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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

Supplementary Report

Client: South Tyneside Council

1.0 Introduction

- 1.1 On 29th March 2023 a report (**the Carr Report**) was submitted to South Tyneside Council (**the Surveying Authority**) by Robin Carr Associates. The report sought to assist the Surveying Authority in the determination of an application (**the Application**) for a Definitive Map Modification Order which sought to add the route (**the Application Route**) shown by a broken black line (**A-B**) on **Plan 1 [RCA App 1 pg. 1]** to the Definitive Map and Statement for the former County Borough of South Shields.
- 1.2 The Surveying Authority subsequently consulted the Objectors and other parties to the to the Application and allowed a period for the submission of further additional evidence and submissions (collectively referred to as **The New Evidence**). The New Evidence was submitted to the Surveying Authority on 27th October 2023. Natural England also made representations to the effect that the Coastal Path was more than “aspirational” as described at section 7.5 of the Carr Report, and provided references to its statutory effect.
- 1.3 This report (**the Supplementary Carr Report**) considers the New Evidence, as far as is reasonably necessary, to assist the Surveying Authority in reaching a decision over whether or not to make the requested Definitive Map Modification Order.

Format of this Report

- 1.4 The Supplementary Carr Report should be read alongside the original Carr Report and the Objector's New Evidence. Where any document contained within the appendices to the Carr Report is referred to, it is reference as follows: **[RCA App xx pg. xx]**. Where reference is made to any point in submissions contained within the Objector's New Evidence, they are referenced as follows: **[OBJ pg. xx para. xx]**. Where reference is made to any evidence contained the Objector's New Evidence, they are referenced as follows: **[OBJ App xx. pg. xx]**.

Statement of Truth

- 1.5 Section 4 of the Carr Report contained a Statement of Truth. That Statement of Truth remains in place and applies to this Supplementary Report as well.

2.0 Issues Arising from the New Evidence

Highways Act 1980, Section 31

- 2.1 Paragraph 9.7 of the Carr Report concluded that there were two possible dates when the existence of public rights was brought into question, namely the Objector's asserted date of 2016 **[RCA App 14. Pg 348]** and 2018 based upon the available Google Earth images **[RCA App 2 pg. 2-14]**.
- 2.2 A later date in 2020 was disregarded due to the evidence of obstruction in 2018 on the Google Earth images **[RCA App 2 pg. 2-14]**.
- 2.3 It should be further noted that on 6th July 2018 Statutory Instrument 2018 No 815 The Access to the Countryside (Coastal Margin) South Bents to Amble) Order 2018 (new appendix **[RCA App 15 pg. 500-502]**) came into effect. This designated the Application Route as part of the English Coastal Path (now the King Charles III England Coast Path) which means it is subject to a statutory right of access within the meaning of "access land" under the provisions of the Countryside and Rights of Way Act 2000. A Google Earth image from April 2018 **[RCA App 15 pg. 521]** suggests that at around the time of

this designation the adjoining properties had not encroached on or across the route. To some extent this renders the Application for a Definitive Map Modification Order somewhat redundant, however for the purposes of the determination of the application it does mean that any use after 6th July 2018 any use would be “by right” as opposed to being “as of right”. Only use that is “as of right” can be considered for the purposes of any presumption of dedication pursuant to Section 31 of the Highways Act 1980, or under the common law.

- 2.4 In view of the above two possible twenty-year periods may be considered, namely **1996-2016** and **1998-2018**.
- 2.5 For completeness, the Objectors also introduced an additional date of bringing into question, within the New Evidence [**OBJ pg. 2 para 3**], when they say the Application Route was blocked off and remained blocked for a period of 15 months starting in May 2007. If correct, this would create a further twenty-year period of 1987-2007. This latter new twenty-year period can, however, be readily dismissed because the user evidence [**RCA App 4 - 11 pg. 19-301**] in support of the Application only dates back too circa 1995 at the earliest.
- 2.6 Before considering the evidence and effect of the Application Route allegedly being temporarily fenced off with heras fencing, it would be expedient to consider the claim that an old dock located at **Point Y [RCA App 1 pg. 1]** was not filled in and reclaimed until sometime between late 1998 and early 1999. Prior to that use would have been impossible due to it being filled with sea water.
- 2.4 Aerial Photographs contained within the New Evidence [**OBJ App 1 pg. 1.0-1.11**] clearly show the continued existence of the dock at **Point Y [RCA App 1 pg. 1]** until 1998, thus rendering any use of the Application Route prior to that time impossible. For the purposes of the earlier of the two twenty-year periods mentioned above (1996-2016) it is not necessary to identify when in 1998/1999 the dock was filled in. The existence of

the dock means that the time period 1996-2016 cannot be considered further for the purposes of Section 31 of the Highways Act 1980.

- 2.5 The existence and infilling of the dock at **Point Y [RCA App 1 pg. 1]** may also have an impact on the remaining twenty-year period (1998-2018). Given that it would appear that the dock was reclaimed and in-filled in late 1998/early 1999, it is quite likely that the required twenty-year period of use would fall short by anything up to six months or so. If that is the case, then this time period (1998-2018) also cannot be considered further for the purposes of Section 31 of the Highways Act 1980.
- 2.6 The Objectors refer to two other matters which they suggest are fatal to any claim based upon the remaining time period (1998-2018) namely, the erection of temporary heras fencing between May 2007 and August 2008 and again between 2016 and 2018. They suggest that this is evidence of interruption to public use and evidence of a lack of intention to dedicate.
- 2.7 Whilst there is no doubt that on both occasions the fencing did prevent actual use of the Application Route, the erection of the fencing etc must be considered in the context of what constitutes interruption and lack of intention to dedicate for the purposes of Section 31 of the Highways Act 1980.
- 2.8 The fencing was not specifically erected to prevent use of the Application Route, it was erected as part of the far wider purpose of securing the entire development site. In other words, the fencing would have been erected regardless of the existence of the Application Route. The temporary fencing of development sites is a practice that will be found on just about every development site in the country.
- 2.9 In *Owen v Buckinghamshire CC (1957) 55 LGR 373* the Court held that the ploughing of a footpath was insufficient to bring the existence of a footpath into question because it was such "*a common occurrence*" (*my emphasis*) in the countryside, and it did not imply the necessary intent on the part of the landowner.

2.10 The issue of a landowner's intention, how it is conveyed, and whether it is sufficiently overt, can be a key consideration in a number of elements of the tests found within Section 31 of the Highways Act 1980. Therefore, if the erection of temporary fencing around an entire development site is considered "*a common occurrence*", as it would appear to be, it may be analogous to the ploughing of paths in the *Owen* case. Whilst *Owen* related to the bringing into question of the existence of a path, it may also be material to the interpretation of issues surrounding "*interruption*" and "*lack of intention to dedicate*" where "*intent*" may be a material consideration.

2.11 In *Fernlee Estates Ltd v City & County of Swansea & Anor [2001] EWHC Admin 360* the Court held that the temporary obstruction of a way by building works was insufficient to constitute an "*interruption*" to use within the meaning of Section 31 of the Highways Act 1980. That being the case, the temporary erection of the heras fencing around the development site, which coincidentally also temporarily blocked the Application Route, does not necessarily render the route being subject to an interruption. It should however be noted that whilst in both "*Fernlee*" and this application the public were able to continue their journeys by way of a diversionary route, the nature and extent of the obstructions (which were alleged to constitute the "*interruption*") in "*Fernlee*" appear to have been somewhat smaller and over shorter timescales than the current case.

2.12 In *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 R (on the application of Drain) (Appellant) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and other action* at paragraph 33 Lord Hoffmann said:

"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."

2.13 In summary, this means that in order to demonstrate a lack of intention to dedicate the landowner must carry out some act or acts which are sufficiently overt, and directed at actual users of a way, so that they may be appraised of the landowner's lack of intention to dedicate. It is therefore possible that some acts, which may be considered to show a lack of intention to dedicate may not be "*sufficient*" or "*sufficiently overt*" so as to meet the test.

2.14 As discussed in para 2.10 above, if the erection of temporary fencing around an entire development site were to be considered "*a common occurrence*", as it would appear to be, it may be analogous to the ploughing of paths in the *Owen* case. Whilst *Owen* related to the bringing into question of the existence of a path, it may also be material to the interpretation of issues surrounding "*lack of intention to dedicate*". It raises the question of whether the fencing of the entire site, and not just the Application Route, was in the eyes of the users sufficiently overt for them to understand they were being told the route was not a public right of way (and there was no intention of dedicating it as such) or was it simply a "*common occurrence*" which happens on all building sites? If it was the latter, then this may be considered to be insufficient to overturn any initial presumption in favour of dedication.

Interim Conclusion

2.15 Having considered all of the available evidence the one remaining potential twenty-year period runs from 1998 to 2018, however there is some doubt over whether there is an actual full period of twenty years available. This is because the infilling of the dock at **Point Y [RCA App 1 pg. 1]** circa 1998/99 may cut the required period short. If this is the case, then there would be no full period of twenty years use available and any case pursuant to Section 31 of the Highways Act 1980 would fail.

- 2.16 If the infilling of the dock at **Point Y [RCA App 1 pg. 1]** fell outside of the twenty-year period, consideration would have to be given to the effect of the temporary heras fencing that was placed around the entire development site between May 2007 and August 2008 and again between 2016 and 2018. In particular, it would be necessary to consider whether these actions constituted an interruption to public use and/or a lack of intention to dedicate.
- 2.17 Whilst the “*Fernlee*” case suggests that an obstruction during development works is not sufficient to constitute an interruption for the purposes of Section 31 of the Highways Act 1980, the circumstances between that case and this one may be considered sufficiently different so as to render any reliance upon it unsustainable.
- 2.18 With regard to the fencing constituting evidence of a lack of intention to dedicate, there is certainly a case to say that the erection of temporary heras fencing around the entire development site was not sufficiently overt so as to meet the requirements of the lack of intention to dedicate test as per the “*Godmanchester*” case.
- 2.19 Taken individually each of the above considerations might be fatal to a case based upon Section 31 of the Highways Act 1980, but also, individually they are not necessarily insurmountable. However, when considered collectively they tip the balance in favour of rejecting the Application to modify the Definitive Map.

3.0 Issues Arising from the New Evidence

Dedication at Common Law

- 3.1 Consideration of the issue of dedication under Common Law in the Carr Report focussed on two significant factors, namely:
- a) the Application Route being physically set out, constructed and then thrown open to public use (See Google Earth images **[RCA App 2 pg. 5]**); and,
 - b) the original plan, and publication of plans etc **[RCA App 13 pg. 305-347]** for the Application Route to form part of the England Coast Path, along with signage to that effect.

- 3.2 Both of these matters must have occurred in the full knowledge of the landowner, who took no apparent steps to disabuse the public of the notion that the Application Route was intended to be a public right of way. There certainly appears to have been no formal objection to the designation of the English Coastal Path.
- 3.3 The issue of landowner capacity to dedicate was also raised and it was confirmed that it may have an impact on the outcome of the case.
- 3.4 It would also be fair to say that in drafting the Carr Report the issue of Common Law dedication was a secondary consideration given that a finding in favour of dedication pursuant to Section 31 of the Highways Act 1980 had already been made.
- 3.5 The Objectors submit **[OBJ pg. 18 para 27]** that *“.....Although the 1932 Act and section 31(9) of the 1980 Act retain the possibility of relying on the common law as a means of proving dedication, in practice that is reserved for cases where the period of claimed use is less than 20 years but the circumstances are such that it is clear the landowner must have intended to dedicate. That possibility is far removed from the current case.”*
- 3.6 Contrary to the assertion made in the final sentence above, this is in fact highly relevant to this case. It may be possible to infer the landowner’s intention to dedicate from the direct, clear and overt act of setting out and physically providing the route on the ground. The route was then thrown open to the public who used it in a nature that may be considered to be *“as of right”*. Under such circumstances it is difficult to see how the landowner could not have been aware of the use yet took no steps to prevent it.
- 3.7 There would however still be the issue of whether the landowner actually had the capacity to dedicate public rights of way over the land, because of any mortgages and/or tenancy agreements. The Objectors do however acknowledge **[OBJ pg. 19-20 paras 29-30]** that a landowner could dedicate a public right of way if he/she had the agreement of the lender and/or tenant. It might therefore be inferred that any lenders/tenants did agree to a dedication because the redevelopment of the site

(including setting out the Application Route) would, overall, increase the financial and amenity value of the land.

3.8 There was however a period between 2014 and 2016 when the land was held by Receivers appointed by [REDACTED] [RCA App 14 pg. 350] and during that period there would be nobody with capacity to dedicate.

3.9 Any issues relating to interruption and/or lack of intention to dedicate arising out of the erection of the temporary heras fencing in between May 2007 and August 2008 and again between 2016 and 2018 may be considered in the same manner as discussed above in respect of Section 31 of the Highways Act 1980.

Interim Conclusion

3.10 Taken on face value a case founded upon dedication arising from the common law appears to have some merit, especially given the fact that the landowners, or their agents, specifically laid out the path and initially threw it open to public use. This does not however get over the concerns raised originally in the Carr Report over the sufficiency of user prior to 2000 and landowner capacity to dedicate. The evidence would need to be sufficient to infer that not only the landowner's intention to dedicate but also the agreement of any tenant or mortgage lender at the time. The effect of the erection of the heras fencing between May 2007 and August 2008 and again between 2016 and 2018 would also have to be factored into the equation. When considered collectively these matters again tip the balance in favour of rejecting the Application to modify the Definitive Map.

4.0 England Coastal Path

4.1 Notwithstanding the above it should be noted that whilst it may be concluded that a public right of way has not been established as a result of public use during the period 1999-2018, the Application Route was designated as part of the English Coastal Path (now the King Charles III England Coast Path) [RCA App 15 pg. 499-521]. The Application Route would therefore appear to be subject to a statutory right of access on foot, albeit of a type that would not be recorded on the Definitive Map.

5.0 Decision Making Options

5.1 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 Carr 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.

5.2 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.

5.3 Clarification should also be provided to both Applicants and Objectors over the access status of the Application Route as a result of its statutory designation as part of the English Coastal Path (now the King Charles III England Coast Path)

6.0 Recommendation

6.1 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 refuse the Application.

26th January 2024