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Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981, Section 53
Application for Definitive Map Modification Order
Alleged Public footpath at Long Row, South Shields

Client: South Tyneside Council

1.0 Introduction

1.2 This report seeks to assist South Tyneside Council, in their role as Surveying Authority, (**the Surveying Authority**) to determine an application (**the Application**) for a Definitive Map Modification Order, made pursuant to Schedule 14 of the Wildlife and Countryside Act 181, to add the route (**the Application Route**) shown by a broken black line (**A-B**) on **Plan 1 [App1 pg. 1]** to the Definitive Map and Statement for the former County Borough of South Shields.

2.0 Instructions

2.1 I am instructed by Lisa Tracey, Public Rights of Way Officer, of South Tyneside Council, Town Hall and Civic Offices, Westoe Road, South Shields, Tyne and Wear NE33 2RL (**the Client**).

2.2 My instructions are to prepare a report, considering all of the available and relevant evidence relating to the Application, to assist the Surveying Authority in determining whether or not the alleged public right of way subsists, or is reasonably alleged to subsist, and subsequently whether or not the requested Definitive Map Modification Order should be made. The decision whether or not such an Order should be made, at this stage, rests solely with the Surveying Authority.

2.3 In carrying out my instructions I have consulted a range of documents submitted by the Applicants and by the owners/occupiers of adjoining properties, the latter of which dispute the existence of public highway rights over the Application Route. I have also

undertaken a site visit and viewed the Application Route form public vantage points. I did not, and do not, considered it necessary for me to have walked the actual line of the Application Route as part of my investigation.

3.0 Consultant's Expertise

3.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), a Practicing Member of the Academy of Experts and a Registered Expert Witness.

3.2 My experience is based, most generally, on an expertise that has been developed over a thirty plus-year period as a Public Rights of Way & Highways practitioner.

3.3 I hold a post-graduate level certificate in Leisure Management from the Institute of Leisure and Amenity Management. I am also a former Treasurer and founding Director of the Institute of Public Rights of Way and Access Management (IPROW); and a founding member of the List of Streets Task Group.

3.4 I have had papers published, on the subjects of: a) highway record management and b) rail crossing closures under the Transport and Works Act 1992, in the journal of the Institute of Public Rights of Way and Access Management. I also have a published Practice Guidance Note on Rights of Way Improvement Plans on the "LexisNexis" legal resource website. In 2019 I was a regional finalist in the Rural Business Awards; and in 2019 and 2022 recipient of a "Lawyer Monthly" magazine Expert Witness Award.

3.5 Between 1987 and 2003 I was employed by a number of local authorities as a rights of way and highways practitioner, including six years at principal officer (management) level, during which time I was responsible for the management of the authority's statutory public rights of way functions as well as the maintenance of the authority's highway records.

3.6 Since 2003 I have worked as an independent consultant specialising in public rights of way and highway matters, and more specifically on matters relating to the existence, status and extent of public highways. This includes matters relating to the diversion, creation and extinguishment of public highways. In doing so I have prepared reports for various local authorities and private individuals, as well as giving evidence at local public inquiries, the Magistrates Court, County Court and High Court. I have also represented clients at local public inquiries, hearings and similar fora.

3.7 Since the mid-1990's I have been actively involved in the delivery of specialist training on public rights of way and highway issues. I have delivered training and CPD sessions to local authority staff and elected members, volunteers, government bodies (i.e. Natural England), further education establishments (e.g. UCL Birkbeck, Losehill Hall & Plas Tan y Bwlch) and the local government ombudsman. I was also invited to contribute towards the drafting and development of the Sheffield Hallam University MSc in public rights of way management.

4.0 Statement of Truth

4.1 This report has been prepared in line with the requirements of the Civil Procedure Rules on the production of expert reports. As such I am required to include a Statement of Truth:

4.2 I understand that my overriding duty is to the Court/Tribunal, and I have complied with that duty. I am aware of the requirements of CPR Part 35, its practice directions and the CJC Guidance for the instruction of experts in civil claims.

4.3 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

4.4 I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Robin Carr FIPROW MAE

29th March 2023

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5.0 Background

5.1 The land over which the Application Route runs is within the area of a former shipyard and dock complex that was owned and operated by Brigham & Cowan Ltd. The company was established by Thomas Brigham and Malcolm Cowan in 1876 and was incorporated as a limited company in 1900. In 1924 the company acquired the shipyard of Hepple Ltd, located beside the Brigham & Cowan premises in South Shields and used the land to extend their drydocks. Brigham & Cowan built an extensive ship repair business with 3 drydocks at South Shields. In 1977 Brigham & Cowan Ltd was nationalised as part of British Shipbuilders. The yard closed in 1982[1].

5.2 In the mid to late 1990's redevelopment of the land commenced with building of a number of apartments off Long Row. By 2001 a number of these apartments fronted onto and overlooked the Application Route between Points **X** and **B** on **Plan 1 [App1 pg.1]**. At this time the land to the north (between Points **X-Y-A** on **Plan 1 [App1 pg.1]** had been levelled, but no development started (See 2001 Google Earth image **[App 2 pg. 2]**).

5.3 Between 2001 and 2006 the land between Points **X-Y-A** on **Plan 1 [App 1 pg.1]** remained levelled and generally open to access (See 2006 Google Earth image **[App 2 pg. 4]**).

5.4 In 2007/8 land between Points **X** and **Y** on **Plan 1 [App 1 pg.1]** was developed resulting in the construction of further apartment buildings with the Application Route being made available throughout its length (**A-Y-X-B** on **Plan 1 [App1 pg.1]**) (See 2006 Google Earth image **[App 2 pg. 4]**)

5.5 Solicitors for the property owners/occupiers assert **[App 14 pg. 348-498]** that the Application Route was blocked off in 2016, however Google Earth images **[App 2 pg. 8-10]** suggest no barriers at Point **B** on **Plan 1 [App 1 pg.1]** until 2018. The User

[1] www.tynebuiltships.co.uk

Evidence **[App 4-11 pg. 19-301]** suggests that the current gate structure at Point **B** on **Plan 1 [App 1 pg.1]** was not installed until February 2020. It is however clear that access has been physically prevented since that time (2020). Since 2016/18 the owners/occupiers of some of the apartments between Point **X** and **Y** on **Plan 1 [App 1 pg.1]** have extended their private areas over the line of the Application Route, thus changing its physical appearance considerably compared to the pre-2016 position (See 2015 and 2021 Google Earth image **[App 2 pg. 8 & 13]**).

5.6 In July 2022 South Tyneside Council (the Surveying Authority) received an application **[App 3 pg. 15-18]** for a Definitive Map Modification Order (the Application) from [redacted] on behalf of the "Friends of Market Dock Pathway". The application was accompanied by a number of user evidence forms alleging public use of the Application Route; a folder of maps and guides which are alleged to show the Application Route; and boxes/folders of photographs of the Application Route. These documents, where relevant are included in the document bundle accompanying this report under **Appendices 4 – 11**.

5.7 The Surveying Authority subsequently instructed Robin Carr Associates (as independent specialist consultants in such matters) to undertake an assessment of all of the available and relevant evidence, and to produce this advisory report to enable the Surveying Authority to determine the Application.

6.0 Consultations

6.1 As part of my investigation I have undertaken consultations in line with the Parliamentary Rights of Way Review Committee's Code of Practice on Consultation. This includes consultation with user interest groups etc as well as those with a more direct land owning/occupying interest. Consultees were asked to focus on the submission of relevant evidence rather than submissions or commentary on any evidence already submitted to the Surveying Authority. Any evidence received as a result of the consultation exercise has been incorporated in this report.

6.2 In particular, some of the owners/occupiers of properties fronting onto the Application Route jointly instructed solicitors to act on their behalf, resulting in the provision of a very focused and concise submission document and folder of evidence. **[App 14 pg. 348-498]**. I should like to record my thanks for this approach.

6.0 Understanding of Legislative Context

6.1 South Tyneside Council are the Highway and Surveying Authority for the area in which the Order Route is situated. The Council are charged with various statutory duties with regard to public highways (which includes routes often described as public rights of way). This includes, but is not restricted to, a duty to assert and protect public highways[2]; a duty to maintain those highways that are maintainable at public expense[3]; a duty to maintain a record (list) of all highways that are maintainable at public expense[4]; and a duty to maintain and continuously review the Definitive Map and Statement of Public Rights of Way[5].

Highways - General

6.2 A highway is a way over which the public have a right to pass and re-pass. The term is not restricted to public carriageways (roads). Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are also highways. Not all highways are maintainable at public expense, nor is there any need for a way to have been "adopted" before it is either a highway or a highway maintainable at public expense.

6.3 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

6.4 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of "*Once a Highway, Always a Highway*"[6] applies.

[2] Highways Act 1980, Section 130
[3] Highways Act 1980, Section 41
[4] Highways Act 1980, Section 36
[5] Wildlife and Countryside Act 1981, Section 53
[6] *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of administrative order or a Court Order.

Types of Highway

6.5 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. how it may be used) is dependent upon the specific type of highway status possessed by a given route.

Common Law

6.6 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

6.7 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

6.8 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.

6.9 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled and mechanically propelled vehicles.

Statute

6.10 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance, under the provisions of the Countryside Act 1968[7] cyclists are granted a right to use bridleways. Other legislation provides for public carriageways to be subdivided into various

[7] Countryside Act 1968, Section 30

categories which include motorways, cycle tracks, restricted byways and byways open to all traffic.

6.11 When determining the status of a specific route one must first consider the common law situation, and then apply any necessary restrictions to status imposed by statute in respect of restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

How Highways Come into Being: Dedication and Acceptance

6.12 With few exceptions, before any highway can come into being there must be an act of dedication on the part of the landowner, followed by an acceptance of the said dedication by the public. The act of dedication need not be express, it may be presumed or implied as a result of the actions (or inaction) of the landowner. Public acceptance is generally demonstrated through public use of the way. Such use must be of a nature that can be defined as being "as of right".

Section 31 of the Highways Act 1980

6.13 Section 31 of the Highways Act 1980 states:

> *"(1) Where a way over land, other than a way of such 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 twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."*
>
> *"The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise."*

"Where the owner of the land, which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway"

6.14 Section 31(1) has two 'limbs' the first provides that proof of twenty years continuous user "as of right" endorses a claim that a highway exists; the second (sometimes referred to as 'the proviso') provides that proof of a lack of intention to dedicate the way as a highway defeats the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

Common Law

6.15 The establishment of highway rights under the common law is not bound by the "20-year rule" discussed above, with the courts having ruled[8] that public rights can be established in a very short period of time.

6.16 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938,* both quoted with approval by Laws J in *Jaques v SSE 1994,* who described the former's summary as *a full and convenient description of the common law.* Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956, Mann v Brodie 1885* and *Poole v Huskinson 1843. Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J's judgment in *Nicholson v Secretary of State for the Environment 1996* comments further on aspects of these differences[9].

[8] North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18-month period
[9] See RWLR: Section 6.2 Dedication: the Common Law Approach: D Braham QC (Oct1991)

6.17 Halsbury[10] states – "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance.* And - *An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;* and *At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication*".

6.18 The inference of dedication may arise in three ways[11]:

i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*[12] the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public taxi-cab rank had been established on part of the bridge. The Justices' conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages sometime after receiving notice of the proceedings before the Justices merely evoked the comment from

[10] Halsbury's Laws of England (Volume 55 'Highways')
[11] See RWLR: Section 6.2 Dedication: the Common Law Approach: D Braham QC (Oct1991)
[12] (1872) 27 L.T. 672

Blackburn J. that "As to the erection of the barriers by the appellants, that was done too late to do away with the dedication".

ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred[13].

iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact[14].

Definitive Map Modification Orders

6.19 The making of applications for Definitive Map Modification Orders, and any subsequent legal orders which may arise from such applications is governed by Section 53, Schedule 14 and Schedule 15 of the Wildlife and Countryside Act 1981 (the 1981 Act).

6.20 Section 53(3)(c)(i) of the 1981 Act places a statutory duty on the Surveying Authority to make a Definitive Map Modification Order upon the discovery of evidence that a public right of way that is not shown on the Definitive Map and Statement subsists, or is reasonably alleged to subsist. This is not a discretionary function.

6.21 The initial, and lowest, trigger test (a reasonable allegation) is a relatively low evidential threshold, and even when there is a conflict of credible evidence on both sides, the Surveying Authority is obliged to make an Order to allow it to be tested through the full order process. Notwithstanding this, an Order that has satisfied the "reasonable allegation" test cannot be confirmed (come into effect) unless the case in

[13] See e.g. Williams Ellis v Cobb [1935] 1 KB 310 (CA)
[14] See e.g. Parker J in Webb v Baldwin and others (1911) 75 JP 564 at p565

support of such an Order can be proved using the civil law test of the "balance of probability". The evidential burden is therefore often greater at the point of confirmation, than it is at the point of making the Order.

6.22 Schedule 14 of the 1981 Act sets out the application procedures and provides an applicant with a right to seek a direction, from the Secretary of State that the Surveying Authority determine their application within a specified time frame. This right comes into effect 12 months after an application is properly lodged.

6.23 Schedule 14 also allows an applicant a right to appeal to the Secretary of State if the Surveying Authority refuses their application. Under such circumstances the Surveying Authority may be directed to make an Order.

6.24 Schedule 15 sets out various provisions relating to the making and confirmation of Definitive Map Modification Orders, and is supported by a set of regulations which prescribe the forms of Orders etc.

Burden and Standard of Proof

6.25 The initial burden of proof rests with those asserting the existence of the alleged rights to first prove their case. It is only once this burden is discharged that any person aggrieved by the Order needs to put any case in response. The standard of proof to be applied to a case of this nature is the civil test of the balance of probability.

Other Considerations

6.26 In reaching a conclusion (under both the common law or Section 31 of the 1980 Act) the decision-maker must take into account Section 32 of the Highways Act 1980, which 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 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 complied, and the custody in which it has been kept and from which it is produced."

6.27 It is also important to understand that the legal principle of "Once a Highway, Always a Highway" will apply. This means that if the evidence shows, on balance of probability, that public highway rights of a certain status existed say 250 years ago, those rights will still exist today, even if they have net been exercised for over 100 years, unless they have been extinguished/stopped up by some form of due legal process.

7.0 Summary of Documentary Evidence & Comment Thereon

7.1 As noted in paragraphs 5.1-5.4 above, the land crossed by the Application Route was in use as a shipyard and dry docks from 1876 until 1982 when they closed. It would appear that the land was not then cleared until the mid-1990's when the area was redeveloped. This timeline of events is supported by the user evidence **[App 4-11 pg. 19-301]** where the earliest claimed use dates back to between 1997 and 1999 (See User Evidence Summary **[App 12 pg. 302-304].** As a result, there is no historic documentary evidence to take into consideration.

Google Earth Images 2001 – Present **[App 2 pg. 2-14]**

7.2 A range of Google Earth images are available from circa 2001 onwards. These show, to some extent, the physical state of the land at a variety of dates, but are, of course, silent on matters of status. In particular these images have been useful in confirming the physical existence of parts of the Application Route at various time, and also when the Application Route appears to have been first blocked off at Point **B** and other locations between Points **X** and **Y** on **Plan 1 [App1 pg.1]** in 2018.

Photographs

7.3 A substantial number of photographs and satellite images etc have been submitted in support of the Application, but they add little or nothing to the overall investigation.

They show the physical existence and or availability of the Application Route at various time, which is not in dispute. Other photographs show people using the Application Route, but without interviewing those people, or asking them to complete a user evidence form, it is impossible to ascertain the validity of their use as part of the determination of the Application. As a result, these documents are not considered further within my report, nor are they included in the report appendices. I do however recommend that these documents be made available for anyone wishing to view them.

Maps and Guides

7.4 At one point, as part of the development of the area, it was proposed that the England Coastal Path would be routed along the line of the Application Route, and it is understood that it was signposted at such. However, following the route being blocked off, the England Coastal Path alignment was re-routed to avoid the disputed path. This has not stopped it being shown on a number of maps and guides, which are now out of date.

7.5 The England Coastal Path is an aspirational trail but does not confer any form of particular legal status on the routes it follows. The fact that some guidebooks and maps show the Application Route as part of the English Coastal Path very much demonstrates the problem with "creating" a concept route, and then publishing it, before actually securing the legal right to use parts of it. A selection of the maps available are attached under **Appendix 13 [pg. 305-347]** and it may be reasonable to conclude that they have inevitably encouraged some level of use of the Application Route following their publication. These documents do not however provide evidence of the existence of a public right of way, albeit they are to a degree supportive.

Documents relating to the Planning Process

7.6 A number of documents have been submitted relating the planning process and development of the area, along with various strategy document etc. These offer very little in terms of evidence in support, or otherwise, of the existence of public rights

over the Application Route. Had there been a clear intention to secure public access as part of the planning process this could have been secured using a legally binding agreement made under Section 106 of the Town and Country Planning Act 1990, but this did not happen. As with the photographic evidence discussed above, I do not propose to consider these documents further within my report, and they are not included in the report appendices. I do however recommend that these documents be made available for anyone wishing to view them.

Documents Submitted in Objection to the Application

7.7 As discussed above, some of the owners/occupiers of properties fronting onto the Application Route have jointly instructed solicitors to act on their behalf, resulting in the provision of a single submission document and folder of evidence **[App 14 pg. 348-498]**. These submission focus primarily on matters relating to the physical availability of the Application Route at certain times and the legal capacity of the landowners to dedicate public rights of way, at common law, over the Application Route.

8.0 Summary of User Evidence

8.1 The Application was supported by the evidence of ninety-one individuals claiming use of the Application Route from c.1995 until 2020 (25 years) **[App 4-11 pg. 19-301]**. Less than half of the user witnesses have completed user evidence forms, with the remainder submitting letters of support, which allude to use, but provide little or no information which can be used in the determination of the Application.

8.2 As with many cases of this nature, the precise dates that witnesses provide with regard to the start and end of their use, and those relating to certain events (such as the locking of gates etc) can vary. Such inconsistencies are to be expected and may be considered to be indicative of witnesses providing their honest recollection of events, whereas evidence that is wholly consistent, at this stage, may be indicative of an element of collusion.

8.3 Overall the user evidence is indicative of public use of the Application Route from when it first became available in the mid-to-late 1990's until it was blocked off and access prevented at some point between 2016 and 2020. Whilst there are only limited references, the user evidence also suggests that use was not interrupted by the development of the area, and that the Application Route was obstructed first by harris fencing (or similar) and later by the installation of the gate. There is no evidence of any challenge to use prior to the Application Route being closed off.

9.0 Assessment of User Evidence (Section 31 of the Highways Act 1980)

Character of the Way

9.1 The Application Route runs between two other highways, thus having two points of public termini, and is a through route. It therefore meets the basic characteristics of a public highway.

Date of Bringing into Question and the Relevant Twenty-Year Period

9.2 In considering this matter it may first be expedient to set out what constitutes an act which brings into question the existence of a public right of way for the purpose of Section 31 of the Highways Act 1980. In "*Fairey*"[15]; Lord Denning set out that:

> " *In order for the right of the public to be brought into question, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it.*"

9.3 Read literally and out of context, this may seem to suggest that the public's right can only be brought into question by the landowner, but that is not correct[16]. Any action, by any person, which brings into question the existence of the public's right to use the way will qualify.

[15] Fairey v Southampton County Council [1956] 2QB 439 456
[16] Rights of Way Law Review Section 6.3 Page 52 "Section 31 Update" D. Bramham QC (April 1998)

9.4 In *Dorset*[17] the "*Fairey*" test, was further considered:

"clearly does not require that every user should be told by the owner of the challenge, or even that it be shown that every user has been made aware of the challenge by other means, for example by reading a notice in a local newspaper. But whatever means are employed, they must be sufficient to make it likely that some of the users are made aware that the owner has challenged their right to use the highway. Anything less will not satisfy the need identified by Denning L.J. to bring home to the users the owner's challenge, so that they are given the opportunity to meet it."

9.5 Lord Hoffman further considered the matter in "*Godmanchester*" at para 37:

"I think it is most unlikely that Parliament intended that the 1932 Act could be capable of being defeated by so simple a device, leaving the claimants to the arbitrary and illogical rules of common law, preserved by section 31(9). In the Fairey case Denning LJ, turning to the proviso after his discussion of bringing the right into question, said that it raised the same point. In general, that seems to me to be right. I do not say that all acts which count as negativing an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts. Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate and section 31(2) provides that the right may be brought into question "by a notice such as is mentioned in subsection (3) below or otherwise". The notice will therefore both negative intention to dedicate and bring the right into question, while the words "or

[17] R v SoS for the Environment ex parte Dorset County Council [1999] NPC. See RWLR S6.3 pp69-72

otherwise" contemplate other ways of bringing the right into question (like barring the way, permanently or once a year) which would also in my view be sufficient to negative an intention to dedicate"

9.6 In this case the Objectors claim **[App 14 pg. 348]** that the Application Route was closed off in 2016, whereas the use evidence suggests later dates up to 2020 when the gate was installed. All of these dates appear to be contradicted by the Google Earth images **[App 2 pg. 2-14]** which suggest the installation of barriers at Point **B** on **Plan 1 [App1 pg.1]** circa 2018.

9.7 There are therefore three possible dates of bringing into question 2016, 2018 and 2020. This latter date (2020) can be disregarded because of the evidence of the Google Earth images **[App 2 pg. 10-14].** For the purposes of determining the Application it would be reasonable to consider both of the remaining dates, and their requisite twenty-year periods, namely 1996-2016 and 1998 – 2018. The user evidence appears to cover both of these periods, although evidence of use in the 1990's is minimal.

Use by the Public

9.8 As discussed above, the application is supported by ninety-one witnesses claiming use of the Order Route from 1995 until 2020 (25 years) **[App 4 - 11 pg. 19-301]**. The witnesses are representative of the public at large and are sufficient in number to meet any sufficiency test from 2000 onwards. Prior to this date there is less evidence of use, and its sufficiency may be open to challenge.

Use that is "as of right" and "without interruption"

9.10 For use to be considered to be "*as of right*" it must be without force, without secrecy and without permission, or in other words, for the purposes of establishing a public right of way any use must be trespassory in nature.

9.11 The user evidence **[App 4 - 11 pg. 19-301]** suggests that the use was of a nature which may be defined as being "as of right" throughout both of the twenty-year periods

discussed above. This may be negated in respect of the period 1998-2018 if the 2016 date of challenge is later proved to be correct.

9.12 Interruption means the actual and physical stopping of the enjoyment of the public's use of the way – it is generally held that this is distinct from periods of non-use or sparse use[18] and therefore means some actual action of the landowner, or someone acting with his authority. A common example is the locked gate or bar across a route, often on a certain, specified day in the year. But this is not absolute proof of interruption: for example, as Staughton LJ speculated in *R* v *Secretary of State for the Environment* ex parte *Cowell*[19], a locked gate on Christmas Day only and in a blizzard may not actually and physically stop enjoyment. The nature and intent of the interruption may also be a consideration. For example, in *Lewis v Thomas [1950] 1 KB 438* Lord Evershed M.R. made the point the following way:

> *"The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring took place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance."*

Thus, a gate that had been locked only at night and for reasons other than for the purpose of preventing public use of a road was held not to have caused an interruption to public use.

9.13 There can be no doubt that the clearance of the shipyard and dock site, and the subsequent redevelopment of the site must have had some impact on use of the Application Route. It is however rarely mentioned within the user evidence, and this may be indicative that access in some form or other was maintained whilst the development was undertaken.

[18] Though periods of sparse or non use are relevant to the question of 'full period of twenty years'
[19] [1993] JPL 851

9.14 In the event that the Application Route was unavailable whist the development works were undertaken, the blockage was not for the purposes of preventing the establishment of a public right of way, but for securing the site, for health and safety purposes, against any form of public access at all.

9.15 Taking the above matters into account, and for the purposes of determining the Application, it may be reasonable to conclude that there is insufficient evidence of any interruption during the relevant twenty-year period.

Interim Conclusion

9.15 There is evidence that the existence of a public right of way over the Application Route was brought into question between 2016 and 2018, and as a result the requisite twenty -year period would run from 1996/8 to 2016/18. There is also evidence of use by the public, throughout this time period, which may be defined as being "as of right: and "without interruption".

9.16 Notwithstanding the above, there are clear conflicts in the evidence provided by the Applicants and the Objectors. In *R v Secretary of State for Wales ex parte Emery [1998]* it was held that where there is such a conflict of apparently credible evidence, and a public right of way is reasonably alleged to subsist, an Order should be made to allow that evidence to be tested through the Order making process. This would apply in this case.

9.17 Furthermore, and more recently, the Court of Appeal has in *R (Roxlena Ltd) v Cumbria County Council [2019]* held that the consideration of evidence at this stage of the process was "*necessarily less intense*" than at confirmation stage of the Order process. The evidence might or might not be satisfactorily sustained when the Order comes to be confirmed but that does not mean an Order cannot be lawfully made at this juncture. This judgement applies to circumstances such as this case.

9.18 Taking all of the above matters into consideration, there is a reasonable allegation in favour of a presumption of dedication, of a public right of way of footpath status, pursuant to Section 31 of the Highways Act 1981

Evidence of Lack of Intention to Dedicate (the proviso)

9.19 The above-mentioned presumption of dedication is rebuttable and may be overturned if there if sufficient evidence that, during the relevant twenty-year period, the owner of the land took steps to demonstrate a lack of intention to dedicate.

9.20 The issue of what constituted sufficient evidence of a lack of intention to dedicate was the central issue to *R (on the application of Godmanchester Town Council) (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other Action [2007] UKHL 28.* At paragraph 33 of the judgement Lord Hoffmann set out the matter as follows*:*

> *33. It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in Billson's case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.*

9.21 The only evidence of acts which would meet the requirements of the "*Godmanchester*" case, would be the obstruction of the Application Route from 2016/8 onwards. These are the same acts that brought into question the existence of public rights over the Application Route and triggered the provisions of Section 31 of the Highways Act 1980. As these events constate the trigger point/end point of the

twenty-year period, they cannot be considered to fall within the twenty-year period. As a result, they are insufficient to defeat the initial presumption of dedication.

9.22 In view of the above it would be reasonable to conclude that there is a reasonable allegation in favour of the establishment of a public footpath along the Application Route and therefore the Surveying Authority's Statutory obligation to make the requested Definitive Map Modification Order.

9.23 Whilst it cannot be lawfully taken into account at this stage of the process, it should be noted that the above conclusion is without prejudice to any decision whether the alleged rights can be shown on balance of probability to subsist, that being the higher evidential test to be met at confirmation stage of the Order process.

10.0 Assessment of User Evidence (Common Law)

10.1 In order to imply dedication under the Common Law, it is necessary for those asserting the right of way to prove that the landowner intended to dedicate the alleged rights, and then also demonstrate acceptance by the public (usually by way of public use).

10.2 Factors which may be considered to be in favour of inferring dedication may include:

a) the route being made physically available as a walkway as part of the site development (See Google Earth images **[App 2 pg. 5]**); and,
b) the original plan, and publication of plans etc **[App 13 pg. 305-347]** for the Application Route to form part of the England Coast Path, along with signage to that effect.

10.3 Both of the above factors much have been in the knowledge of, and with the acquiescence of, the landowner. Furthermore, there is no evidence of any steps being taken to prevent the establishment of public rights, yet there is evidence of use of the route by the general public, as of right, for up to 20 years prior to it being blocked off between 2016 and 2018.

10.4 Factors which may be considered to go against any inference of dedication include the fact that the land was subject to leases and mortgages between 2008 and 2016. This raises questions over the landowners "capacity to dedicate' during this period; and may, or may not, amount to a complete bar to dedication being inferred under the common law. It very much depends upon the facts of the individual case.

10.5 The combination of factors discussed above, in particular the setting out of the Application Route as a walkway, and its initial promotion and signage as part of a national trail make it difficult to understand how the landowner would not have known about these matters, and the subsequent use the Application Route. On the other hand, the landowner could not carry out any acts which put him/her in breach of the leases that were assigned to the land.

10.6 This is again perhaps a situation where reference must be made to the guidance of the Court of Appeal has in *R (Roxlena Ltd) v Cumbria County Council [2019]* where it was held that the consideration of evidence at this stage of the process was "*necessarily less intense*" than at confirmation stage of the Order process. The evidence might or might not be satisfactorily sustained when the Order comes to be confirmed but that does not mean an Order cannot be lawfully made at this juncture.

11.0 Conclusions

11.1 In conclusion:

a) There is a reasonable allegation in favour of a presumption of dedication pursuant to Section 31 of the Highways Act 1980, and no evidence of overt acts demonstrating any lack of intention to dedicate public rights over the Application Route; and

b) There is also a reasonable allegation in favour of an inference of dedication under the common law, albeit there are questions over the landowner's lawful capacity to dedicate at certain times.

11.2 Notwithstanding the above, it must be acknowledged that there are conflicts in the evidence which cannot be reconciled at this time. Therefore, the guidance provided by the Courts in In *R v Secretary of State for Wales ex parte Emery [1998]* should be applied, and the case be tested through the full legal order process.

11.3 If the Surveying Authority is satisfied that the "reasonable allegation" test has been satisfied (as concluded above), then they are duty bound to make a Definitive Map Modification Order to add the Application Route to the Definitive Map as a Public Footpath. The decision to make such an Order is without prejudice to any view over whether the alleged public footpath rights can be shown, on balance of probability, to subsist, that being the test to be considered at confirmation stage of the legal order process.

12.0 Decision Making Options

12.1 If, having considered all of the available and relevant evidence, the Surveying Authority are satisfied that there is a reasonable allegation in favour of the existence of public footpath rights over the Application Route, they should resolve that:

a) A Definitive Map Modification Order be made to add the route shown by a broken black line (A-B) on Plan 1 attached to the report, to the Definitive Map and Statement of Public Rights of Way;
b) In the event of objections being received, and not subsequently withdrawn, the Order be referred to the Secretary of State for determination;
c) In the event of no objections being received, or received and subsequently withdrawn, the order be confirmed by the Council.

12.2 If, having considered all of the available and relevant evidence, the Surveying Authority are not satisfied that there is a reasonable allegation in favour of the existence of public footpath rights over the Application Route, they should resolve to refuse the Application and advise the Applicants of their rights of appeal.

13.0 Recommendation

13.1 The decision whether or not to make a Definitive Map Modification Order is "*quasi-judicial*" in its nature, therefore the Authority must make its own decision based upon the available and relevant evidence. Notwithstanding this, it is the Consultant's view that it would be appropriate to make the requested Order.