

## **SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981**

### **APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A PUBLIC FOOTPATH – Brunel’s Bridge, Bathampton and Bathford**

(Ward Division: **Bathavon North**)

#### **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 BA1/32 in Bathampton to Bradford Road in Bathford.

#### **2. Recommendation**

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) makes a DMMO to record the Decision Route, as shown by a broken black line on the plan contained at Appendix 1 (“the Decision Plan”) as a public footpath 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 ‘events’ to which this Application may relate are set out in:

- section 53(3)(b) of the 1981 Act (as amended) which states that: *“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;”*
- 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...”*
- *the latter half of section 53(3)(c)(iii) of the 1981 Act which states that: “...any other particulars contained in the map and statement require modification.”*

5.3 The meaning of ‘reasonably alleged’ was considered in *Bagshaw and Norton* [1994]<sup>1</sup> 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 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.

5.5 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:

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

*“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.”*

5.6 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 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.

5.7 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.”*

5.8 Further legal considerations specific to this application are discussed in Section 10 below.

## **6. Background and Application**

6.1 On 10 December 2016, Bathford Parish Council of c/o 54 Bathford Hill, Bath, BA1 7SN (“the Applicant”) applied to have a public footpath added to the DM&S (“the Application”). The Application was accompanied by historical documentary evidence, contemporary photographs and 68 User Evidence Forms (“UEFs”). The Application sought to add the ‘*continuation of [public footpath] BA1/32 toward A363 Bradford Rd*’ to the DM&S. However, during the investigation it was found that the Definitive Statement for BA1/32 contained omissions and inaccuracies and it was therefore decided that the investigation should also encompass the whole of public footpath BA1/32.

6.2 Consequently, the route under consideration commences from a junction with Tynning Road at grid reference ST 7820 6661 (point A on the Decision Plan) and proceeds in a generally north easterly direction over a railway level-crossing for approximately 15 metres to grid reference ST 7821 6662 (point B on the Decision Plan) and continues

in a generally north easterly direction across fields for approximately 382 metres to grid reference ST 7842 6694 (point C on the Decision Plan) and continues in a generally north easterly direction adjacent to the railway for approximately 79 metres to ST 7847 6699 (Point D on the Decision Plan) and turns in a generally east-northeasterly direction for approximately 39 metres midway across the railway bridge over the River Avon to grid reference ST 7851 6701 (point E on the Decision Plan) and continuing in a generally east-northeasterly direction for approximately 39 metres across the remainder of the bridge to grid reference ST 7854 6703 (Point F on the Decision Plan) and turning in a generally easterly direction adjacent to the railway for approximately 55 metres to a junction with Bradford Road (A363) at grid reference ST 7860 6704 (point G on the Decision Plan). This route is referred to as “the Decision Route”.

- 6.3 The land between points A and B and between points C and G on the Decision Plan is owned by Network Rail. The land between points B and C on the Decision Plan was owned by a local farmer who sold the land in January 2000 to another private landowner who has continued to own the land since that date; this land is occupied and farmed by a separate tenant.

## **7. Consultations**

- 7.1 In November 2017, the Authority consulted on the Application with the Applicant, Bathampton and Bathford Parish Councils, local and national user groups, the ward members and the affected landowners and tenant. Notices were also erected at either end of the Decision Route and on the Authority’s website.
- 7.2 Network Rail responded to enquire about the kissing gate at point C on the Decision Plan and stated that prescriptive rights cannot be established via a criminal act. Although Network Rail has not explicitly stated that they object to the Application, the correspondences imply opposition to the section of the Decision Route on their land being recorded on the DMS.
- 7.3 Seven additional UEFs were also received by the Authority before the end of the consultation period.

## **8. Historical Documentary Evidence**

- 8.1 Extensive archival research was undertaken in the Somerset Heritage Centre (“SHC”) in Taunton, the Bath Record Office (“BRO”) and in the Authority’s own records.

### **County Maps**

- 8.2 Day and Masters’ Map dated 1782 (SHC ref.: D\B\wsm/38/6) and Greenwood’s map dated 1822 (SHC ref.: A\AUS\60) were produced for the travelling public and usually only show carriageways but neither map shows the Decision Route.

### **Railway Documents**

- 8.3 Railway plans provide a record of land in the vicinity of the Decision Route from 1834 to 1990. Plans and sections for the Great Western Railway between Bristol and London were deposited with Parliament on 29 November 1834. The Decision Route runs through enclosures 33 and 34 in Bathampton and 1 and 3 in Bathford; enclosures 33 and 3 are both identified in the accompanying Book of Reference as '*Pasturefield*' and enclosures 34 and 3 are both identified as '*Part of the River Avon*'. However, there is no indication of the Decision Route in either document.
- 8.4 Plans and sections for diversions and variations in the Great Western Railway were deposited with Parliament on 30 November 1836. The Decision Route runs through enclosures 32, 33, 34 and 43; enclosures 32, 33 and 43 are all identified in the accompanying Book of Reference as '*Pasture Field*' and enclosure 34 is identified as '*River Avon*'. Again, there is no indication of the Decision Route in either document.
- 8.5 Plans, sections and a schedule of alterations to the Great Western Railway Company line through Bathford and Bathampton were deposited with Parliament on 30 September 1837. The Decision Route runs through enclosures 32, 33, 34 and 43; enclosures 32, 33 and 43 are all identified in the accompanying Book of Reference as '*Pasture Field*' and enclosure 34 and 1 are identified as '*Part of River Avon*'. There is no indication of the Decision Route in these documents.
- 8.6 An extract from the Bath Chronicle newspaper published on 6 August 1840 states; '*an arrangement had been concluded with the Great Western Railway Company to widen their bridge across the Avon between [Bathford and Bathampton], so as to admit of a foot way being provided across it for accommodation of the Lord of the Manor's tenants ; and that a further application was in contemplation to increase the width of the bridge so as to admit of a carriage way across, which would thus be accomplished for a comparatively trifling sum*'. A further note states that the proposal to make the bridge accessible to carriages was rejected because it would bypass Bath and be disadvantageous to the city. This newspaper extract is the earliest reference to the Decision Route and it indicates that the landowner made the section of the Decision Route over the railway bridge available to a particular class of the public (namely the tenants of the Lord of the Manor). This is likely to be distinct from the 'inhabitants at large' of the parish who were responsible for maintaining the highways at the time and who therefore were a quasi-highway authority. Any dedication at this stage would be to a limited class of user, rather than the public, and Great Western Railway Company's actions will not have created any public rights.
- 8.7 Plans and sections for the enlargement of works and a railway/tramway to the Midland Railway were deposited with Parliament on 30 November 1864. The section of the Decision Route commencing from approximately 40 metres south east of Point C on the Decision Plan and proceeding to the start of the railway bridge at



Point D on the Decision Plan is shown with a single dotted, black line running through an unnumbered enclosure and annotated '*Footpath*'. The route continues over the railway bridge between two solid black lines but there is no indication of the Decision Route beyond Point F on the Decision Plan. These documents show that at least a section of the Decision Route physically existed in 1864 but the annotation provides only ambiguous evidence regarding the Decision Route's status.

- 8.8 Plans and sections for the Bath and District Light Railway were deposited with Parliament on 31 May 1900. The eastern end of the Decision Route runs through an unnumbered enclosure but it is not delineated on the deposited plan and the remainder of the Decision Route is outside the surveyed area.

### **Tithe**

- 8.9 The Bathampton Tithe Map and Apportionment were produced in c.1840 under the Tithe Commutation Act 1836 to locate titheable land within the parish. The section of the Decision Route between points A and C on the Decision Plan is shown with a pecked, black line running through enclosure 153 on the Bathampton Tithe Map and the accompanying Tithe Apportionment identifies this enclosure as '*Part of Longlands*' which is a pasture field upon which Tithe was levied. The section of the Decision Route between points C and E on the Decision Plan is shown as a continuation of this aforementioned route using the same pecked, black line running through enclosure 186 on the Tithe Map; the Tithe Apportionment identifies this enclosure as '*Land occupied by Railway*', which is identified as a pasture field upon which Tithe was levied. The Tithe Map shows the western half of the railway bridge which crosses the River Avon.

- 8.10 The Bathford Tithe Map and Apportionment were produced in c.1840. The Decision Route runs through enclosure 140 and the accompanying Tithe Apportionment identifies this enclosure as '*Railway*' upon which Tithe was levied. Neither the railway bridge nor the section of the Decision Route between points E and G on the Decision Plan are shown on the Bathford Tithe Map.

- 8.11 The Bathampton Tithe Map indicates that the section of the Decision Route between points A and E on the Decision Plan physically existed in c.1840. The Bathford Tithe Map provides only ambiguous evidence because, although it does not show the Decision Route, it also does not show the railway bridge which was in existence at this time and which carries the continuation of the Decision Route.

### **Ordnance Survey**

- 8.12 The first edition of the 1:2500 OS map was surveyed between 1882 and 1883 and published in 1884. The Decision Route is shown by a double, pecked black line, except for the section of the bridge near Point E on the Decision Plan which is shown running between two solid, parallel black lines.

- 8.13 A copy of a 1972 OS map was submitted by the Applicant and the map does not state a scale. The Decision Route is shown by a single, pecked black line, except for the section between points D and E on the Decision Plan which is shown running between two solid, parallel black lines. A copy of a 1976 OS map was also submitted by the Applicant and again the map does not state a scale. The Decision Route is shown by a single, pecked black line, except for the section between points D and E on the Decision Plan which is shown running between two solid, parallel black lines. These three OS maps show that the Decision Route physically existed in 1883, 1972 and 1976 but they do not provide evidence regarding the status of the Decision Route.

#### **Inland Revenue**

- 8.14 Plans, valuation books, and field books were created under the Finance (1909-10) Act 1910 with a view to levying a new tax on land. The section of the Decision Route between points A and C on the Decision Plan is shown with a double-pecked, black line and annotated 'F.P.' on the underlying 1902 Ordnance Survey map. This section runs through hereditament 4 in Bathampton; tax was levied against this hereditament and a £50 reduction was claimed for '*Public Rights of Way or User*'. The Decision Route is the only path shown crossing this hereditament.
- 8.15 The remainder of the Decision Route runs through hereditaments 42 and 784 and is shown as a continuation of this aforementioned route using the same double-pecked, black line for the sections running up and down the railway embankments and between solid, parallel black lines for the section over the railway bridge; the section on the northeastern side of the railway bridge is annotated 'F.P.' on the underlying 1902 Ordnance Survey map. Hereditament 42 is identified in the accompanying Books of Reference as '*Railway Brid-ges*' (followed by two identified characters which appear to read 'tc') and hereditament 784 is identified as '*Rail Lines 72 Chains*'. Tax was levied against both of these hereditaments without any reductions being claimed for '*Public Rights of Way or User*'.
- 8.16 The Inland Revenue documents indicate that the Decision Route physically existed in 1902 and suggests that the section of the Decision Route between points A and C on the Decision Plan was a public right of way but the documents do not provide evidence regarding the status of the remainder of the Decision Route.

#### **Definitive Map**

- 8.17 The National Parks and Access to the Countryside Act 1949 required Somerset County Council to prepare a Definitive Map to record the public rights of way in the district.
- 8.18 Bathampton and Bathford Parish Councils carried out Parish Surveys in their areas. The section of the Decision Route between points A and E on the Decision Plan is shown on the Bathampton Parish Survey Map as part of Parish Path 32. The Parish Survey card states that '*The path starts at Level crossing gate at termination of road leading to*

*Bathampton Saw Mills, crosses W.R. Railway, through Level crossing gate and NE across rough pasture (well defined) through stile (side creep V) continuing to foot of Railway Embankment at termination of Railway Bridge over River, over stile, up over Railway Embankment (well defined) to path adjoining railway over bridge to parish boundary (mid way point over river). The path continues to the main road at Bathford, where there is a notice that the F.P. is "private property of Railway". The public has had undenied access to the path in living memory, and it is believed since the bridge was erected, as it is possible that the BATHFORD was at this point where the river shallows on sweeping in an S bend, and a condition of the erection of the bridge may well have been that the public should be granted a right of way over the bridge. The path is well fenced from the railway, and there is no danger to the public (except from a missile hurled from a train!)*. The Walking Survey was carried out on 24<sup>th</sup> October 1950 and the parish meeting approved its inclusion on 16 October 1951.

- 8.19 The section of the Decision Route between points E and G on the Decision Plan is not shown on the Bathford Parish Survey Map; however, the path is included in the Parish Survey cards as Parish Path No. 20. The description of the path states that *'The path starts at the main road Bathford first S. of railway bridge T runs W. alongside railway to Parish bdy on bridge over River Avon, where it continues as FP. 1/32 alongside railway embankment in Bathampton Parish.'* The Parish Survey card does not record if a Walking Survey was carried out or if the Parish Council approved its inclusion.
- 8.20 The Parish Surveys were collated into the Draft Map and Statement, and given a Relevant Date of 26 November 1956. Notice was published that the Draft Map had been prepared and the public (including landowners) then had the opportunity to object to what was included in, or omitted from, the map and statement. Hearings were held on these objections, and recommendations made on the evidence presented. The section of the Decision Route between points A and E on the Decision Plan is shown as part of public footpath BA1/32 on the Draft Map produced by Somerset County Council (SCC) in its capacity as the Surveying Authority. The section of the Decision Route between points E and G on the Decision Plan is shown as public footpath BA3/20.
- 8.21 A Summary of Objections to the Draft Map records that the British Railways Board objected to the inclusion of the Decision Route on the DM&S (Objections BA. 3 and 12). SCC's Clerk is recorded as observing *'Protected by notice at western end under Great Western Railway Act, 1924.'* and it is determined to delete both BA3/20 and *'the section of 1/32 from junction of 3/20 westerly to stile at point B on plan on file.'* Subsequent Modification Stage cards record a new path description for BA1/32 which states *'The path starts at eastern end of Canal Road + runs northwest across GWR (Bathampton Branch) line + thence across two fields to GWR main line boundary fence. Over stile it continues as a private path'*. The corresponding Modification Stage card for BA3/20 states *'Pse delete this path (Mod. Stage).'* The Draft Modification Map shows the section of the Decision Route between



points C and G on the Decision Plan with a solid red line which the key identifies as depicting a route to be deleted.

- 8.22 The Draft Map was amended following the recommendations for the area, and Notice of the Provisional Map was published. Landowners, lessees and tenants could apply to the Crown Court for amendment of the map, but the public could not. Only the section of the Decision Route between points A and C on the Decision Plan appears to be recorded on the Provisional Map, which was placed on deposit on 15 June 1970.
- 8.23 The DM&S have a relevant date of 26 November 1956 and were published on 25 January 1973. The Definitive Statement for BA1/32 states *'The path is a F.P. it starts at eastern end of Canal Road and runs north west across GWR (Bathampton Branch) line and thence across two fields to GWR main line boundary fence. Over stile it continues as a private path.'* The word 'west' has been struck through in pencil and a hand written amendment in pencil reads 'east'. The Definitive Map records public footpath BA1/32 running from Tynning Road at point A on the Decision Plan in a generally northeasterly direction to the Great Western Railway boundary fence to point C on the Decision Plan. The continuation of the Decision Route to the northeast of point C on the Decision Plan is approaching the edge of the map sheet. The edge of the map sheet is in poor condition and there was a query during the Application's investigation and consultation stages whether the Definitive Map showed the public footpath continuing to the edge of the map sheet. After further consideration, it is concluded that on balance the Definitive Map does not BA1/32 continuing past point C on the Decision Plan.
- 8.24 The DM&S provide conclusive evidence in law that the section of the Decision Plan between points A and C on the Decision Plan is a public footpath. The documentation relating to the production of the DM&S indicates that SCC regarded the section of the Decision Route between Points C and G on the Decision Plan to not be a public right of way on the Relevant Date of 26 November 1956. Canal Road is now known as Tynning Road and public footpath BA1/32 runs in a generally northeasterly direction, rather than 'north west' as stated in the Definitive Statement.

#### **Documentary Evidence Summary**

- 8.25 The documentary evidence indicates that the Decision Route has physically existed since the Great Western Railway was built in 1840. At the time, the landowners did not dedicate the Decision Route to the public but nevertheless the public acquired footpath rights over the section of the Decision Route between points A and C on the Decision Plan. Although a stile existed at point C on the Decision Plan from at least 1950, the Railway Company took sufficient steps up until at least 1967 to demonstrate a lack of intention to dedicate. The Definitive Statement for BA1/32 contains typographical errors which require modification and the width of the footpath needs to be recorded.

## **9. User Evidence**

- 9.1 The Authority has received 75 UEFs detailing use of the Decision Route between 1952 and 2018. All users state that they used the Decision Route on foot and 18 users<sup>2</sup> state that they also used the Decision Route on bicycle.
- 9.2 All of the users state that they did not see any signs deterring public use or stating that the land was private. The Definitive Map records detailed in paragraphs 8.17 to 8.24 above provide contemporaneous written evidence that there were signs on site between 1950 and 1967 stating that the land was private property. The eight users<sup>3</sup> who used the Decision Route before 1967 are therefore likely to be incorrectly recalling the situation regarding signage. There is no evidence of any such signage deterring public use after 1967. There is a public footpath sign at point G on the Decision Plan which appears to match standard signs installed by the Authority.
- 9.3 All users state that at no time were they prevented from using the Decision Route or turned back by the landowner. Section 31(7B) of the 1980 Act states that in the absence of the landowner taking any positive steps to call 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. Therefore, the date of challenge would be 10 December 2016 and the relevant 20 year period of use for deemed dedication under section 31(1) of the 1980 Act will run from 10 December 1996 to 10 December 2016 ("the Relevant Period").
- 9.4 At least 39 users<sup>4</sup> used the Decision Route during each year of the Relevant Period. Their frequency of use varies from daily<sup>5</sup> to once per year;<sup>6</sup> however, the average was 48 times per year for each of these users. By 2016, 71 users<sup>7</sup> were using the Decision Route with an average frequency of 105 times per year for each of these users. This level of use is sufficient to demonstrate that the Decision Route has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. Additionally, there is not sufficient evidence to show that the landowner had an intention during that period to dedicate it. Consequently, the Decision Route is to be deemed to have been dedicated as a public footpath.
- 9.5 Ten users<sup>8</sup> state that they also used the Decision Route on bicycle. This use extends from 1960 until 2016. The Decision Route was used by eight members of the public on bicycle during the first five years of the Relevant Period; however, of these individuals, two only used the

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<sup>2</sup> Users 1, 7, 9, 10, 11, 14, 17, 29, 34, 35, 46, 47, 51, 52, 57, 58, 71 and 73

<sup>3</sup> Users 20, 21, 24, 27, 57, 68, 70 and 71

<sup>4</sup> Users 2/26, 5/6, 7, 8, 17, 20, 21, 22, 23/24, 25, 28, 29, 30, 31, 39, 41, 42, 43, 45, 47, 48, 49, 50, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 71, 73 and 75

<sup>5</sup> Users 17 and 71

<sup>6</sup> User 25

<sup>7</sup> Users 1-4, 6-18, 20-23, 25-32, 34-75

<sup>8</sup> Users 1, 7, 9, 10, 28, 33, 44, 45, 68 and 72

Decision Route on bicycle once a month<sup>9</sup> and two used the Decision Route on bicycle less than once a year. This is not a sufficient level of use to constitute use by the public and cycling rights have not been acquired pursuant to statutory dedication under section 31 of the 1980 Act. The UEFs demonstrate use by nine cyclists between 2007 and 2016; however, this level of use, and the presence of a kissing gate at point C on the Decision Plan throughout this period, means that a rightful inference cannot be drawn that there was an intention to dedicate the way for cyclists at common law.

### **Stile/Kissing Gate**

- 9.6 There is a clear consensus within the user evidence that there was a wooden stile at point C on the Decision Plan (which correspondences with the historical evidence detailed above) and that this was later replaced with a metal kissing gate. However, there is little consensus regarding when this might have taken place. Two users<sup>10</sup> stated that they thought the Cotswold Wardens might have installed the kissing gate. The Cotswold Wardens have informed the Authority that their records show that they repaired a stile at point C on the Decision Plan on 17 December 2003 and that very soon afterwards the stile was replaced with a kissing gate. The Cotswold Wardens thought that the kissing gate was installed by the Authority's Path Wardens; however, the Authority has retained work sheets from this period and no records have been found that show the kissing gate was installed by the Authority.
- 9.7 The Authority has spoken to the current and previous owner of the land over which the section of the Decision Route between points B and C on the Decision Plan runs. The previous owner stated that there was a wooden stile at point C on the Decision Plan at least up until they sold the land in January 2000. The current owner stated that there has been a metal kissing gate at point C on the Decision Plan at least since they bought the land in January 2000. Neither were able to provide any information about who might have installed the kissing gate or what permissions were sought.
- 9.8 Although the evidence about the date that the kissing gate was installed is also conflicting, the Cotswold Wardens evidence that the kissing gate was installed at the end of 2003 or the start of 2004 is likely to be the most reliable as it is based on reference to a contemporary written record and not just individuals' memory. There is no firm evidence about who installed the kissing gate and what permissions may have been sought or granted but Network Rail do not appear to have raised any objection to the presence of the kissing gate during the following 13 years since it was likely installed.
- 9.9 Additionally, a wooden stile at point C on the Decision Plan has allowed unhindered access for members of the public since at least 1950. Consequently, it wasn't the installation of the kissing gate which has made it possible for the public to use the Decision Route in the matter required by section 31 of the 1980 Act. Therefore, even if the

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<sup>9</sup> Users 17 and 73

<sup>10</sup> Users 25 and 55

kissing gate was deemed to have been installed without the landowner's permission, this would not prevent public rights being acquired through deemed dedication.

- 9.10 The Oxfordshire case<sup>11</sup> indicates that dedication is deemed to have occurred at the start of the Relevant Period. Neither the wooden stile nor the kissing gate were in situ throughout the full Relevant Period and, consequently, the right of the owner to erect and maintain either structure is not a limitation upon the dedication of the Decision Route. The field to the south of point C on the Decision Plan is agricultural land used for rearing livestock, so the existing kissing gate could be authorised under section 147 of the 1980 Act outside of the DMMO process.

### **Width**

- 9.11 The section of the Decision Route between points A and C on the Decision Plan crosses open ground and there are no physical features on the ground to indicate the width of this section. The Planning Inspectorate's Rights of Way Advice Note No. 16 states that; "*In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occasional pinch points excepted.*" The Decision Route has been used by pedestrians and 1.8 metres would be sufficient to allow two pedestrians to pass comfortably.
- 9.12 The remainder of the Decision Route is physically defined on the ground by fences, banking and walls. The Decision Route is 1.3 metres wide between points C and D, 1.0 metre wide at point D, 1.3 metres wide between points D and F and 2.0 metres wide between points F and G. None of the UEFs state that the width of Decision Route has changed during the periods of use they record and the physical evidence on the ground indicates that the public has enjoyed use of this full available width.

## **10. Further Legal Considerations**

- 10.1 In determining this Application, the Authority must be mindful of the judgement from the Zulus Crossing case<sup>12</sup> and, in particular, issues relating to incompatibility, illegality and cul-de-sacs.

### **Incompatibility**

- 10.2 Although the Decision Route runs partially over a railway embankment, it is separated from the railway lines and the operational railway land by secure fencing. Consequently, the existence of a public right of way would not be inconsistent with Network Rail's obligations to operate a safe and efficient railway network and Network Rail do therefore have the requisite capacity to dedicate.<sup>13</sup>

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<sup>11</sup> *Oxfordshire County Council v Oxfordshire City Council* [2004] Ch 253

<sup>12</sup> *Ramblers' Association v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 716 (Admin)

<sup>13</sup> *British Transport Commission v Westmorland CC* [1958] A.C. 126



### **Illegality**

- 10.3 Bakewell<sup>14</sup> clarifies that a prescriptive right could be obtained by long use that throughout was illegal in the sense of being tortious; however, if the use was illegal in the sense of being a criminal offence then public policy would prevent such a right being acquired. Section 55(1) of the British Transport Commission Act 1949 makes it a criminal offence to trespass on any railway embankment; however, under s55(3), this provision is contingent upon a notice being displayed at the nearest station warning the public not to trespass.
- 10.4 There are four notices at either end of both platforms at Bath Spa, which is the nearest station. These read: "*Passengers must not pass this point or cross the line*", "*Passengers must not pass beyond this point*", "*Trains run either way on this line*" and "*Warning Do Not Trespass on the Railway Penalty £1000*". The first and second signs do not apply to users of the Decision Route because they will not have passed the points where the signs are located and the third sign is not warning people not to trespass. In the fourth sign, the meaning of 'Railway' in the notice is to an extent ambiguous. However, the public, to whom the notice is directed, is likely to interpret this as applying to the operational railway land to the north of the fence and not the land over which the Decision Route runs. Use of the Decision Route would therefore have been tortious rather than criminal and this does not prevent deemed dedication under section 31(1) of the 1980 Act.

### **Cul-de-sac**

- 10.5 There is no dispute that the section of the Decision Route between points A and C on the Decision Plan is a public footpath. The continuation of the Decision Route would form a junction with Bradford Road which is also public highway and the restrictions which apply to the creation of cul-de-sac highways by means of deemed dedication do not apply.

## **11. Conclusion**

- 11.1 It has been demonstrated on the balance of probabilities that the section of the Decision Route between points C and G on the Decision Plan has become a public footpath through deemed dedication under section 31(1) of the 1980 Act.
- 11.2 Having considered the evidence and comments, an Order should be made to:
- record the section of the Decision Route between points C and G on the Decision Plan as a public footpath on the Definitive Map;
  - modify the Definitive Statement for BA1/32 to:
    - correct typographical errors relating to the section of the Decision Route between points A and C on the Decision Notice Plan;
    - incorporate the section of the Decision Route between points C and E on the Decision Notice Plan;;

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<sup>14</sup> Bakewell Management Ltd v Brandwood [2004] UKHL 14



- record a width of 1.8 metres between points A and C on the Decision Notice Plan, 1.3 metres wide between points C and D on the Decision Notice Plan, 1.0 metre wide at point D on the Decision Notice Plan, 1.3 metres wide between points D and E on the Decision Notice Plan;
- and record no limitations or conditions;
- create a new Definitive Statement for BA3/23 to:
  - record the section of the Decision Route between points E and G on the Decision Notice Plan;
  - record a width of 1.3 metres between points E and F on the Decision Notice Plan and 2.0 metres between points F and G on the Decision Notice Plan;
  - and record no limitations or conditions.

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## AUTHORISATION

Under the authorisation granted by the Council on 12 May 2016, the Place Law Manager is hereby requested to seal a Definitive Map Modification Order to:

- record a public footpath commencing from grid reference ST 7842 6694 (point C on the Decision Notice Plan (attached)) and continuing in a generally north easterly direction adjacent to the railway for approximately 79 metres to ST 7847 6699 (Point D on the Decision Notice Plan) and turning in a generally east-northeasterly direction for approximately 39 metres midway across the railway bridge over the River Avon to grid reference ST 7851 6701 (point E on the Decision Notice Plan) and continuing in a generally east-northeasterly direction for approximately 39 metres across the remainder of the bridge to grid reference ST 7854 6703 (Point F on the Decision Notice Plan) and turning in a generally easterly direction adjacent to the railway for approximately 55 metres to a junction with Bradford Road (A363) at grid reference ST 7860 6704 (point F on the Decision Notice Plan) on the Definitive Map;
- modify the Definitive Statement for BA1/32 to:
  - correct typographical errors relating to the section of the Decision Route between points A and C on the Decision Notice Plan;
  - incorporate the section of the Decision Route between points C and E on the Decision Notice Plan;;
  - record a width of 1.8 metres between points A and C on the Decision Notice Plan, 1.3 metres wide between points C and D on the Decision Notice Plan, 1.0 metre wide at point D on the Decision Notice Plan, 1.3 metres wide between points D and E on the Decision Notice Plan;
  - and record no limitations or conditions;
- create a new Definitive Statement for BA3/23 to:
  - record the section of the Decision Route between points E and G on the Decision Notice Plan;

- record a width of 1.3 metres between points E and F on the Decision Notice Plan and 2.0 metres between points F and G on the Decision Notice Plan;
- and record no limitations or conditions.



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Craig Jackson  
Team Manager – Highways Maintenance and Drainage

Dated:.....13/3/18.....

**APPENDIX 1  
Decision Plan**



Scale 1:2500

Decision Route A B C D E F G

