified county road), used predominantly by motor vehicles. Consequently, while there is no dispute that this is public highway, it is not a class of highway recordable on the DM&S.
- 11.2 The section of the Application Route between points B and C on the Decision Plan is shown on an Ordnance Survey map but this is only evidence of the physical existence of that path on the ground and not the existence of legal rights. The remainder of the documentary evidence does not provide evidence that the Application Route was, or is, a public right of way. Furthermore, the user evidence provides evidence of use of the Alternative Route, rather than the Application Route.
- 11.3 Although six users' periods of use of the Alternative Route span the Relevant Period, only four were able to state that they actually used the Alternative Route during the early years of the Relevant Period. This is insufficient to demonstrate use '*by the public...for a full period of 20 years*' as required by section 31 of the 1980 Act. Furthermore, there is insufficient evidence of use to raise a presumption that the Alternative Route has been dedicated as a public right of way at common law.
- 11.4 There is a conflict within the evidence as a whole regarding the Metal Sign. The Landowner, four of the LWs and User 1 provide reasonably consistent evidence that the Metal Sign read '*Private Shoot Keep Out*' and was legible for approximately the first half of the Relevant Period. Except for User 1, the other individuals that used the Alternative Route during the first half of the Relevant Period all state that they have never seen a sign that's either legible or illegible. Given that the Metal Sign remains in situ today, albeit now illegible, it is questionable whether these users evidence from that period can be reasonably accepted, as required by *Bagshaw and Norton* [1994]¹⁰. There is no suggestion that anyone has sought to misrepresent the situation and the differing recollections is most likely due to the considerable period of time which has elapsed since the start of the Relevant Period. Park Copse being an ancient woodland would not prevent its use for a shoot and there is sufficient evidence from the Landowner, LWs and several users that Park Copse was used for shooting in the past. A sign in the location of the Metal Sign stating '*Private Shoot Keep Out*' would have meant that users would reasonably have understood the Landowner had a lack of intention to dedicate, as required by *Godmanchester*¹¹, to fulfil the proviso in section 31(1) of the 1980 Act.

12. Conclusion

- 12.1 No order should be made in respect of the Peppershells Route as this is a public road and not of a class recordable on the DM&S.

¹⁰ *R v SSE ex parte Bagshaw and Norton* [1994] 68P & CR402

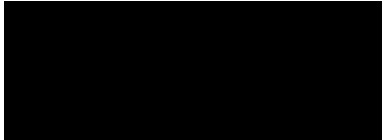
¹¹ *R (Godmanchester Town Council) v. Secretary of State* [2007] UKHL 28

12.2 No order should be made in respect of the Application Route as there is no documentary evidence of public rights or evidence of its actual use by the public.

12.3 No order should be made in respect of the Application Route as there is no documentary evidence of public rights and insufficient evidence to demonstrate that it has been dedicated as a public right of way either under section 31(1) of the 1980 Act or at common law.

AUTHORISATION

Under the authorisation granted by the Council on 21st July 2022, the Authority resolves to formally reject the application to modify the Definitive Map and Statement in respect of the Peppershells Route and the Application Route. Furthermore, the Authority resolves not to modify the Definitive Map and Statement in respect of the Alternative Route.



Dated: 7th February 2023

Craig Jackson
Team Manager – Highways Maintenance and Drainage

