



<b>Regulatory Committee:</b>	<b>Commons and Rights of Way Committee; Report of the Lead Commissioner Communities &amp; Infrastructure</b>
<b>Date:</b>	<b>10 December 2024</b>
<b>Chair:</b>	Councillor Hoyland
<b>Presenting Officer:</b>	Julie Haworth
<b>Item Type:</b>	For decision
<b>Purpose of Report:</b>	<p>To supply evidence to enable the determination of the following Definitive Map Modification Order application:</p> <p><b>APPLICATION FOR MODIFICATION ORDER TO ADD A PUBLIC FOOTPATH FROM OAK WAY TO MST30, STONEHOUSE PARISH, GLOUCESTERSHIRE</b> <b>(ref:573/11/212(4))</b></p>
<b>Recommendations of the Presenting Officer:</b>	<p>That an Order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B-C</p>
<b>Background Documents:</b>	<ul style="list-style-type: none"><li>• Sub-heading 8. 'Consultations'.</li><li>• Paragraph 9.7 – Summary of User Evidence Forms</li></ul>
<b>Forthcoming Decisions:</b>	To flag those items that get referred on to Council for determination.
<b>Appendices:</b>	As listed under sub-heading 11: ' <i>Appendices</i> ' in the report.
<b>Contact Information (For information on the report)</b>	Julie Haworth, Asset Data Officer (Definitive Map), Highway Records & DMMO Team Telephone: 01452 427969 Email: julie.haworth@gloucestershire.gov.uk (quoting file reference)

## 1. **RESOURCE IMPLICATIONS**

Average staff cost in taking an application to the Committee - £5,000. Cost of advertising Order in the local press, which must be done twice, is approximately £500 per notice. In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application. If the application were successful, section A-B would be maintainable at the public expense whereas section B-C would not be maintainable at the public expense.

## 2. **SUSTAINABILITY & EQUALITY IMPLICATIONS**

No sustainability or equality implications have been identified.

## 3. **STATUTORY AUTHORITY**

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section [3]. Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

Section 53(3)(c)(i) relates to the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

**HIGHWAYS ACT 1980 - Section 31:** Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 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.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

## **PRESUMED DEDICATION AT COMMON LAW**

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate the way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises, rests with the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

## 4. **ISSUES TO BE DECIDED**

- 4.1 The primary issue to be decided is whether there is evidence to show that public rights 'subsist' or are 'reasonably alleged' to subsist. It is not necessary therefore for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map and Statement ("DMS") can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and Landowners on the other, an order should be made so that the evidence can be tested at a public inquiry.
- 4.2 Where a Definitive Map Modification Order ("DMMO") is made, the process allows for objections to the order to be submitted. Further evidence could potentially be put forward for examination along with an

objection. In these circumstances, the County Council cannot confirm the order, and the matter would need to be referred to the Secretary of State.

- 4.3 Where an order has been made and no objections are received, the Order Making Authority (“OMA”) can confirm it.
- 4.4 In the event of an application under Section 53 being refused, the applicant has the right to appeal against the decision to the Secretary of State, who may direct the OMA to make the order that is sought.

## **REPORT**

### **5. BACKGROUND**

- 5.1 A location map at scale 1:10,000 (**JAH1**) showing the position of the claimed route within Stonehouse parish. It is found within Ordnance Survey Grid Square SO 8005. A plan of the claimed route at a scale of 1:1250, is appended (**JAH2**).
- 5.2 The DMMO application was made by Mr Tipper on 14 February 2023, and included Form 1 and an accompanying scaled plan (1:1,000) of the claimed route which is highlighted in blue. Form 3 was also supplied, certifying that permission had been given by GCC to the applicant to erect impersonal notices on site to give notice of the application.
- 5.3 H M Land Registry (“HMLR”) shows the upper part of the claimed route (B-C) as unregistered land and therefore information on the same is not held at HMLR. However documents that are available indicate that this unregistered land is owned by Melbourne Investments Limited, (a wholly owned subsidiary of Taylor Wimpey PLC) by way of transfer from Halls-Keck Investments Limited on 6 February 1973. Taylor Wimpey have stated that they are unable to confirm this. This lack of confirmation would not preclude statutory dedication. There is no explicit reference in section 31(1) HA80 of use having to be of a level to have come to the attention of the Landowner. It does not speak of a *landowner being deemed to have dedicated* the way, but of the *way being deemed to have been dedicated*, i.e., irrespective of the existence or non-existence of a person capable of dedicating the routes.

### **6. DESCRIPTION OF CLAIMED ROUTE**

- 6.1 The claimed route was inspected on 1 March 2023 and 10 September 2024. It commences at a point marked A on the plan at Ordnance Survey Grid Reference (“OSGR”) SO 8093/0537 at its junction with Oak Way (publicly maintainable highway 407737) for approximately 34.5m metres to point B. This section of the claimed route is approximately 1.5m wide with foliage encroaching on the left hand side. It has a tarmacked surface and a streetlight along it. Points B-C is an unrecorded route of approximately 73m which ends at public footpath MST30 at OSGR SO 8095/0547. This section of the claimed route comprises of unenclosed scrub and grassy areas ascending to woodlands with a muddy and grassy track which varies in widths of between 1-3m. The claimed route in its entirety runs in a north/northeasterly direction. Photographs are appended (**JAH3A-J**).

### **7. DOCUMENTARY EVIDENCE**

- 7.1 **Under Section 32 of the Highways Act 1980, when 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 in 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.**
- 7.2 The County Archivist has examined sources in the Gloucestershire County Record Office to see if this route is marked in any way and has identified other sources which might be useful in establishing the status of any right of way along this route. These sources have then been checked by the Asset Data Officer.

- 7.3 Ordnance Survey Maps;** The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.
- 7.4** The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.
- 7.5 Ordnance Survey 1811 2":1 mile Pen & Ink on Paper Drawing attributed to Robert Dawson (Cheltenham OSD172) Wikimedia** - This drawing shows Doverow Hill and surrounding area, but does not show the claimed route.
- 7.6 1824 Bryant & Greenwoods Maps** – do not identify the claimed route.
- 7.7 Ordnance Survey 1st edition 1":1 mile 1830 (Published at the Tower of London) Sheet 35 (National Library of Australia)** - This is a colour washed first edition 1":1mile map "engraved at the Drawing Room in the Tower under the Direction of Lieut. Col. Colby of the Royal Engineers"... "Published 1 May 1830" from the pen and ink drawings of the Royal Corps of Military Surveyors and Draughtsmen as referred to in para 7.6 above. The claimed route is not identified.
- 7.8 Stonehouse Inclosure Map & Award (Gloucestershire Archives - Q-RI-129)** The claimed route is not identified.
- 7.9 Stonehouse Tithe Map 1839 (Gloucestershire Archives - GDR/T1/172)** The claimed route is not identified.
- 7.10 Ordnance Survey First, Second & Third Editions; 25"1 mile, Map sheets 41.14; published 1885, 1902 & 1923 - (National Library of Scotland);** The claimed route is not identified.
- 7.11 National Archives - Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25": 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheet 41.14.** The claimed route is not identified.
- 7.12 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 ("NPACA 1949"); Glos Archives.** The claimed route was not identified under this process.
- 7.13 DOCUMENTARY EVIDENCE CONCLUSIONS;-** The documentary evidence is considered to be insufficient on its own to establish dedication of the claimed route.

## **8. CONSULTATION**

- 8.1** In September 2024, the following organisations, user groups, adjacent landowners (as identified by Land Registry) and landowner (as identified by researched documentation) were consulted regarding this application: Stonehouse Town Council, Linda Maiik, Mr and Mrs Lane, Ms Foxcroft, Taylor Wimpey (Melbourne Investments), Stroud District Council, County Councillor Housden, The Ramblers Association, and the Open Spaces Society. Responses were received from The Open Spaces Society

representative, Stroud District Council, all of which can be read in full, as background papers to this report.

- 8.2 Mr Townley, local representative of The Open Spaces Society** responded by email on 5 September 2024. The following comments were made: *“This claimed route crosses an area of open land which remains in the ownership of the original development company Melbourne Investments, which carried out the Oak Way/Rosedale Avenue/Anderson Drive development on land acquired from the 1963 brickworks company. Melbourne Investments incidentally was originally taken over by Wimpey but has subsequently been taken over by Taylor Woodrow (now renamed Taylor Wimpey) and is a third level subsidiary within a large group structure. My understanding is that both Stroud District Council and Stonehouse Town Council (then of parish council status) were originally offered the opportunity to acquire the land and quarry face as public open space but neither was willing to accept the significant risks. Whilst the quarry face had significant nature conservation interest it was seriously damaged by the developer prior to Natural England (or its predecessor organisations) deciding whether to protect it as a SSSI. Melbourne Investments currently do not actively involve themselves in the management of the land and there is no evidence that the company has taken active management of this area. The evidence that this area is managed as “public open space” is non-existent and I have been unable to find any S106 Town and Country Planning Act 1990 or similar under earlier iterations of TCPA legislation) which covenants the area as public open space and therefore I believe that use has been “as of right” rather than the “as right” which would apply if the use was by permission of the landowner”.*

*“I would though point out that the user evidence for this route is unlikely to stretch back to before 1 January 1960 - the commencement date of the Highway Act 1959, which without any genuine or proper consultation repealed Section 47 of the National Parks and Access to the Countryside Act 1949 which would have enable this route to be “maintainable at public expense” for any path “shall apply to all public paths, whether coming into existence before or after the commencement of this Act”. I would therefore urge that the County Council considers making a Section 25 Order, on the basis that this would not only require the county council to maintain the route but also place a statutory duty to protect and assert the public rights to use the route....”.*

- 8.3 Mrs Margaret Foxcroft of 9 Oak Way, Stonehouse** responded to Andrew Houldey, Asset Data Officer (PROW Definitive Map) by telephone on 19 September 2024. She said, *“that she has no legal interest in the path, she has lived there for 10 years and has known the path since 1982 – she has no issues with the path”.*
- 8.4 Richard Hanman of Stroud District Council** responded by email on 19 September 2024; *“Having reviewed the documents you have provided I can confirm on behalf of SDC that it has no comments to make”.*

## **9. USER EVIDENCE**

- 9.1 Section 31(1) of the Highways Act 1980 (“s31HA80”)** states that where a way over any 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’; without force, secrecy or permission and without interruption for a full period of 20 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”.
- 9.2 Section 31(2)** states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public to use the way is brought into question through an overt act by the landowner which makes it clear to the public that their right is being challenged.
- 9.3 When the status of the claimed route was called into question;**
- 9.4** The date of calling into question is simply the date when, as the result of some action, the public’s entitlement to use the way was challenged. Where no action was taken to question or challenge the public’s use of the route, as with this application, section 69 of the Natural Environment and Rural

Communities Act 2006 (NERC) provides that the date of the DMMO application can be used in accordance with paragraph 1 of Schedule 14 to the Wildlife & Countryside Act 1981.

- 9.5 For this report therefore, the user evidence will be assessed over the 20-year period 2003-2023 leading up to the application.**
- 9.6** Under s31HA80, after a period of 20 years user 'as of right', it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that he has taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner's intentions. The analysis of the user evidence is detailed in the following paragraphs.
- 9.7** This report will consider the 10 User Evidence Statements ("UESs") completed by 10 individual members of the public in support of this application (**573/11/212(4)**) plus five UESs submitted as part of a separate application (**573/11/212(6)-(10)**). A summary & bar chart are appended (**JAH4**).
- 9.8** All 14 individuals claim use of the application route on foot dating back to 1978, 1 of whom also claimed use by pedal cycle. 1 individual didn't give any information regarding method of use. 11 individuals identified a route which is consistent with the depiction of the claimed route A-B-C as shown by the applicant. In addition, 4 individuals also covered the claimed route but included a short section from Point C, across a field boundary which incorporated a stile which then led to an unrecorded route into land known as Verney Fields. This short section is being considered as part of application 573/11/212(6)-(10).
- 9.9** One individual, identified in the summary as No.11, claimed use of the route by bicycle in addition to by foot. In the case of *R v SSETR ex parte Dorset County Council (1999)* it was accepted that, "*although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test of dedication*". Therefore, the evidence supplied by one individual of bicycle use along these application routes, would also be insufficient to infer dedication of a bridleway or restricted byway.
- 9.10** An inspection of the 10 UESs within the **573/11/212(4)** application, suggests an element of collusion. The maps attached to the UESs appear to have been drawn by one hand using the same colour. The answers provided to the questions regarding use of the claimed route however were sufficiently different.
- 9.11** It is not essential for the claimed route to have been used for the full period of 20 years by the same persons; the period may accrue as a result of use by different persons for shorter periods (*Davis v Whitby (1974)*). Nor does it matter that the use is not continuous in the sense that it may not have occurred every day. Mr Tipper, Mrs Tipper, Ms Shere-Massey, Ms Davis, Ms Armstrong, Mr Capener & Ms Martin claimed use of the route over the whole 20 year qualifying period. Mr Harris, Mr Fulton, Ms Kambites, Ms Silsbury, Ms Finney, Ms Bell and Mr Howard claim use of the route over a 10-20 year period and the remaining individual Ms Foxcroft claim less than 10 years use. With regard to sufficiency, it was held in *Mann v Brodie 1885* that '*the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. In a semirural area such as this, it would be generally accepted that the amount of use of a way may be less than a way in an urban area*'.
- 9.12** Mr Harris, Mr Tipper, Ms Foxcroft, Ms Shere-Massey, Mrs Tipper, Ms Davis, Mr Fulton, Ms Martin and Mr Capener all assumed that the claimed route was already a public right of way. Mr Harris and Ms Shere-Massey commented on the fact there was tarmac and streetlighting present, Ms Martin, Ms Kambites, Mr Howard and Ms Armstrong noted that the route was very well used, and Mrs Tipper, Ms Kambites and Mr Capener all commented on the links between the claimed route and Verney Fields/Doverow Hill.
- 9.13** None of the 15 individuals supplying evidence of their use of the claimed route noted stiles, gates, notices, or obstructions along the route and none were challenged or verbally turned away.

- 9.14 Use by the ‘public’:** All of the 15 individuals claiming use of the route live either at Oak Way, Rosedale Avenue, Verney Road or Glen Court. Consideration therefore should be given to whether this constitutes use by the ‘public’. There appears to be no legal interpretation of the term ‘the public’ as used in s31. The dictionary definition is “the people as a whole, or the community in general. Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) in *R v Southampton (Inhabitants)* 1887 said “*user by the public must not be taken in its widest sense... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.*”. This report considers therefore that use of this application route does constitute use by the public.
- 9.15** The user evidence shows that all individuals used the claimed route to access local schools, work, or walking dogs. Observations made by some of the 15 individuals include;
- Mr Harris of Rosedale Avenue (8 years claimed use) stated; “*The existence of a tarmac path and clear evidence of multiple use over the grass section, and the provision of a streetlight (shown on the map) has always led me to believe it is a public path.*”.
  - Ms Shere-Massey of Oak Way (22 years claimed use) stated; “*I have been a daily dog walker using this route and was surprised to learn that it is not included on the Definitive Map of public footpaths especially in view of the first part (Oak Way end) being tarmac and having street lighting which is regularly maintained.*”.
  - Ms Kembites of Oak Way (13 years claimed use) stated; “*The path concerned is a well-used route to access Verney Fields.*”.
- 9.16 Use ‘as of right’ (without force, secrecy, or permission);** for a claim to give rise to a presumption of dedication, user must be without force, secrecy, or permission. Use that complies with these three requirements is termed user ‘as of right’. The House of Lords in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) reasserted an ancient principle namely, that if sufficient people carry on an activity openly and for long enough without anyone trying to stop them, it is right and proper that the activity should be treated by the law as having a lawful origin. The House of Lords held that it was only necessary to prove that they have made use of the routes without resort to force, secrecy and as if they had a right to do so – that is, without having been granted any licence/ permission by the landowner. There is no evidence that use of the claimed route was by force, secrecy or permission.
- 9.17** This application would therefore support a case for deemed dedication as a public footpath.
- 9.18 Whether there is evidence of a lack of intention to dedicate a public right of way;** “Intention to dedicate” was considered in *Godmanchester 2007*, which is the authoritative case dealing with s31HA80. In his leading judgement, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held “*in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate.*”.
- 9.19** As previously explained, the land over which the claimed route crosses (Points B-C) is unregistered. There is no explicit reference in section 31(1) HA80 to use having to be of a level to have come to the attention of the landowner. It does not speak of a *landowner being deemed to have dedicated* the way, but of the *way being deemed to have been dedicated*, i.e., irrespective of the existence or non-existence of a person capable of dedicating the way. Therefore, the fact that part of the route crosses unregistered land would not preclude a claim of presumed dedication, and it follows that the absence of evidence of a lack of intention to dedicate a public right of way on the part of a landowner will also not prevent the presumption of dedication.
- 9.20** The ‘sufficient evidence’ must be inconsistent with an intention to dedicate, it must be contemporaneous, and it must have been brought to the attention of those people concerned with using

the way. There has been no evidence provided of use being publicly challenged or of a lack of intention to dedicate prior to 2023.

**9.21** If it is considered that highway rights are reasonably alleged to subsist resulting in the direction that an order should be made to add the claimed route to the Definitive Map, it should be noted that Points B-C of the claimed route will not be accepted as publicly maintainable on the basis that public rights came into being post 1959 when criteria for route proposed for adoption as publicly maintainable was introduced. Under our general duty of care however as an authority, we would work with the Landowner to ensure that highway rights can be exercised.

## **10. CONCLUSIONS**

**10.1** Section 53(3) (c) (i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

**10.2** Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence discovered by the Council, when considered with all other relevant evidence available, shows that the Definitive Map and Statement require modification because a right of way which is not shown on the map and statement subsists, or is reasonably alleged to subsist. The relevant tests are now set out in section 4.4 of the Defra Rights of Way Circular 1/2009, version 2 (October 2009) and discussed below.

**10.3** Analysis of the 14 accepted UESs indicates that the claimed route, as described and marked on the accompanying maps, has been used by members of the public, on foot, 'as of right' and without interruption for over 20 years. No evidence has been provided of any subsequent challenge to public use or a lack of intention to dedicate the claimed route prior to the application in 2023. It is submitted that this claimed route is deemed to subsist and must now be protected by being recognised on the Definitive Map as a public footpath.

**10.4** Therefore, the recommendation is as follows:

- That an Order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B-C.

## **11. APPENDICES:**

**JAH1** 1:10,000 scale - Location Map

**JAH2** 1:1,250 scale - Claimed Route Map

**JAH3A-J** Photographs of Claimed Route

**JAH4** Summary of User Evidence Statements (Sheet 1) - Bar chart of use (Sheet 2)