

## Statement of Case

Bath and North East Somerset Council (Restricted Byway BA21/12, Beeks Mill, St Catherine)  
Definitive Map Modification Order 2017

This statement is made on behalf of Ms Kate Chubb, who I will be representing as the agent of The Trustees of Beeks Mill and occupier of the land affected. They will ask that the Order is not confirmed.

I act as agent in this matter.

The original application that created this investigation was for a Byway Open to All Traffic. After detailed research the Council decided that it was not supportable as such but that there was a "reasonable allegation" that Restricted Byway rights may be alleged. They are taking a neutral stance in this process.

It is for the Inspector to decide if the "reasonable allegation" can pass the stricter "balance of probabilities test".

I have reviewed the basis for the claim which falls into two parts. Historical and modern user.

The Council has already soundly dismissed the historical claim but I would add the following:

The "mile stone" is not 2 miles from Marshfield and is made from what appears to be redundant material from the Mill that fell into disrepair in the late 1880s. Mile Stones were a requirement on Turnpikes only and there is no record of the route ever being one. Indeed, as the "mile stone" appears to date from post 1880, past the time of turnpikes and does not appear on any mapping it is difficult to explain it as having a proper purpose, except decorative.

There is no record of a guide post at the southern end of the route, which was a requirement for all public highways where a route diverges.

No mention has been made by the applicant or the Council of the "stone" marker further north on Beeks Lane where it diverges. This indicates two locations; "Beeks Farm" to the South (but not the Beeks Mill or St Catherine) and "Beeks House" east. Importantly it does not indicate Marshfield to the North. This can only be because the route was not a through route and could only be approached from the north.

The applicant alleges that the missing of this route from the Definitive Map process following the 1949 Act was in error, yet he provides no new or relevant evidence to support this. Indeed, given the criss-cross of footpaths in and around the site it does appear that the area was fully and comprehensively covered by both relevant Counties during the Definitive Map creation process and later reviews.

Turning now to Modern User Evidence, that may suggest in the absence of express dedication, a presumption of dedication by user.

The Council has provided the Inspectorate with 59 User Evidence Forms and Statements.

These show that the route was well used by a variety of people including the Water Board to access their equipment, the postman to deliver mail, the local Police officer checking his beat, farmers with given and acknowledged permission, the local hunt who covered the area, local horse riders who acknowledged that the route under consideration was private and used permissively.

The relevant dates we are to consider are either 2013 when the application was made or 2001 when some people acknowledge signs in existence. We argue instead that the true date should be circa 1996 when witness (52) Glyn Watkins replaced the gates and pre-existing existing "Private" signs.

In any case, the law requires that to form a public right of way there must be dedication and acceptance. In this case, in the absence of express dedication the applicant must show presumed dedication as per the Act.

### **31 Dedication of way as highway presumed after public use for 20 years.**

- (1) *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.*

As set out in the Inspectors guidelines

*5.21 Use 'as of right' must be without force, secrecy or permission ('nec vi, nec clam, nec precario'). It was once thought that users had to have an honest belief that there was a public right. In Sunningwell 1999 it was held that there is no requirement to prove any such belief. However, if a user admits to private knowledge that no right exists, it may have a bearing on the intention of the owner not to dedicate.*

In this case we have already been provided with 59 statements. Of those, the vast majority say that the route was "private" - there was a sign that said so. Those who used it accepted that it was private, no public right of way and used it with the permission of the landowners. We have heard from others that they accepted it was private, because of the signs, and didn't use it. But we have a hard core of about 10 people who said they did use the route, within the relevant periods "without secrecy, force or permission". It is these 10 out of 59 that we should be interested in.

Again, in the consistency guidelines;

*5.20 In R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in Sunningwell that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In R (Powell and Irani) v SSEFRA [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in Lewis were not authority for an additional test beyond the tripartite 'as of right' test. The judgements in Lewis confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication*

*arises from acquiescence in the use. Again in Redcar, in the Court of Appeal Dyson LJ refers to Hollins and Verney and the words of Lindley LJ.*

*"... no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term ... the user is enough at any rate to carry to the mind of a reasonable person...the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended."*

We therefore need to examine the 10 or so claimed users who say they used the way as of right and to such an extent that the owner must have been aware that the claimed users were asserting presumed rights.

Careful examination of their UEFs and statements show that their claimed usage was minimal. For instance, it was 3 or 4 times a year. Others say they used it when the A46 was blocked. Now I'm no expert on the Road Traffic Collision rate of the A46 but it seems to me that this would be infrequent to rare.

But the point they make is a good one in that when the A46 is not blocked they would use the A46, presumably and in actual fact because it was shorter or quicker. The same argument can *also* *equally* be extrapolated to other claimed 'as of right' users who say they used the route to get to Marshfield on foot, cycle, horseback or vehicle and live to the east in St Catherine's. Using google earth to plot routes using the choices offered of *either* foot, cycle or car always offers quicker shorter routes via appropriate ways for the mode. One has to wonder why these witnesses claim to use the route when more direct, easier, flatter routes exist.

But the bottom line remains, if all these 10 or so users were using the route as they claim on an infrequent basis, was it possible for the non-resident owner to distinguish them from the 40 plus known and invited users that had permission. 1), the farmers, 2), the hunt, 3), the horse riders, 4), the neighbours, 5), the Police, 6), the postman and 7), Wessex Water? Would this small number of ten non-permissive users be distinguishable from the lawful users?

We have statements from supporters of the Order and those against that say that Mr Charlie Godwin parked his car on the route side in his garage. Some say he locked the gate at night whilst others deny the gate was ever closed. We have to establish why these people never saw the gate closed or locked if their use was as extensive as it is suggested. After all, the fence line is relatively new and the field within the route lies was and is grazed by beef cattle. It had to be gated at either end. We can only establish real truth by cross examination of the witnesses to find out what has been missed from the untested nor proven statements of claim.

In support of our case that no public rights exist we intend to call as witnesses, subject to availability, the following people in support of their already made statements;

Mike Roberts

David Colbourne

Brian Wilson

Glyn Watkins

David Jones

Steve Earle

Andy Turner  
Robin Guild  
Jackie Durnell (nee Godwin)  
Roger Coombe  
John Wright  
Jen Watkins  
Becky Dymond

The following people are not expected at the Inquiry but Sworn statements are already in the possession of the Inspectorate:

Valentine Thornhill  
Derek Toghill  
Gillian Tayler  
Jan Priest  
Tom Shaw (Lord Craigmyle)  
Roz Tate

The following people are not expected at the Inquiry but their Statements of Truth are already in the possession of the Inspectorate

Janet Avery (nee Godwin)  
Stuart Harper  
Gordon Lindup  
David Clifford  
Lorraine Littler

We will ask that the Inspector declines to confirm the Order.

Andy Dunlop

Hall Barn  
Little Field Lane  
Levisham  
North Yorks  
YO18 7NL

