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Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981

Application for Definitive Map Modification Order

Alleged Public Footpath from Churton Road (Opposite Brewery Lane) to

Public Footpath, Farndon No 8. Parish of Farndon

Client: Cheshire West and Chester Council

1.0 Introduction

1.1 This report seeks to assist Cheshire West and Chester Council (**the Surveying Authority**) to determine an application for a Definitive Map Modification Order to add an alleged Public Footpath (**the Application Route**) to the Definitive Map and Statement for the area. The Application Route runs from Churton Road (Opposite Brewery Lane) to Public Footpath, Farndon No 8 and is shown by a broken black line (**A-B**) on **Plan 1 [App 1 pg. 1]** attached to this report.

2.0 Background

2.1 The Application route runs along the alignment of an old lane which, by reference to the 1840 Tithe Map [**App 2 pg. 2**] for the area, is shown to have physically existed for at least the last 180 years. Other documentary evidence is limited, but Ordnance Survey Maps [**App 2 pg. 3-5**] show its continued existence and the 1910 Finance Act Index Plan [**App 2 pg. 6**] suggests, by way of its inclusion in the adjoining land holding, that it was not considered, at that time, to be a public highway of any description.

2.2 For the avoidance of any doubt, for the purposes of establishing the existence or otherwise of any public right of way, no reliance is placed upon the above-mentioned historic documentary evidence. It does however assist in establishing the physical existence of the lane.

2.3 Over approximately the last decade, the land in the immediate vicinity of the Application Route has been subject to housing development. This has completely changed the character of the land surrounding the Application Route. The development of the area has also resulted in an increase in use of the Application route as a short cut between the new development and the old village.

- 2.4 In 2019 the owner of one of the properties adjoining the Application Route installed a gate across the Application Route and “Private Road” sign at its junction with Churton Road. It is understood that a fence was also erected across the Application Route, but that this was subsequently removed.
- 2.5 In response to the above, in March 2020 Farndon Parish Council (**the Applicants**) submitted an application [**App 3 pg. 7-17**] to the Surveying Authority, for a Definitive Map Modification Order to add the Application Route to the Definitive Map and Statement for the area.
- 2.6 The Application [**App 3 pg. 7-17**] was supported by sixty-three public rights of way user evidence forms [**App 4 – 9 pg. 18-610**] claiming evidence of use for the period 1969-2020 (51 years). A summary of the user evidence is attached to this report under **Appendix 10. [pg. 611-613]**.
- 2.7 In order to progress applications of this nature as expediently as possible the Surveying Authority had adopted the use of independent specialist consultants to undertake packages of work. In this instance Robin Carr Associates has been asked to undertake the required investigations etc and to produce this advisory report to assist the Surveying Authority in determining the Application.

3.0 Legislative Context

- 3.1 Cheshire West and Chester Council are the Highway and Surveying Authority for their area. As a result, they are charged with various statutory duties with regard to public highways (within which include routes often described as public rights of way). This includes, but is not restricted to, a duty to assert and protect public highways; a duty to maintain those highways that are maintainable at public expense; a duty to maintain a record (list) of all highways that are maintainable at public expense; and a duty to maintain and continuously review the Definitive Map and Statement of Public Rights of Way.
- 3.2 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.

- 3.3 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*” applies. 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.

How Highways Come into Being: Dedication and Acceptance

- 3.4 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”.
- 3.5 Claims for the establishment of public rights of way based upon modern user evidence usually rely upon the provisions of Section 31 of the Highways Act 1980 (the 1980 Act) which provides that where a has been used by the public, as of right and without interruption for 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 twenty-year period is calculated back for the date in which the existence of the claimed rights is called into question.
- 3.6 Public rights can however also be established under the common law based upon evidence of public use. Under such circumstances the onus rests upon those asserting that the alleged rights subsist to prove an intention to dedicate on the part of the landowner. There is no requirement for a period of twenty years use under such circumstances.
- 3.7 In cases which rely primarily on historic documentary evidence, the need for any modern-day usage does not apply, nor is there any requirement to demonstrate any twenty-year period from which dedication may be inferred. In historic documentary evidence cases the inference *is* 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.

Definitive Map Modification Orders

- 3.8 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).
- 3.9 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.
- 3.10 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 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.
- 3.11 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.
- 3.12 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.
- 3.13 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.

4.0 Consultations

- 4.1 As part of the investigation process informal (non-statutory) consultations have been carried out. Consultees include all known landowners; user group representatives (e.g. Ramblers); the Parish Council; and, the local Councillor(s) for the area. All consultation responses have been given due consideration, and where appropriate/relevant, they have been considered within the body of this report.

5.0 Summary of Historical Documentary Evidence

5.1 An initial search of historical documentary evidence reveals little evidence that is of assistance in determining the existence of historic public rights. The 1840 Tithe Map [App 2 pg. 2] for the area, Ordnance Survey Maps [App 2 pg. 3-5] and the 1910 Finance Act Index Plan [App 2 pg. 6] do however confirm the physical existence of Application Route as an access to fields. This would suggest that the origins of the old lane, over which the Application Route runs, rest with it being an occupation lane (private road) for access to land.

6.0 Summary of User Evidence in Support of the Application

6.1 A total of 63 user evidence forms [App 4 - 9 pg. 18-610] were submitted in support of the Application. These forms provide evidence of public use over a period of approximately 51 years, from circa 1969 to 2020 when the Application Route was blocked. The forms are summarised in Appendix 10 [pg. 611-613] to this report and provide evidence of regular (daily and weekly) use by many of the witnesses.

7.0 Summary of Evidence Submitted in Objection to the Application

7.1 The owners of a property adjoining the Application Route (**the Objectors**) have made substantial submissions to the Consultants [App 11 pg. 614-668] in objection to the Application. These include the submission of a number of letters/statements from local people who believe that the Application Route is private [App 12 pg. 669-689]. For completeness a copy of all submissions, made direct to the Council, in objection to the application is also appended at Appendix 13 [pg. 690-768] and the Council's Case file on this application is appended at Appendix 14 [pg. 769-857]. Overall, these documents do not provide any evidence of a lack of intention to dedicate on the part of anyone with a landowning interest/capacity to dedicate.

7.2 The Objector's case is somewhat hampered by the fact they only purchased the property in 2018/19. Whilst their own actions, which undoubtedly do demonstrate a lack of intention to dedicate, so far as may own any part of the land crossed by the Application Route, it also serves to bring into question the existence of public rights over the Application Route.

8.0 Discussion

8.1 The decision to make a Definitive Map Modification Order is quasi-judicial in nature. This means that the decision-maker(s) act in a manner that is comparable to a court of law. In doing so the decision-maker(s) must take into account all available and relevant evidence, and allow all interested parties a reasonable and fair opportunity to put their case. Ultimately the decision must be made based upon consideration of

all available and relevant evidence, and not simply the recommendation of a third party.

- 8.2 When considering whether or not to make a Definitive Map Modification Order the Surveying Authority should be minded of the fact that such Orders do not extinguish or create any public rights of way. They do nothing more than amend the legal record to reflect the current and legal situation. By way of example, if an Order is made to add a footpath to the Definitive Map, the footpath must, as a matter of evidence, be shown to already exist/have come into being. As a result, issues such as desirability, suitability, need, anti-social behaviour, security, crime prevention, privacy and even public safety, whilst all undoubtedly genuine concerns, are not matters that can lawfully be considered as part of the decision-making process. They are, of course, matters that may have to be addressed if the alleged public right of way is shown, on balance of probability, to subsist.

Highways Act 1980, Section 31

- 8.3 It is perhaps most appropriate to first consider the user evidence under the statutory scheme set out within Section 31 of the 1980 Act. This provides that where a way is used by the public, in a manner which may be defined as being as of right and without interruption for a full period of twenty years, a presumption of dedication will arise. Such a presumption may be overturned if there is evidence that the owner of the land has carried out sufficiently overt acts aimed at those using the way, that he/she had no intention to dedicate. The abovementioned twenty-year period is to be calculated back from the date upon which the existence of the alleged public right of way is brought into question (challenged).

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

- 8.4 Before the provisions of Section 31 of the Highways Act 1980 come into effect there must be some action or event which brings into question the existence of the alleged public right of way (e.g. the locking of a gate or the erection of notices advising that there is no public right of way. The requisite twenty-year period is then calculated back from that date of challenge. Where no such challenge has occurred, Section 31 (7A & 7B) allow for the date of the submission of an application for a Definitive Map Modification Order to be used instead.
- 8.5 Based upon the information available, the installation of the gates, fencing and signs in 2019 would appear to be the first point when the existence of public rights was first called into question. If this is the case the requisite twenty-year period would be 1999-2019.

- 8.6 The Objectors do however suggest that the Application Route was blocked off for a four-year period between 2014/15 and 2018/9 when the adjacent housing development was undertaken. This is not referred to by any of the user witnesses. If this is the case, then it may shift the twenty-year period to 1994-2014. However, it is possible that this blocking of the Application Route, for safety purposes, while the development was underway, did not bring onto question the existence of the public right of way.
- 8.7 The act which brings into question the existence of a public right of way for the purposes of Section 31 of the Highways Act 1980 must be sufficient to bring it home to the public that their right to use the way is being challenged, thus allowing them the opportunity to respond (e.g. with an application for a Definitive Map Modification Order). A temporary obstruction of the way for the purposes of facilitating development may not be considered sufficient to meet this test.

Use by the Public

- 8.8 The user evidence forms [App 4 - 9 pg. 18-610] suggest use by the public as opposed to any closed section of the community. There is a considerable amount of user evidence in support of use of the Application Route over the full twenty-year period.

Use that is As of Right and Without Interruption

- 8.7 The term “as of right” means: without force, without secrecy and without permission. No evidence has been forthcoming which would suggest that use has been either forceable or secretive, nor is there any evidence that any of the use was in the exercise of permissions granted by or on behalf of the landowner. This use would therefore appear to be “as of right”.
- 8.8 None of the user evidence [App 4 - 9 pg. 18-610] suggests that there has been any interruption to public use during the requisite twenty-year period. However, the Objectors suggest [App 11-13 pg. 614-768] that the Application Route was blocked off for a period of up to four years between 2014/15 and 2018/19 when the area was subject to housing development. This is quite a significant period of interruption (4 years), but it is not referred to by any of the user witnesses, which is unusual. Given that the Objector’s only moved into the property at the end of this alleged period of blockage, their understanding of the situation may be incorrect.

Interim Conclusion

- 8.9 The available evidence [App 4 - 9 pg. 18-610] suggests that the existence of public rights was brought into question in 2019/20 when gates, a fence and signs were erected. The requisite twenty-year period would therefore be 1999 to 2019. Notwithstanding this, the Objectors suggest [App 11-13 pg. 614-768] that the Application Route was blocked off for a four-year period commencing circa 2014. If this is correct, then then the twenty-year period may shift to 1994-2014.
- 8.10 The user evidence [App 4 - 9 pg. 18-610] indicates that public use extended over both of the above twenty-year periods and that such use was both as of right and without interruption. There is however evidence [App 11-13 pg. 614-768] submitted by the Objectors, that use was interrupted for a four-year period between 2014 and 2019. It would therefore appear there is there is a clear conflict in the evidence which cannot be reconciled.
- 8.11 The Court of Appeal has in *R (Roxlena Ltd) v Cumbria County Council [2019]* said that the consideration of evidence at this stage of the Modification Order process was “*necessarily less intense*” than at confirmation stage. The evidence might or might not be satisfactory sustained when the Order comes to be confirmed but that does not mean an Order cannot be lawfully made at this juncture.
- 8.12 Furthermore in *R v Secretary of State for Wales ex parte Emery [1998]* it was held that where there is 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.
- 8.13 In view of the above, it may be considered reasonable to conclude that, at this stage in the process, there is sufficient evidence to give rise to a “reasonable allegation” in favour of a presumption of dedication, yet still recognise that there is a conflict in the evidence.

Evidence of Lack of Intention to Dedicate

- 8.14 The above reasonably alleged presumption of dedication can be overturned if there is sufficient evidence of a landowner’s lack of intention to dedicate public rights over the Application Route. Such evidence must be of overt acts directed at actual users of the way, and which indicate a lack of intention to dedicate) e.g. direct challenges or the locking of gates etc).
- 8.15 The Objectors have made lengthy submissions [App 11-13 pg. 614-768], but they do not contain any evidence which would constitute a lack of intention to dedicate within the meaning of section 31 of the Highways Act 1980.

Common Law

- 8.16 Under the common law the onus rests on those asserting that the alleged public right of way subsists to prove an intention on the part of the landowner to dedicate it. Dedication may be inferred from public use if it is sufficiently notorious.
- 8.17 Use of the Application Route has allegedly taken place over many years [**App 4 - 9 pg. 18-610**] and it may be reasonable to conclude that this use is of sufficient quantity and frequency to give rise to an inference of dedication.

9.0 Conclusions

9.1 In conclusion:

- a) The available and relevant evidence is supportive of a reasonable allegation in favour of presumption of dedication pursuant to Section 31 of the Highways Act 1980, however there is a conflict in some of the evidence which cannot be reconciled at this time;
- b) There is insufficient evidence of any lack of intention to dedicate during the requisite twenty-year period;
- c) There is sufficient evidence to support any inference of dedication under the common Law.

10.0 Decision Options

10.1 If the Surveying Authority is satisfied the evidential tests set out above have been met and the alleged public right of way subsists, or is reasonably alleged to subsist, they should resolve to:

- a) make a Definitive Map Modification Order to add the route shown by a broken black line (A-B) on Plan 1 to the Definitive Map
- b) if no objections are received in response to the making of the Order, or if any objections received are subsequently withdrawn, the Order be confirmed; or
- c) if objections are received in response to the making of the Order, and they are not subsequently withdrawn, the Order be referred to the Welsh Assembly Government (Planning Inspectorate) for determination.

10.2 If the Surveying Authority is not satisfied the evidential tests set out above have been met and therefore the alleged public right of way does not subsist, or is not reasonably alleged to subsist, they should resolve to refuse the application, and advise the applicant of his/her right of appeal.

11.0 Recommendation

- 11.1 Whilst it is the investigating Consultant's view that a Definitive Map Modification Order should be made, given the quasi-judicial nature of the decision-making process, it is a matter for the Surveying Authority to make their own decision.