

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A PUBLIC FOOTPATH – Meadow Park, 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 at Meadow Park in Bathford.

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) makes a DMMO to record the Application Route, as shown by broken green lines 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)(b) of the 1981 Act 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...”

- 5.3 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.

- 5.4 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 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.”

6. Background and Application

- 6.1 On 29th November 2019, Bathford Parish Council (“the Applicant”) applied to have a public footpath added to the DM&S (“the Application”). The Application was accompanied by 25 User Evidence Forms (“UEFs”).

- 6.2 The route under consideration commences from a junction with Meadow Park at grid reference ST 7869 6731 (point A on the Decision Plan at Appendix 1) and proceeds in a generally easterly direction predominantly over a concrete path for approximately 105 metres to a junction with public footpath BA3/24 at grid reference ST 7879 6731 (Point B on the Decision Plan). This route is hereafter referred to as “the Application Route”.

7. Consultations

- 7.1 In November 2021 the Authority consulted on the Application with the Applicant, the affected landowners, local and national user groups and the ward members. Notices were also erected at either end of the Application Route and on the Authority’s website.
- 7.2 Prior to the commencement of the public consultation, the owner of the land over which the Application Route runs was invited to submit evidence using the Authority’s standard Landowner Evidence Form but no response was received. In addition to those UEFs appended to the Application, four UEFs were received prior to the consultation and a further six were received during the consultation. All evidence and submissions are considered in sections 8, 9 and 10 below.

8. 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.
- 8.2 The following documents have been examined but were not found to provide any evidence in respect of the Application Route:
- Day and Masters’ Map (SHC Ref.: D\B\wsm/38/6);
 - Greenwood’s map (SHC Ref.: A\AUS\60);
 - Great Western Railway Plans (SHC ref.: Q/RUP/123)
 - Bathford Tithe Map and Apportionment (SHC refs.: D\D\Rt/M/167 and D\D\Rt/A/167);
 - Inland Revenue documents (SHC Refs.: DD/IR/OS/8/15 and DD/IR/B/18/6);
 - Definitive Map records.
- 8.3 The Application Route does not appear to have physically existed prior to the construction of the Meadow Park development in the 1960s. On 6th August 1965, C. H. Beazer and Sons Ltd (the owner and developer of Meadow Park, including the land over which the Application Route runs) and Somerset County Council (the then highway authority) entered into an agreement pursuant to section 40 of the Highways Act 1959 to adopt highways at Meadow Park in Bathford. The agreement provided for several routes to be adopted as public road and for a footpath, which partially follows the alignment of the Application Route; this footpath follows A to X and Y to B on the Decision Plan but runs in a straight line between points X and Y. On 24th July 1969, Burningham & Brown stated that their client (C. H. Beazer and Sons Ltd) did not wish

the footpath to be included in the Section 40 Agreement; a letter from Somerset County Council confirms that this amendment was accepted and actioned.

- 8.4 The Chair of Bathford Parish Council has stated that the Meadow Park properties were originally sold on a leasehold basis and that the leases for nos.12 to 77 Meadow Park are all substantially to the like effect. The Authority has seen the leasehold agreements for 14, 45 and 47 Meadow Park and these are substantially to the like effect and telephone interviews with other Meadow Park residents indicate that those other leases are also substantially to the like effect.
- 8.5 The lease grants certain rights and benefits including “*a right of way...over the footway coloured brown on the said plan upon payment of a proportionate part of the cost of maintaining that said way*”. The accompanying plan does not include a route coloured brown and, consequently, it is unclear which route is being referred to. It is possible that the lease had intended to refer to part or all of the Application Route; however, there is no evidence to indicate that this is the case and it would be equally possible that the lease is referring to public footpath BA3/24 or the footway adjacent to one of the estate’s carriageways. Irrespective of which route is the ‘*footway coloured brown*’, there is no evidence that a payment has either been levied or paid for the proportionate part of the cost of maintaining that route and, consequently, no rights will have arisen.
- 8.6 The lease also grants “*the right to use the land edged yellow on the said plan as a woodland amenity area subject to the payment of a proportionate part of the cost of maintaining the same in good order*”. This woodland amenity area (“the Woodland Amenity Area”) is also edged yellow on the Decision Plan and this includes the majority of the section of the Application Route between points X and Y on the Decision Plan but does not include the remainder of the Application Route.
- 8.7 User 29 has provided copies of correspondences and invoices relating to maintenance payments for the Woodland Amenity Area. A letter dated 29th August 1990 from The West of England Estate Management Co. Limited (“WoEEM”) indicates that from at least that date onwards they were responsible for collecting the maintenance payments. A letter and invoice dated 17th December 1991 shows that the leasehold owners of 44 properties were invoiced for maintenance of the Woodland Amenity Area and it is assumed that this covered the following calendar year. Further invoices dated 29th September 1993, 30th June 1995, 20th November 1998, 17th May 2000, 29th November 2002, 10th March 2004 and 18th July 2007 were issued by WoEEM. Some of these invoices included payment for multiple years and the only year not covered by one of these invoices is 1994; it is assumed that an invoice was issued to cover that year but it has just not been retained and made available to the Authority. The invoice issued in 2007 covered up to the end of 2006 and no paperwork has been made available that indicates payments were made after this date.

- 8.8 The documentation shows that 44 properties were invoiced for 1992 and 55 properties were invoiced for 1996 to 1998 and for 2001 to 2006. The documentation does not indicate how many properties were invoiced for 1994, 1999 and 2000.
- 8.9 The Authority wrote to WoEEM to ask for any information or evidence regarding the Amenity Woodland Area or the maintenance payments but no response was received. The documentation indicates that the leaseholders who paid the maintenance fee did so for the period between 1992 and 2006 inclusive; consequently, their use of the land was 'by right' rather than 'as of right'. It should be noted that the maintenance payment associated with the Woodland Amenity Area is separate and distinct from the payment of ground rent.
- 8.10 A stile is referred to in an invoice dated 29th September 1993 which was included in the documents referred to in 8.7 above. An invoice dated 20th November 1998 includes a line stating '*Jul-97 Supply New Padlock*'. Given the lack of other uses for a padlock on the Woodland Amenity Area, it is reasonable to assume that the padlock was for use on the gate at point B on the Decision Plan. A letter dated 10th March 2004 requesting payment of the maintenance fee for 2003/2004 includes the '*Replacement of lower gate*' at some point during that period. A letter dated 18th July 2007 requesting payment of the maintenance fee for 2005/2006 shows the '*replacement of damaged, fence, stile and concrete*' at some point during that period.
- 8.11 The cessation of invoicing for the maintenance costs roughly coincides with the change in ownership; the current owner Peter Stephen Waters purchased the land which includes the Woodland Amenity Area and the section of the Application Route between points X and B on the Decision Plan on 12th March 2007. The land over which the section of the Application Route between points A and X on the Decision Plan runs is not registered at Land Registry. This indicates that the land has not been transferred since registration became compulsory. The Meadow Park development was built by C. H. Beazer & Sons Limited who were acquired by Persimmon plc in 1991 and who are therefore assumed to be the current owner of this section of the Application Route.
- 8.12 A Google Streetview image from April 2009 shows a one-step stile and a closed adjacent pedestrian gate at point B on the Decision Plan. A Google Streetview image from August 2012 shows only the step remaining of the stile and the rails missing; the adjacent pedestrian gate is still in situ but the slamming post is missing. Google Streetview from March 2019 shows the stile completely removed; the gate cannot be seen but the slamming post would be obscured in the images by vegetation and it is therefore not possible to determine from this image whether the gate was missing or just open and therefore out of view. A site visit by an officer from the Authority on 29th November 2019 found a gate open and still in situ.
- 8.13 A local resident has submitted a series of 15 photos of the Application Route taken between 24th February 2015 and 4th September 2019; the metadata contained within three of those photos shows that they were

taken between 16.53 and 16.55 on 24th March 2015. All 15 photos show various sections of the Application Route as clear and unobstructed.

- 8.14 The landowners have not submitted either a Landowner Deposit under section 31(6) of the 1980 Act or any evidence to the Authority in respect of this DMMO application. No legal orders have been made to stop up or divert the Application Route.

9. User Evidence

- 9.1 As detailed in 7.2 above, the Authority has received 35 user evidence forms. The Authority has attempted to carry out telephone interviews with each of these individuals to confirm and clarify details of their evidence. It has not been possible to contact Users 5, 8 and 11; user 5 did not state in their UEF when they used the Application Route and, consequently, it is not possible to determine if theirs was qualifying use under section 31 of the 1980 Act.
- 9.2 User 31 refers to being prevented from using the Application Route and the presence of free-standing signs placed at points A and B on the Decision Plan during a one-week period in 2015 when trees were being felled. User 31 cannot recall the exact wording of the signs but states that they were to the general effect that tree felling was taking place and people were not to use the route while this was happening; the user did not progress down the Application Route on the day they encountered the sign and did not meet the landowner or contractors on that occasion.
- 9.3 User 31 was unable to be specific about the exact date; however, a letter dated 8th April 2015 from a local resident to a Bathford Parish Councillor sets out the timeline of events in respect of the felling of trees on the Woodland Amenity Area. The letter states that '*Tree cutters were on site for 2-3 days*' commencing on Monday 23rd February 2015 and describes more intensive tree works being carried out throughout the working week commencing on Monday 23rd March 2015. The tree felling in March 2015 is corroborated by emails supplied by the Authority's Tree Team, who subsequently placed a Tree Preservation Order on the trees within Woodland Amenity Area. Given that User 31 described being prevented from using the Application Route for a one-week period it is most likely that this relates to the works commencing on 23rd March 2015.
- 9.4 *Godmanchester*¹ states that if a challenge is to be effective it must bring home to users that their right was being challenged. None of the other 28 individuals that used the route in 2015 state that they were prevented from using the Application Route or saw any signage despite 13 of those individuals² using the Application Route on a daily basis at that time. As detailed in 8.13 above, three photos show the Application Route on 24th March 2015 including one which shows the gate at point B on the Decision Plan; no signage can be seen in the photos and the

¹ *R (on the application of Godmanchester Town Council (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28

² Users 6, 7, 8, 13, 14, 15, 19, 28, 29, 30, 31, 32 and 34

local resident who took the photos was not prevented from using the Application Route to take the photos and has stated that *'never has the woodland path been closed to my knowledge.'* Furthermore, User 31 states that the reason they were turned back *'Was for safety'* rather than because the landowner was contending that no rights exist.

- 9.5 If 28 of the 29 users that were using the Application Route at the time continued to do so without interruption and they did not see any signage then on balance it can be concluded that the landowner's actions were not sufficient to call the public's right into question and the challenge did not have legal effect.
- 9.6 The evidence does not demonstrate that the landowner effectively challenged the public's right to use the Application Route prior to the submissions of the DMMO application in 2019. 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 11th November 2019 and the relevant 20 year period of use for deemed dedication under section 31(1) of the 1980 Act runs from 11th November 1999 to 11th November 2019 ("the Relevant Period").
- 9.7 22 users³ were living in properties numbered between 12 to 77 Meadow Park which were owned on a leasehold basis during part or all of their periods of use of the Application Route. As detailed in 8.6 above, the associated leases gave the residents the right to use the Woodland Amenity Area *"subject to the payment of a proportionate part of the cost of maintaining the same in good order"*. However, as detailed in 8.8 above, not all properties between nos. 12 to 77 Meadow Park were invoiced and only users 23, 24, 25, 29, 30, 31, 32, 34 and 35 have said that they paid a maintenance fee. User 23 ceased making payments in 2000 when they moved out of Meadow Park, user 29 provided the documentation detailed in 8.7 above and confirmed that this accurately reflects the period over which they paid; users 30, 31 and 32 made payments from 1998 to 2006 inclusive and have copies of their invoices and user 35 made payments covering 1996 to 2003 inclusive; users 24, 25 and 34 were unable to recall when they made payments and it is therefore assumed that their payments correspond with the 1992 to 2006 timeframe detailed in the documentation at 8.7 above.
- 9.8 Users 23, 24, 25, 29, 30, 31, 32, 34 and 35's use during the years when they were making maintenance payments will therefore have been 'by right' and, consequently, this usage must be disregarded for the purposes of deemed dedication under section 31 of the 1980 Act. User 19 could not recall whether they had contributed towards the maintenance costs and it is therefore unclear whether their use during that period was as of right.
- 9.9 The UEFs detail use of the Application Route by 35 individuals and their period of use extends from 1965 to 2021. During the Relevant Period,

³ Users 2, 3, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 25, 29, 30, 31, 32, 33, 34 and 35

excluding the 'by right' use detailed in 9.8 above and the indeterminate nature of User 19's use, there are 14 members of the public⁴ who have used the Application Route throughout the Relevant Period and a further 18 members of the public⁵ who have used the Application Route for part of the Relevant Period.

- 9.10 It should be noted that even if the date of challenge was accepted as 23rd March 2015 when the substantial tree felling commenced then there were still 11 members of the public⁶ who have used the Application Route throughout the proceeding 20 year period and a further 18 members of the public⁷ who have used the Application Route for part of the proceeding 20 year period.
- 9.11 During the Relevant Period, 13 individuals used the Application Route on a daily basis⁸, five individuals used the Application Route on a weekly basis⁹, eight individuals used the Application Route on a monthly basis¹⁰ and three individuals used the Application Route between six and 10 times per year¹¹. All the individuals used the Application Route on foot. Additionally, four individuals¹² also took bicycles down the Application Route; however, all pushed their bicycles down the stepped section between points A and X on the Decision Plan and only User 12 took a bicycle down the Application Route throughout the Relevant Period.
- 9.12 A number of individuals referred in their UEFs to having been granted permission to use the Application Route; however, during telephone interviews it was established that they were referring to rights, as set out in their leasehold agreement discussed in 8.6 above, rather than permissions. Furthermore, the UEFs do not suggest that any of the user of the Application Route has been covert or in secret. As detailed in 9.14 below, there have been various gates and stiles at point B on the Decision Plan but none of these have prevented use of the Application Route. None of the users have been prevented from using the Application Route due to an obstruction or turned back by the landowner. Consequently, excluding the 'by right' use detailed in 9.7 and 9.8 above, all use of the Application Route appears to have been 'as of right'.
- 9.13 There is no evidence that any of the landowners demonstrated a lack of intention to dedicate the Application Route as a public right of way during the Relevant Period.
- 9.14 The majority of users refer to the presence of a pedestrian gate at point B on the Decision Plan throughout their use of the Application Route and this gate being permanently open in recent years; a gate was still

⁴ Users 2, 3, 8, 9, 12, 13, 15, 17, 18, 20, 21, 22, 28 and 33

⁵ Users 1, 4, 6, 7, 10, 11, 14, 16, 19, 23, 24, 25, 29, 30, 31, 32, 34 and 35

⁶ Users 2, 3, 9, 12, 13, 15, 17, 18, 20, 21 and 22

⁷ Users 1, 6, 7, 8, 14, 16, 19, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34 and 35

⁸ Users 6, 7, 8, 13, 14, 15, 19, 28, 29, 30, 31, 32 and 34

⁹ Users 9, 12, 20, 21 and 22

¹⁰ Users 1, 16, 17, 23, 24, 25, 33 and 35

¹¹ Users 2, 3 and 18

¹² Users 6, 7, 8 and 12

present during a site visit by the Authority in July 2021. Seven users¹³ refer to the gate being locked for a period of time and, when this was the case, an adjacent stile was used instead; the presence and use of the stile is confirmed by seven other users¹⁴. User 22 has stated that the gate was locked for '*Approximately 3 years*' but no other users have been able to recall for how long the gate was locked.

- 9.15 The Application Route physically exists as a 1.3 metre wide concrete path. The UEFs indicate that the width of the path, which appears to have been constructed at the same time as the Meadow Park development, has remained unchanged and that users have not ventured wider than this surfaced width. The only exception is at the eastern end of the Application Route where users will have habitually used the area immediately south of the concrete path to access the stile. Although the stile is no longer present, it can be seen in Google Streetview images as detailed in 8.12 above. Measurements taken on site with the aid of these Streetview images show that the Application Route is 3 metres wide at point B on the Decision Plan and tapers down at a consistent rate over a length of 4.2m until it becomes 1.3m wide thereafter.

10. Conclusion

- 10.1 There is no evidence of the Application Route physically existing prior to the Meadow Park development being built in the mid-1960s. It was originally proposed that a route which partially followed the alignment of the Application Route should be dedicated as a public footpath but this proposal was subsequently withdrawn. Nevertheless, the Application Route was constructed as a concrete path at this time and the UEFs show that members of the public started using the Application Route from 1965 onwards.
- 10.2 The leasehold agreement for some of the properties at Meadow Park gave the lessees the right to use the Woodland Amenity Area upon payment of a maintenance fee. This payment was made by some users between 1992 and 2006 inclusive and their use of the Application Route during that period will have been by right and must be excluded for the purposes of deemed dedication.
- 10.3 The UEFs demonstrate that 14 individuals used the Application Route on foot without force, secrecy or permission throughout the Relevant Period and that a further 18 individuals used the Application Route on this basis for part of the Relevant Period. The use by the public continued without interruption during the tree felling operations in 2015. This is sufficient to demonstrate on the balance of probabilities that the Application Route has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. The use during the 20 year period prior to the tree felling in 2015 would have also been sufficient to demonstrate 20 years use as of right by the public.

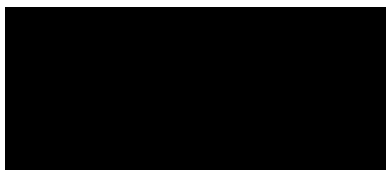
¹³ Users 8, 9, 21, 22, 28, 29 and 35

¹⁴ Users 3, 12, 17, 18, 19, 23 and 31

- 10.4 There is not sufficient evidence to demonstrate that the landowner had a lack of intention to dedicate the Application Route as a public right of way during the Relevant Period. The Application Route has therefore become a public footpath through deemed dedication under section 31(1) of the 1980 Act.
- 10.5 Seven UEFs indicate that the gate at point B on the Decision Plan was locked for a period of time. The maintenance payment documentation discussed at 8.7 above indicates that it is likely that this gate was padlocked in July 1997 and User 22 has indicated that it was locked for approximately three years, which would include the first year of the Relevant Period. When the gate was locked members of the public used an adjacent stile and for the remainder of the Relevant Period they used the gateway. Although the gate was left open for the majority of the Relevant Period, it was nevertheless present throughout the Relevant Period and the right of the landowner to erect and maintain a 1.8m wide pedestrian gate at point B on the Decision Plan is a lawful limitation upon the landowners' dedication of the Application Route as a public footpath. However, the Google Streetview photos show that although the stile was in situ in April 2009 it was no longer functional by August 2012 and is therefore not a lawful limitation.
- 10.6 The public rights which have been accrued through deemed dedication extend over a 1.3m width, except at the eastern end where the width increases to 3m.
- 10.7 An order should be made to record the Application Route as a public footpath on the DM&S as a consequence of an event under section 53(3) of the 1981 Act.

AUTHORISATION

Under the authorisation granted by the Council on 10 May 2018, the Place Law Manager is hereby requested to seal an Order to record the Application Route on the Definitive Map and Statement and to confirm the Order if no sustained objections are received.



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Dated: 16th February 2022

Craig Jackson
Team Manager – Highways Maintenance and Drainage

APPENDIX 1: DECISION PLAN

Application Route A X Y B

Public footpath recorded on DM&S



Scale 1:1250

