

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

### **DEFINITIVE MAP MODIFICATION ORDER TO ADD 14 PUBLIC RIGHTS OF WAY IN WIDCOMBE & LYNCOMBE, BATH**

(Ward Division: **Widcombe & Lyncombe Ward, including a small section of Oldfield Park**)

#### **1. The Issue**

- 1.1 This report deals with the evidence relating to 25 alleged public rights of way in the Widcombe & Lyncombe and Oldfield Park Wards, Bath and seeks the Team Manager - Highways Maintenance & Drainage's approval to make a Definitive Map Modification Order (DMMO), to record 14 paths on the Definitive Map and Statement for the City of Bath ("DM&S") with 14 separate path numbers (as described in the Background Information at Appendix 1, point 1.9).

#### **2. Recommendation**

- 2.1 It is recommended that Bath and North East Somerset Council ("the Authority") makes a DMMO on the grounds that the routes as shown by a broken black line and labelled Parts 1 to 14 on the plans ("the Decision Plans") contained at Appendix 2 have been dedicated as public rights of way, and to confirm the Order if no duly made objections are received and sustained against the Order.

#### **3. Financial Implications**

- 3.1 Financial implications are not a relevant consideration which may be taken into account under the provision of the 1981 Act. The costs associated with making a DMMO and any subsequent public inquiry or hearing 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 Surveying Authority must make an Order on its own initiative if it discovers evidence which shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist.
- 5.2 Bath and North East Somerset Council, as Surveying Authority, is under a statutory duty, imposed by Section 53(2) of the Wildlife and Countryside Act 1981, 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”.*

- 5.3 The “events” referred to above are set out in section 53(3). The event relevant to this report is set out in section 53(3)(c)(i) as follows:

*“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...”*

- 5.4 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.”*

- 5.5 The Authority must make an Order on its own initiative if it discovers evidence which justifies the making of an Order and such applications must be determined in accordance with the provisions of Schedule 15 of the Wildlife and Countryside Act 1981.
- 5.6 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 state 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*

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

*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."*

- 5.7 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.
- 5.8 Documentary evidence is often considered in determining applications for DMMOs. Section 32 of the 1980 1980 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. Consultations**

- 6.1 The initial list of paths included in the research were numbered Path 1 to Path 22. Two paths were removed from the consultation during the initial research - Path 6 is obstructed by a locked gate and Path 17 does not end on a highway that can be added to the DM&S and is potentially included in a project involving another team within the Authority. These 2 paths were removed from the project prior to the consultation.
- 6.2 The following groups were consulted - Ward Councillors, local and national user groups, other B&NES Services and local residents.
- 6.3 The Ward Councillors for Oldfield Park, Widcombe & Lyncombe, Odd Down, Moorlands and Combe Down were sent a map and list of the 20 paths included in the consultation in June 2023 (Paths 1 to 22 – with Paths 6 and 17 removed). They were invited to comment on the list and to add any paths they considered to be missing.
- 6.4 Local and national user groups and other B&NES Services were consulted on the list of 20 paths in October 2023 by email. Responses were received from the Bath Ramblers, Friends of Bloomfield Green,

Bear Flat Association and Greenway Lane Area Resident's Forum. A summary of responses can be found in Appendix 4 – Path Summary.

- 6.5 Respondents requested the inclusion of The Two Tunnels Greenway<sup>2</sup>, a ramp between Maple Grove and the Two Tunnels Greenway<sup>3</sup> and a path linking the Two Tunnels Greenway to Path 14<sup>4</sup>. The respondents were informed that it is not possible to include these paths in the consultation because they do not start and end on a highway that can be recorded on the DM&S.
- 6.6 The Bath Ramblers requested for an additional four paths to be included in the consultation – Path A, Path B, Path C and Path D. Preliminary research of the paths has revealed that a Section 31(6) Declaration was lodged on land over which Paths C and D partly run. The Declaration was made on 17<sup>th</sup> December 1998 and expired in 2004. It has not been renewed and there is no other documentary evidence to support the inclusion of these two paths in the consultation. The public may have begun accruing public rights since the expiration of the Declaration but a sufficient time period under section 31(1) of the 1980 Act has not yet been reached. Path A was removed from the consultation because it crosses land held for recreation, to which the public already has a right of access. Path B has been included in the consultation.
- 6.7 The Bear Flat Association requested a path to be added to the consultation – Path E.
- 6.8 Attempts were made to contact all owners or occupiers of the paths being considered for addition to the DM&S in this report. Land Registry searches were undertaken for all paths not completely on Authority owned land. Landowners and adjoining landowners were consulted by letter or email between July and August 2023 and in December 2023 (Paths A, B and E).
- 6.9 Documentary and user evidence was gathered for each of the paths included in the consultation and summarised. The following documents were consulted:
- Cotterell's 1852 Map of Bath
  - Historic Maps available on the Authority's GIS Mapping:
    - Bath Town Plan, 1885
    - OS Mapping 1887 – 1891
    - OS Mapping 1901 – 1905
    - OS Mapping 1920 – 1933
    - OS Mapping 1933 – 1936
  - Bath City Engineer's Survey, 1957
  - The Authority's List of Streets
  - Previous Legal Orders

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<sup>2</sup> Bath Ramblers and Greenway Lane Residents' Forum

<sup>3</sup> Bear Flat Association

<sup>4</sup> Bath Ramblers, Bear Flat Association, Friends of Bloomfield Green and Councillor Ian Halsall

## **7. Officer Comments**

- 7.1 To avoid confusion, the paths included in the consultation were given reference numbers between 1 and 22. It was considered that these numbers would be easier for the consultees to identify with than the numbering convention used by the Public Rights of Way Team. Where allocated, the PROW path numbers are shown in brackets. Additional paths recommended by the consultees were given reference numbers between A and E.
- 7.2 Documentary evidence was gathered for each of the paths included in the consultation. The information is presented in full at Appendix 4. A recommendation for each path is summarised below in paragraphs 7.3, 7.4 and 7.5.
- 7.3 Officers are satisfied that the evidence gathered for the following paths is sufficient to make and confirm, if no objections are received, an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. The recommendation for these 13 paths is to record them as public footpaths and add them to the DM&S:

### **Path Numbers**

Path 1 (AQ52), Path 2 (CQ109), Path 3 (AQ59), Path 8, Path 13, Path 14, Path 15 (AQ73), Path 16 (AQ74), Path 18 (AQ75), Path 20 (AQ86a), Path 21 (AQ86b), Path 22 (BQ49), Path B, Path E.

- 7.4 Officers are satisfied that the evidence gathered for the following path is sufficient to make and confirm, if no objections are received, an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. The recommendation for this path is to record it as a public bridleway and add it to the DM&S:

### **Path Number**

Path 14.

- 7.5 Officers will not include the following paths in an Order made at this time for Moorlands, Oldfield Park and Westmoreland Wards because objections were received during consultation. The recommendation for these paths is not to make an Order at this time. The paths will become non-routine paths and be dealt with outside the scope of this project. This does not prejudice any public rights which may have been accrued over time:

### **Path Numbers**

Path 4 (CQ23), Path 5 (CQ10), Path 7, Path 9, Path 10, Path 11, Path 12, Path 19 (BQ59), Path A, Path C, Path D.

- 7.6 After analysis of the submitted evidence, Officers are satisfied that the relevant legislation (Wildlife and Countryside Act 1981 section 53(3)(c)(i)) has been met and that an Order should be made for 14

public rights of way in Widcombe & Lyncombe Ward and Oldfield Park Wards, Bath.

## **8. Risk Management**

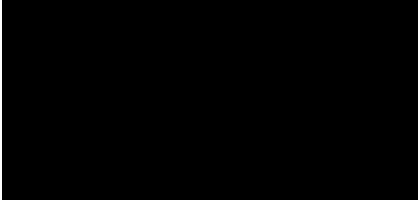
- 8.1 There are no significant risks associated with making of an Order.

## **9. Conclusion**

- 9.1 The Authority has collected both user and documentary evidence concerning each of the paths. Taken together, it is possible to make an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provided the relevant tests are met.
- 9.2 The Team Manager - Highways Maintenance & Drainage has to decide what are the correct facts and, on the basis of those facts, whether a right of way is reasonably alleged to exist along the paths recommended for inclusion in a DMMO.
- 9.3 Officers are satisfied that, there is both a reasonable allegation and that on the balance of probabilities, the documentary and / or user evidence gathered for Path 1 (AQ52), Path 2 (CQ109), Path 3 (AQ59), Path 8, Path 13, Path 14, Path 15 (AQ73), Path 16 (AQ74), Path 18 (AQ75), Path 20 (AQ86a), Path 21 (AQ86b), Path 22 (BQ49), Path B and Path E is sufficient to conclude that they should be recorded as public rights of way and that a DMMO should be made to that effect. It may be that higher rights exist, but these have not been proven at this time. The Team Manager - Highways Maintenance & Drainage is asked to authorise the making of a DMMO for the paths listed above. Plans identifying the proposed routes can be found in Appendix 2, labelled as Parts 1 to 14.
- 9.4 Responses from the consultations have indicated that objections are likely to be received to a DMMO made for Path 4 (CQ23), Path 5 (CQ10), Path 7, Path 9, Path 10, Path 11, Path 12, Path 19, Path A, Path C and Path D. These paths may be classed as non-routine and looked at again outside of the scope of this project. This does not prejudice any public rights which are subsequently found to exist.
- 9.5 Plans identifying the routes not to be included in a DMMO at this time can be found in Appendix 5.
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## **AUTHORISATION**

Under the authorisation granted by the Council on 21<sup>st</sup> July 2022, the Team Leader: Place (Legal & Democratic Services) is hereby requested to seal a Definitive Map Modification Order to record public rights of way as detailed in the Decision Plans (Appendix 2) and Decision Schedules (Appendix 3).



Dated: 22<sup>nd</sup> April 2024

Craig Jackson  
Team Manager - Highway Maintenance & Drainage