

Bath & North East Somerset Council

MEETING:	REGULATORY (ACCESS) COMMITTEE	AGENDA ITEM NUMBER	
MEETING DATE:	Tuesday 8 th January 2008		
TITLE:	Objections to Bath and North East Somerset Council (Public Footpath AQ78 at Claverton Down, Bath) Definitive Map and Statement Modification Order (No. 1 Claverton Down) 2006		
WARD:	Bathwick / Widcombe		

AN OPEN PUBLIC ITEM

LIST OF ATTACHMENTS TO THIS REPORT:

Appendix A - Report to Regulatory (Access) Committee dated 27 January 2005

Appendix B - Letter of objection from Mr Clive Ellwood

Appendix C - Letter of objection from Withy King, Solicitors acting for Mr and Mrs Andrew Taylor

1 THE ISSUE

1.1 In January 2005 the Committee considered evidence relating to an alleged public footpath at Claverton Down and decided to make a Definitive Map Modification Order ("the Order") to record the path on the Definitive Map and Statement. Following advertisement of the Order, two objections were received. The Order must now be submitted to the appropriate Secretary of State so that it can be determined independently by an inspector.

1.2 This report reviews the objections in relation to the evidence and the law, and seeks Committee approval to recommend to the Secretary of State that the Order be confirmed.

1.3 The report on which the Committee made its decision on 27 January 2005 is attached at Appendix A.

2 RECOMMENDATION

2.1 That the Assistant Director Environmental Services be granted delegated authority to recommend to the Secretary of State that Bath and North-East Somerset Council (Public Footpath AQ78 at Claverton Down, Bath) Definitive Map and Statement Modification Order (No. 1 Claverton Down) 2006, be confirmed without modifications.

3 FINANCIAL IMPLICATIONS

3.1 Financial implications are not a relevant consideration which may be taken into account under the provisions of the Wildlife and Countryside Act 1981. The costs associated with an Order to the Secretary of State and any subsequent Public Inquiry would be met from the PROW budget.

4. LEGAL FRAMEWORK

4.1 Bath and North East Somerset Council, as Surveying Authority, is under a statutory duty, imposed by Section 53(2) of the Wildlife and Countryside Act 1981, to keep the Definitive Map and Statement of Public Rights of Way under continuous review. The legal framework relating to this process was presented to the Committee in the original report concerning the Claverton Down footpath Definitive Map Modification Order (DMMO) and can be seen in paragraphs 4.2 to 4.7 of that report which is attached at Appendix A.

4.2 Once a DMMO has been made and advertised the Council is required to refer the Order, together with any objections or representations, to the Secretary of State so that it can be determined. In relation to this process the Wildlife and Countryside Act 1981 Schedule 15 paragraph 7 states:

Opposed orders

(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either –

(a) cause a local inquiry to be held; or

(b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.

(2A) The Secretary of State may, but need not, act as mentioned in sub-paragraph (2)(a) or (b) if, in his opinion, no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order, either with or without modifications.

(3) On considering any representations or objections duly made and the report of any person appointed to hold an inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.

4.3 The Rights of Way (Hearings and Inquiries Procedures) (England) Rules 2007 requires the Council, prior to any inquiry or hearing, to submit to the Planning Inspectorate a statement of case containing full particulars of the case which the Council proposes to put forward.

5. THE REPORT

Background

5.1 The evidence supporting the Officer's recommendation to make a DMMO for Footpath AQ78 at Claverton Down was presented and evaluated in the original report to the committee and is set out in paragraphs 5.1 to 6.2 of that report attached at Appendix A.

5.2 Following advertisement of the Order two objections were received by the Council within the statutory objection period. One from Mr Clive Ellwood and this is attached Appendix B and one from Withy King Solicitors acting for Mr and Mrs Andrew Taylor, attached as Appendix C.

The objections to the Order

5.3 Mr Ellwood's objection deals entirely with management issues and, whilst these matters are of obvious concern to Mr Ellwood, they have no bearing on the question of whether or not a public right of way exists over the footpath. Although the objection is 'duly made' because it was submitted within the prescribed time period, its content has no bearing on whether or not the order should be confirmed.

5.4 Mr Taylor's objection is concerned solely with the width recorded in the schedule of the Order for the section E to G. Mr Taylor does not dispute that the route is a public footpath; his objection is that the Council has over-stated the width where the route passes over a section of his property.

5.5 Mr Taylor's objection consists of a covering letter from his solicitors Withy King, which sets out a summary of their clients' objection and an accompanying detailed objection statement. Mr Taylor does not dispute the route is a public footpath; his objection is that the Council has over-stated the width where the route passes over a section of his property being that shown between points E to G on the order plan. NB, The letter from Withy King only is attached as Appendix C, the detailed objection statement can be inspected in the background papers.

5.6 Mr Taylor cites the Council's response to the Land Charges Search and also information supplied by a Council officer in 1998 as being in conflict with the width of the path now recorded in the Order. He also points out that the planning consent granted by the Council for development at Quarry Farm was

based on application plans showing the footpath much narrower than the width recorded in the Order.

5.7 Mr Taylor has submitted letters and a statement from previous owners of Quarry Farm covering the period 1955 to 1998 asserting that the eastern (Quarry Farm) edge of the footpath was restricted by fencing, a rockery, etc confining the public to a width varying from 1 to 2 metres.

Comments on Mr Taylor's objection

5.8 With reference to the Land charges search, the Council drew Mr Taylor's attention to the existence of a public right of way over the site, but no reference was made to a width.

5.9 Neither should the drawings attached to a planning application be construed as indicating the legal width of a right of way as the documents have no legal status in this regard.

5.10 In my original report to the Committee I set out the user evidence available at the time relating to the width of the path. This is reproduced in paragraphs 5.11 to 5.13 below.

5.11 Four of the ten witnesses interviewed defined the width of the path at the Quarry Farm end. The comments are as follows:

"... the boundaries being a stone wall or steep bank on the side of the caravan park and edging stones on the side of the wood".

"I believe that the width of the public right of way extends from the wall along the edge of Quarry Rock Caravan Park to the edge of the wood on the other side of the track".

"The width of the track was marked by the disintegrating wall on the right hand side (the wood side). On the left hand side there was never a clear fence and the public right of way was limited purely by the bank with the trees on it".

"On the side of the caravan park, the track was defined by a stone wall. Stones defined the boundary on the side of the wood".

5.12 All 10 witnesses interviewed referred to how the building of the fence along a section of the path had altered their use of the path along that section. Some of the comments are recorded below. The witness statements are included as background papers.

"Before the overlap fence was built, I could walk along the path without having to step aside for oncoming cyclists or pedestrians".

"Before the fence was constructed you could pick your way along the path to avoid the mud in bad weather".

"Since the fence has been built, one can no longer walk 2 abreast or overtake other path users".

"The erection of the fence has meant that only one person can use it at a time and when it has been raining there is no way you can avoid walking in the mud, other than crawling through the undergrowth".

5.13 Presumed dedication under section 31 of the Highways Act 1980 or dedication under common law would apply to the entire width used by the public and thus the width recorded by any order should cover the entire used width.

5.14 The evidence collected by the Council relating to the width enjoyed by the public during the twenty years prior to 2000 is credible but conflicts with the, also credible, evidence submitted by the previous owners and occupiers of Quarry Farm as reported to Mr Taylor. Therefore the evidence should be tested by hearing the witnesses at a public inquiry. That conflicting evidence should be dealt with in this way has been confirmed in the Court of Appeal case of R-v-Secretary of State for Wales, ex parte Emery.

5.15 In addition to the user evidence, the Council examined documentary evidence relating to the route. The original report to the committee in January 2005 referred to large-scale Ordnance Survey Maps produced in the 1930s which show the footpath clearly defined between two solid black lines for the section E to G (see Appendix A paragraph 5.19). The report explained that the case of Attorney-General v Benyon sets out the fence to fence presumption "If a path runs between fences (or walls etc) the presumption is that the whole area between these has been dedicated to the public provided the fences were laid out by reference to the highway".

5.16 Mr Taylor contends that these boundaries were not erected with reference to the highway, in support of which is a statement from Mrs Vincent (a previous owner) that one of the fences was to contain livestock rather than to mark the edge of the footpath.

5.17 Item 7 in Mr Taylor's submission is a copy of a letter to Mr Taylor dated 28 June 2002 from the Council's Rights of Way Team leader. In paragraph 4 of that letter the Council refers to the Ordnance Survey maps mentioned above and also to "City of Bath Council maintenance plans showing the full width of the route coloured up". Mr Taylor has not commented on the legal implications of this maintenance map, although he does assert that no actual maintenance was carried out.

5.18 Mr Taylor has not submitted any evidence concerning the width of the route prior to 1955, nor has he commented on the Council's documentary evidence concerning the physical width of the enclosed route prior to 1955 and the legal inference to be drawn from that evidence.

5.19 Despite the strength of the historical evidence that is now known to exist, it is acknowledged that, in 1998, one of the Council's rights of way officers advised Mr Taylor that the footpath was narrower than it is now believed to be. This advice was based on the information available to the officer at the time, but has now been superseded by the discovery of further evidence as described above.

Conclusions

5.20 In relation to a presumption of dedication under Section 31 of the Highways Act 1980, the period of use on which the Council is relying extends from 1980 to 2000. The evidence supplied by the Council's witnesses and that supplied by Mr Taylor conflicts as to the width enjoyed by the public. However, it is still the case that a right of way as recorded in the Order is reasonably alleged to subsist, based on the statements of those persons who have supplied user evidence to the Council. The evidence should now be tested at a public inquiry so the inspector can decide whether or not that right of way actually exists, i.e. the inspector is required to apply a more rigorous test in deciding how to confirm the Order than that which the Council had to apply in making it. This principle was stated in the Emery case referred to above.

5.21 Even if an inspector were to decide that, on the balance of probability, the width enjoyed by the public during the period 1980 to 2000 was less than that recorded in the Order, the Council should refer him or her to the earlier documentary evidence. The Ordnance Survey plans of the 1930s indicate that the land occupied by the right of way (the existence of the right of way is not in dispute) was an enclosed path of the width recorded in the Order. In support of the assertion that the whole of the enclosed width forms the right of way, the Council should draw the inspector's attention to the Benyon case cited in paragraph 6.8 above.

5.22 Furthermore, the original highway record plan shows that the full width between the boundaries was considered by the highway authority to be a footpath maintainable at the public expense.

Decision

5.23 Having reviewed the evidence leading to the making of the Order, and having considered Mr Taylor's objection, it is recommended that the Council should ask the Secretary of State's inspector to confirm the Order as made.

6 RATIONALE

6.1 The Council's action in making a DMMO for Footpath AQ78 at Claverton Down was correct as it had discovered evidence that a public footpath was reasonably alleged to subsist. This duty is prescribed in the Wildlife and Countryside Act 1981 s.53(3)(c)(i).

6.2 That Order must now be submitted to the Secretary of State in accordance with Wildlife and Countryside Act 1981 Schedule 15 paragraph 7.

6.3 Upon receipt of the Order and its objections the Secretary of State will appoint an inspector to determine whether the Order should be confirmed either as it stands, or in a modified form, or not confirmed at all.

6.4 In cases where the evidence submitted is credible but conflicting (as is the case with Footpath AQ78 at Claverton Down concerning the width) the Inspector will hold a public inquiry so that the evidence can be tested.

6.5 Prior to the public inquiry your officers will be required to submit the Council's statement of case in accordance with the Rights of Way (Hearings and Inquiries Procedures) (England) Rules 2007. The rationale for recommending to the Inspector that the Order should be confirmed as drafted is set out above.

7 HUMAN RIGHTS IMPLICATIONS

7.1 The Human Rights Act incorporates the rights and freedoms set out in the European Convention on Human Rights into UK law. So far as it is possible, all legislation must be interpreted so as to be compatible with the convention.

7.2 However, the Wildlife and Countryside Act 1981 does not impact on human rights in that it is only concerned with the accurate recording of public rights of way that already exist. It does not create any new rights, nor does it extinguish any existing rights. In this sense, the HRA is not a relevant consideration in the determination of this application/order.

8 OTHER OPTIONS CONSIDERED

8.1 The Council is under a statutory duty refer the Order to the Secretary of State in accordance with Wildlife and Countryside Act 1981 Schedule 15 paragraph 7. The Regulatory (Access) Committee is required to make a decision whether or not to ask the Secretary of State's inspector to confirm the Order as drafted (your officer's recommendation) or to uphold Mr Taylor's objection and request that the Order be modified to record a lesser width over the section E to G.

9 CONSULTATION

9.1 Pre-order consultations were carried out as required by the Act, but no further consultations are required after the Order has been advertised.

10 CONCLUSIONS

10.1 See paragraphs 5.20 to 5.22

Contact person	Mr Alan Harbour, Definitive Map Officer, PROW
Background papers	Case file including Application, Order and supporting evidence, together with letters objecting to and in support of the Modification Order.

Bath & North East Somerset Council			
MEETING:	REGULATORY (ACCESS) COMMITTEE	AGENDA ITEM NUMBER	
MEETING DATE:	27 th JANUARY 2005		
TITLE:	Definitive Map Modification Order to add a Public Footpath at Claverton Down, Bath		
WARD:	Bathwick / Widcombe		
AN OPEN PUBLIC ITEM			
LIST OF ATTACHMENTS TO THIS REPORT:			
Appendix 1 - Plan identifying used route: proposed DMMO route			
Appendix 2 - Extract from City of Bath Engineer's Map, 1957			
Appendix 3 - Extract from City of Bath Engineer's Statement, 1957			
Appendix 4 - Photographs of the path			
Appendix 5 - Letter to Mr Taylor, dated 28 th June 2002			
Appendix 6 - Letter from Mr Taylor, dated 4 th November 2004			
Appendix 7 - Witness Statement Précis			
Appendix 8 - OS 25" Map Edition of 1904, Somerset Sheets 14NW and 14SW			
Appendix 9 - Revision of 1930 OS Map with additions in 1938, Somerset Sheet 14NW and Edition of 1933, Somerset Sheet 14SW			
Appendix 10 - List of Consultees			
Appendix 11 - List of Landowners consulted			
Appendix 12 - List of interested parties informed of the research into this path			
Appendix 13 - Summary of use chart			

1 THE ISSUE

1.1 This report deals with the evidence relating to an alleged public footpath at Claverton Down and seeks Committee approval to make a Definitive Map Modification Order (DMMO), to record the path on the Definitive Map and Statement.

2 RECOMMENDATION

2.1 That the Head of Transportation and Highways be granted delegated

authority to take all action to make an Order to Modify the Definitive Map and Statement by adding a public footpath between Widcombe Hill and Claverton Down Road, Bath, as shown by the route marked A-B-C-D-E-F-G-H on the plan attached at Appendix 1, and to confirm the Order if no duly made objections are received to the Order.

3 FINANCIAL IMPLICATIONS

3.1 Financial implications are not a relevant consideration which may be taken into account under the provisions of the Wildlife and Countryside Act 1981. The costs associated with making an Order and any subsequent Public Inquiry would be met from the PROW budget.

4. LEGAL FRAMEWORK

4.1 Bath and North East Somerset Council, as Surveying Authority, is under a statutory duty, imposed by Section 53(2) of the Wildlife and Countryside Act 1981, to keep the Definitive Map and Statement of Public Rights of Way under continuous review.

4.2 Section 53 (2) (b) states:

"As regards every definitive map and statement, the surveying authority shall:

.....keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event".

4.3 The 'events' referred to in subsection (2) are set out in section 53 (3). The event relevant to this case is set out in Section 53(3)(c)(i) as follows:

"The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

"that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist..."

4.4 Anyone may apply to the Council for an Order to modify the map and statement, and such application must be determined in accordance with the provisions of Schedule 14 of the Act. The Council must also make an Order on its own initiative if it discovers evidence which justifies the making of an Order.

4.5 Evidence of use by the public can be sufficient to raise a presumption of dedication at common law or under Section 31 of the Highways Act 1980. The "discovery" of such evidence of use can constitute the "event" for the purposes of section 53(2)(b).

4.6 For presumed dedication to have occurred under Section 31 of the Highways Act 1980, a way is deemed to have been dedicated as a highway

after 20 years use by the public unless there is evidence of a contrary intention. In order to establish a presumed dedication under this section, each element in the wording of Section 31(1) and (2) needs to be proved on the balance of probabilities.

"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 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 a notice such as is mentioned in subsection (3) below or otherwise."

4.7 Documentary evidence is often considered in determining applications for Definitive Map Modification Orders. Section 32 of the Highways Act 1980 states:

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

5. THE REPORT

Background

5.1 The path, shown on the plan at Appendix 1, begins (point A), at a gate on North Road, opposite the junction with Shaft Road. It continues in a north-north easterly direction on a made up surface for approximately 20m before the surface becomes natural. The path follows a track to a gate (point B) and then crosses the eastern edge of Monument Field. It reaches a kissing gate (point C) and continues for a short distance through woodland. The path then follows the western edge of a field to a gap in the wall, restricted by wooden posts (point D). The path takes a northerly direction along the edge of woodland before taking a north-easterly direction (to point E) and then easterly direction. It continues along the track in a north-easterly direction where the surface becomes tarmac (point F). The direction changes to northerly before turning to north easterly. The path ends on Widcombe Hill (point H), opposite the entrance to Copseland, after a total length of 1,418m. Photographs of the path are shown at Appendix 4.

5.2 In 1957 the City and Waterworks Engineer's Department of Bath City Council undertook a survey of public rights of way in the city. The document produced is titled 'Survey of Public Rights of Way: For the Purpose of Part IV of the National Parks & Access To The Countryside Act 1949'.

5.3 No 'official' action was taken on the above Act but the 1957 survey was a fairly comprehensive survey of the footpaths. A 6" scale map was produced

showing footpaths within the city boundary. The path was given the internal reference number of AQ78 during the survey.

5.4 Path AQ78 is recorded in the 1957 survey and map, described as starting at Combe Down (Convalescent Home) and continuing at the boundary towards Claverton Down Quarries. A copy of the map is shown at Appendix 2. The description of the path is 'Footway - East of Picnic Woods, through W.G. to stile & W.G. bordering driveway to Rainbow Wood House and on through W.G. to Widcombe Hill'. (W.G. is Wicket Gate). A copy of the description is shown at Appendix 3.

5.5 Mr Andrew Taylor of Natelliam, Quarry Farm was granted planning permission in July 1999 to develop the Quarry Farm site at the northern end of the footpath. The claimed footpath crosses land owned by Mr Taylor, Bath and North East Somerset Council and the National Trust.

5.6 In January 2000, the council received a complaint from a local resident regarding the state of the footpath during development works at Quarry Farm. Construction vehicles were causing damage to the surface of the footpath.

5.7 During developments, a temporary fence was put up along a section of the path. Discussions took place between Mr Taylor and Public Rights of Way Officers about this.

5.8 A letter was sent to Mr Taylor on 28th June 2002 regarding the addition of the path to the Definitive Map and Statement. This is included at Appendix 5.

5.9 Following the appointment of the Bath Definitive Map Project Officer in August 2003, investigations began into the legal status of the footpath. Documentary evidence has been collected. Members of the public who had contacted the Public Rights of Way Team regarding the footpath were contacted and sent a Public Right of Way Evidence Form to complete regarding their use of the path. A number of these contacts requested forms to send to other interested members of the public.

5.10 It was considered that the right of the public to use the way was brought into question by the building of the temporary fence along a section of the path. The period under consideration of public use has therefore been taken to be the 20 year period between 1980 and 2000.

Landowners

5.11 Officers wrote to Mr Taylor on 17th June 2004 informing him that investigations were being made as to the legal status of the footpath. He was invited to return a Landowner's Evidence Form. A letter was sent by recorded delivery on 14th October 2004. The letter gave Mr Taylor an update on progress made so far. Another Landowner's Evidence Form was sent. Correspondence received from Mr Taylor objecting to the recording of the route as a public right of way is included at Appendix 6. The Landowner's Evidence Form has not yet been returned.

5.12 Officers wrote to Mr Ben Cross of the National Trust on 14th October 2004. He returned a Landowner's Evidence Form on 23rd November 2004 stating his belief that the status of the path was a footpath and that it was a public right of way.

5.13 Officers wrote to Mr Matthew Smith, Head of Leisure and Amenity Services, on 21st October 2004. Mr Andrew Carr, Contract and Development Manager, replied on 1st November 2004 by email and also with a completed Landowner's Evidence Form. Mr Carr stated that in the 20 years he had been aware of the path, he had always believed that the path was a footpath and that it was a public right of way.

User Evidence

5.14 The evidence collected includes 27 Public Right of Way Evidence Forms. A précis of the information gathered from the Forms is attached at Appendix 7. Ten of the members of the public who returned Forms have been interviewed. From the Forms and interviews, it is clear that at least 20 years' use as of right has taken place over the route A-H shown at Appendix 1.

5.15 The interviews were undertaken between June and September 2004. The interviews were made to gather further information about use of the path and about the specific issue of the width of the footpath at the Quarry Farm end.

Documentary Evidence

5.16 Claverton Tithe Map 124. This was received by the Tithe Commission on 24th June 1856. The footpath is shown on the map but there is no deduction listed on the apportionment for a public right of way across the land. Whilst the map records the physical existence of this path, there is no evidence of the existence or otherwise of public rights.

5.17 Finance Act 1910 Valuation Books, Claverton and Monkton Combe. The northern section of this footpath is shown on map reference 14/6. The southern section is shown on map reference 14/10. The land which the footpath crosses is not recorded with a deduction for a public right of way. Whilst the map records the physical existence of this path, there is no evidence of the existence or otherwise of public rights.

5.18 OS 25" Map Edition of 1904 14NW and 14SW, revised in 1902. The footpath is clearly defined on the maps, as shown at Appendix 8.

5.19 The Revision of 1930 OS Map with additions in 1938, Somerset Sheet 14NW and the Edition of 1933, Somerset Sheet 14SW are both shown at Appendix 9. The footpath is clearly defined between two solid black lines for the section shown shaded on the plan at Appendix 1.

Consultations

5.20 Preliminary consultations were undertaken with Claverton Parish Council, as legislation dictates, on 1st October 2004. No response has been forthcoming.

5.21 No other statutory consultations are required by the legislation. However, comments or submissions regarding the proposed DMMO were requested from user groups and ward

councillors. A list of those consulted can be found at Appendix 10 along with any responses given. The Bath Ramblers' Association and The Widcombe Residents' Association both supported the application and asserted that the path had been well used by the public.

5.22 The landowners were sent a Landowners Evidence Form to complete. A summary of the information received can be found at Appendix 11.

5.23 Adjacent property holders and those who had completed Public Rights of Way evidence forms were informed of the intention to make an Order on 12th October 2004. A list of those informed can be found at Appendix 12.

Assessing the Evidence

5.24 The council has collected user evidence applicable to section 31 of the Highways Act 1980. Taken in conjunction with the 1957 map, it is possible to make an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provided the relevant tests are met.

5.25 The Regulatory Committee has to decide what it considers are the correct facts and on the basis of those facts, whether, on the balance of probabilities, dedication of the path as a public footpath has been established.

5.26 Use of the way is not in itself enough - it is the nature of such use that has to be established. All the provisions of section 31(1) and (2) of the Highways Act 1980 have to be carefully considered.

(a) *"other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication"*

Officers are not aware of any legal basis preventing the applicability of section 31 in this case.

(b) *"by the public"*

The persons completing the witness statement forms were drawn from the public at large, not from a closed class of person or tenants/employees of the landowner.

(c) *"as of right"*

It is only necessary to prove that use was open, without force, and without the permission of the landowner. All the witnesses giving evidence appear to meet these criteria.

All of the witnesses state that the landowners have never challenged public use of the path.

In summary, the public have used the path 'as of right'.

(d) *"period of 20 years ... 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) .. or otherwise"*

It is considered that the date when the public's right of access to the path was first brought into question was on the installation of the temporary fence along a section of the path in 2000. The period under consideration of public use has therefore been taken to be the 20 year period between 1980 and 2000.

Analysis of the 27 Public Right of Way Evidence Forms received reveals that within the identified 20 year period of use, 12 of the 27 witnesses have used the path for at least the entire 20 years between 1980 and 2000; 1 of the witnesses has used the path since 1982; 2 of the witnesses have used the path since 1983; 1 has used the path since 1989, 2 have used the path since 1992; 1 has used the path since 1994; 1 has used the path since 1996; 1 has used the path since 1999; 2 have used the path since 2001; 1 has used the path since 2002; 1 has used the path for a total of 15 years during the 20 year period; 1 has used the path from 1981 until 'closure of our gated entrance' and 1 stated 8 years of use but gave no dates.

It is clear that sufficient public use has occurred to satisfy this element of section 31. Appendix 13 shows a summary of this use.

(e) "*without interruption*"

The use of the way must be without interruption. An interruption has been defined as the actual and physical stopping of the use of a way by the landowner or their agent. Moreover, such interruption must be with the intention to prevent public use. It is not sufficient if the interruption is for some other purpose. There is no evidence of any interruption of public use between the 1930s and 2000.

(f) "*unless there is sufficient evidence that there was no intention during that period to dedicate it*"

Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show that there is sufficient evidence to show that there was no intention to dedicate.

There are numerous legal rulings on what constitutes 'a lack of intention to dedicate' a highway. In summary, an overt act by the landowner which is contemporaneous with the period of claim is considered to be required. The placing of signs by a landowner may be construed as evidence of an intention not to dedicate. No signs have ever been displayed to suggest that the path should not be used by the public. A sign at the entrance to the footpath on Claverton Down Road states 'Foot-Path Only Private Road'. Another sign states 'Quarry Farm Private Drive', which is normally interpreted to mean no public vehicular access. Additionally there is no record of any verbal or other challenges from the landowner or agent to deter the public.

In summary, there is no evidence of any act on the part of any of the landowners, to show an intention not to dedicate the route for public use, such as signs or verbal challenges, prior to 2000.

The width of the path

5.27 Four of the ten witnesses interviewed defined the width of the path at the Quarry Farm end. The comments are as follows:

"... the boundaries being a stone wall or steep bank on the side of the caravan park and edging stones on the side of the wood".

"I believe that the width of the public right of way extends from the wall along the edge of Quarry Rock Caravan Park to the edge of the wood on the other side of the track".

"The width of the track was marked by the disintegrating wall on the right hand side (the wood side). On the left hand side there was never a clear fence and the public right of way was limited purely by the bank with the trees on it".

"On the side of the caravan park, the track was defined by a stone wall. Stones defined the boundary on the side of the wood".

5.28 All 10 witnesses interviewed referred to how the building of the fence along a section of the path had altered their use of the path along that section. Some of the comments are recorded below. The witness statements are included as background papers.

"Before the overlap fence was built, I could walk along the path without having to step aside for oncoming cyclists or pedestrians".

"Before the fence was constructed you could pick your way along the path to

avoid the mud in bad weather".

"Since the fence has been built, one can no longer walk 2 abreast or overtake other path users".

"The erection of the fence has meant that only one person can use it at a time and when it has been raining there is no way you can avoid walking in the mud, other than crawling through the undergrowth".

5.29 Presumed dedication under section 31 of the Highways Act 1980 or dedication under common law would apply to the entire width used by the public and thus the width recorded by any order should cover the entire used width.

5.30 Additionally, the case of Attorney-General v Benyon sets out the fence to fence presumption "If a path runs between fences (or walls etc) the presumption is that the whole area between these has been dedicated to the public provided the fences were laid out by reference to the highway". It appears clear from the map and user evidence that the boundaries defined the edge of the route in question.

5.31 The evidence of use and map evidence indicates that the public right extends to the whole width between the original boundaries within the enclosed section, as shown shaded on the plan shown at Appendix 1. It is common practice where there is no evidence regarding width to record a standard width. It is considered appropriate in this case to record a width of 1.8m for the unenclosed section.

Decision

5.32 Officers are satisfied that the witnesses have used the claimed route for the requisite

20 year period (1980 - 2000), pursuant to the tests laid down in section 31 of the Highways Act 1980.

5.33 It is clear that public use has occurred over the claimed path, as the public have walked the entire length. Until the erection of the temporary fence, the public were able to use the whole width of the path at the Quarry Farm end. Nine of the 10 witness statements allege that the whole width of the path was available for use by the public before the fence was erected.

6 RATIONALE

6.1 The surveying authority must make an Order on its own initiative if it discovers evidence which shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist.

6.2 After analysis of the submitted evidence, officers are satisfied that the relevant legislation (Wildlife and Countryside Act 1981 section 53, and Highways Act 1980 section 31) has been met, and that an Order should be made.

7 HUMAN RIGHTS IMPLICATIONS

7.1 The Human Rights Act incorporates the rights and freedoms set out in the European Convention on Human Rights into UK law. So far as it is possible, all legislation must be interpreted so as to be compatible with the convention.

7.2 The Committee is required to consider the application in accordance with the principle of proportionality. The Committee will need to consider the protection of individual rights and the interests of the community at large.

7.3 In particular, the convention rights which should be taken into account in relation to this application are Article 1 of the First Protocol (protection of property), Article 6 (the right to a fair hearing) and Article 8 (right to respect for family and private life).

8 OTHER OPTIONS CONSIDERED

8.1 Local Authorities are under a statutory duty to consider evidence and make Orders within the provisions of section 53 of the Wildlife & Countryside Act 1981. The Regulatory (Access) Committee is required to make a decision whether or not to make any DMMO.

9 CONSULTATION

Please see sections 5.20 to 5.23 regarding consultations undertaken.

10 CONCLUSIONS

10.1 The path is well used by the public and has been so for many years. Evidence of the physical existence of the path is found on historical records such as the Claverton Tithe Map, the Finance Act Map and the City and Waterworks Engineer's Department of Bath

City Council survey of 1957.

10.2 It is only since the erection of the fence by Mr Taylor that the public right to use that section of the footpath has been challenged.

10.3 Officers are satisfied that the public use of the path meets the tests contained within the relevant legislation (Highways Act 1980 section 31).

10.4 Officers are satisfied that, on the balance of probabilities, dedication of this route as a footpath has occurred and thus that a DMMO should be made to record the route.

10.5 The building of the fence along a section of the path has called the public right into question and precipitated the need to formally record the footpath as a public right of way. Bath and North East Somerset Council has researched the status of the path and made the decision to record the legal status of the path on the Definitive Map and Statement. Once this has been done, the issue relating to the building of the fence along a section of the path can be resolved.

Contact person	<i>Jenny King, Bath Definitive Map Project Officer, PROW,</i>
Background papers	<i>Bundle of Witness Statements and associated typed witness interview statements.</i>

RECEIVED
22 MAY 2006

The Old Barn
Quarry Farm
Claverton Down
Bath BA2 6EE

Tel 01225 314360

18 May 2006

Public Rights of Way Team
Floor 2, Riverside
Temple Street
Keynsham
Bristol BS31 1LA

Dear Sirs

**Bath & NE Somerset Council Public Footpath AQ78 at Claverton Down, Bath
Definitive map & statement modification order (No 1 Claverton Down) 2006
Footpath to be known as BC62/1**

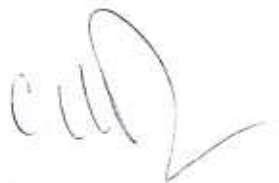
I am very concerned about your proposal to formally register the footpath between Claverton Down and Combe Down. There is no doubt that a right of way exists, but at the Claverton Down end this passes over a private road (Quarry Farm Drive) which is also used by vehicular traffic. The proposal says that the footpath should extend across the full width of the road (as opposed to 1.8m in other places) which is clearly not safe. Pedestrians should be encouraged to walk at the side of the road for safety reasons. There is no need or advantage to try to claim the full width of the road for use as a footpath.

I have other safety concerns over the increasing use of the footpath by cyclists. Cyclists often exit the woods onto Quarry Farm Drive at excessive speed and without care for other road users. A staggered barrier or kissing gate should be erected at this point to slow cyclists to avoid an accident. There have already been several near misses between cars and cyclists. I would request that you carry out a full risk assessment before proceeding.

I understand that the ultimate objective is to turn the footpath into an official cycle path. The increase in traffic will bring cars, cycles and pedestrians into close proximity on Quarry Farm Drive. The road is narrow with poor visibility due to a bend and also is on a slope. It is not hard to predict that this increase in traffic could result in a serious accident.

Would you please ensure that my safety concerns are properly considered and pass on a copy of my letter to other relevant departments if necessary. If nothing is done to address these issues and there is a serious accident, this letter will be on public record that you have been put on notice about the risks.

Yours faithfully



Clive Ellwood



WITHY KING

SOLICITORS

Public Rights of Way Team
Floor 2 Riverside
Temple Street
Keynsham
Bristol
BS31 1LA

CONTACT:

Caroline Preist

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YOUR REFERENCE
JK/AQ78/DMM01

DATE
15 June 2006

OUR REFERENCE
CP/84401/1

Dear Sirs

**B&NES Council (Public Footpath AQ78 at Claverton Down Bath)
Definitive Map and Statement Modification Order (No1 Claverton Down) 2006**

We act on behalf of Mr and Mrs Andrew Taylor of Natelliam, 4 Quarry Farm Claverton Down Bath. Our clients are the owners of the land between points D-G as shown on the Map attached to the order dated 26 April 2006 over which the above proposed footpath runs.

Our clients wish to object to and/or to make representations in respect of the making of the order to modify the Definitive Map by adding the proposed footpath. Our clients' objections and representations relate to the width of the path between points E and G which is shown on the Map as a shaded area which extends to 7 metres wide in places. Our clients do not object to the creation of the footpath itself.

In summary our clients' objections are as follows:

- 1 There is no physical evidence that at any point that the footpath extended to 7 metres in width.
- 2 There is physical evidence that the footpath was restrained to a width of no more than 1-1.5 metres wide along its length
- 3 No written evidence has been produced by the Council that indicates that the footpath was up to 7 metres wide at any point.
- 4 Our clients have produced evidence from themselves and former land owners that the footpath never extended at any point to more than 1.5 metres in width.
- 5 It is essential when determining the extent of the footpath to look in detail at the history of the land and the Council have failed to do this.



WITHY KING

SOLICITORS

- 6 The Council have permitted and encouraged cyclists to use the footpath over the last few months which has caused evidence on the ground to be destroyed and the appearance of the path physically widened.
- 7 It appears to be the case that the Council intends to convert the footpath to a cycle track in the future and the extended width is integral to this intention rather than a reflection of the use of the footpath.
- 8 The case of *Att-Gen -v- Benyon* creates a rebuttable presumption that land between hedges/fences is part of the "highway". The presumption only applies if the likeliest explanation for the existence of the hedge/fence is that they were erected to mark the edge of the "highway". The presumption does not apply if this is not the case. The evidence produced from former owners of the property (Mrs Vincent and Mrs Gardner) is that the land, which was then a working farm, was fenced off from the track and not vice versa. The presumption is therefore rebutted.
- 9 The Council has taken into account information and evidence that it should not have considered and failed to take account of information and evidence that it should have considered.
- 10 There is insufficient evidence available to support the assertion that the footpath is any wider than 1.5 metres along its length between points D to G.
- 11 The Council is wrong in law to make an order that the footpath extends to the full width of the shaded area between points E and G.

Our clients therefore ask that the footpath be limited to 1.5 metres in width between points D and G.

Details of the objections/representations are set out in the attached witness statements of:

1. Andrew Taylor
2. Joy Vincent
3. Trudy Gardener

Please confirm that the mater will now be referred to the Secretary of State.

Yours faithfully

WITHY KING