

Bath & North East Somerset Council	
MEETING:	Regulatory (Access) Committee
MEETING DATE:	8 October 2014
TITLE:	Handel Road DMMO
WARD:	Keynsham South
AN OPEN PUBLIC ITEM	
<p>List of attachments to this report:</p> <p>Appendix 1: Decision Plan</p> <p>Appendix 2: Decision Schedule</p> <p>Appendix 3: Objections and Representations</p>	

1 THE ISSUE

- 1.1 An application has been received for a Definitive Map Modification Order ('DMMO') to be made under section 53(2) of the Wildlife and Countryside Act 1981 ('the 1981 Act') to modify the Definitive Map and Statement of Public Rights of Way ('the DM&S') by adding a public footpath running from Park Road to Charlton Park in Keynsham.

2 RECOMMENDATION

- 2.1 It is recommended that the Regulatory (Access) Committee resolves for Bath and North East Somerset Council ("the Authority") makes a DMMO to record the Application Route, as shown by a broken black line on the plan contained at Appendix 1 ("the Decision Plan") and described in the schedule contained at Appendix 2, on the DM&S.

3 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

- 3.1 Resource implications are not a relevant consideration which may be taken into account under the provision of the 1981 Act. The costs associated with making a DMMO and any subsequent public inquiry or hearing would be met from the existing public rights of way budget.

4 STATUTORY CONSIDERATIONS AND BASIS FOR PROPOSAL

- 4.1 The Authority, as Surveying Authority, is under a statutory duty, imposed by section 53(2) of the 1981 Act, to keep the DM&S under continuous review. 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’

- 4.2 The ‘events’ referred to above are set out in section 53(3) of the 1981 Act. The ‘events’ to which this Application relates are set out in sections 53(3)(c)(i) and (iii) of the 1981 Act which state that:

‘...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 over land in the area to which the map relates...’

‘...any other particulars contained in the map and statement require modification.’

- 4.3 The meaning of ‘reasonably alleged’ was considered in *Bagshaw and Norton* [1994]¹ where Owen J. stated that:

‘Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to uses is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist then, it would seem to me, to be reasonable to allege such right.’

- 4.4 Anyone may apply to the Authority for a DMMO to modify the DM&S and such applications must be determined in accordance with the provisions of schedule 14 of the 1981 Act. If, after consideration of an application, the Authority decides not to make a DMMO then the Applicant may appeal to the Secretary of State within 28 days of the service of notice of that decision. The Secretary of State will then re-examine the evidence and direct the Authority accordingly.

- 4.5 Evidence of use by the public can be sufficient to raise a presumption of dedication under section 31 of the Highways Act 1980 (‘the 1980 Act’) or at common law. Section 31(1) of the 1980 Act states that:

‘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.’

- 4.6 Documentary evidence should also be considered in determining applications for DMMOs. Section 32 of the 1980 Act states that:

¹ R v SSE ex parte Bagshaw and Norton [1994] 68P & CR402
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'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.'

- 4.7 The Human Rights Act 1998 ('the 1998 Act') incorporates the rights and freedoms set out in the European Convention on Human Rights ('the Convention') into UK law. So far as it is possible all legislation must be interpreted so as to be compatible with the Convention.
- 4.8 The 1981 Act does not permit personal considerations to be taken into account. A decision relating to a DMMO would be lawful without taking account of personal considerations, as provided by section 6(2) of the 1998 Act, as it would be impossible to interpret the legislation in such a way that it is compatible with section 3 of the Convention. Further details of Human Rights considerations can be found in the Planning Inspectorate's Public Rights of Way Advice Note No. 19.
- 4.9 In deciding whether to make a DMMO the Authority can only consider whether public rights exist^{2 3}. Paragraph 19 of the Planning Inspectorate's Public Rights of Way Advice Note No. 7 states that '*Sections 53 and 54 of the 1981 Act are concerned with the status of rights of way. Arguments about which particular rights of way are desirable or suitable are irrelevant to orders under those sections.*'

5 THE REPORT

- 5.1 On 18 April 2008, Keynsham Town Council made an application for a DMMO to record a public footpath commencing from a junction with Charlton Park at grid reference ST 6492 6825 (Point A on the Decision Plan contained at Appendix 1) and continuing in a generally easterly direction along a tarmaced path to a junction with Park Road at grid reference ST 6515 6827 (Point D on the Decision Plan). This route is 3.7 metres wide between points A and B on the Decision Plan, 2.7 metres wide between points B and C on the Decision Plan and 1.4 metres wide between points C and D on the Decision Plan and is hereafter referred to as 'the Application Route'.
- 5.2 The Authority carried out archival research into the Application Route at the Somerset Heritage Centre ('SHC') and in its own records. On 24 July 2014, the Authority commenced a six-week consultation process and received 16 objections and representations as detailed in paragraphs 8.1 to 8.3 below. The original application was accompanied by 29 user evidence forms and an additional 11 user evidence forms were submitted to the Authority during the consultation period. All the evidence submitted to, or discovered by, the Authority is considered below.

² Mayhew v Secretary of State for the Environment [1992] 65 P & CR 344; [1993] JPL 831; [1993] COD 45
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- 5.3 The Parish Survey dated 1950, the Provisional Map dated 1970 and the DM&S dated 1973 all record the section of the Application Route between points C and D on the Decision Plan as public footpath BA27/18. The accompanying Statements all describe this section as '*continuing westward terminating at back access roadway to houses in Handel Road (parcel 524).*' The Authority does not have a copy of the Draft Map and the remainder of the Application Route is not recorded or referred to on the Parish Survey, Provisional Map or DM&S. These documents show that the section of the Application Route between points C and D on the Decision Plan was a public footpath when the documents were prepared but no widths or limitations are recorded on the DM&S. The Bath and North East Somerset District Council (Former Keynsham Urban District Area) (No.1) Definitive Map and Statement Modification Order 2001 renamed this section of path as BA27/18b; the associated legal event affected a section of BA27/18 to the east of Park Road.
- 5.4 The 10,560 Ordnance Survey Maps dated 1885 and 1903 show that the section of the Application Route between points B and D on the Decision Plan physically existed when the land was surveyed. Additionally, the plan accompanying a planning application dated 1964 (SHC Ref.: D/U/Keyn/22/1/387-397) shows that a small section of the Application Route physically existed in 1964. Day and Masters' Map dated 1782 (SHC Ref.: D\B\wsm/38/6), Greenwood's map dated 1822 (SHC Ref.: A\AUS\60), Keynsham Tithe Map dated c.1840 (SHC Ref.: D\D\Rt/M/363) and Apportionment dated 1832-1835 (SHC Ref.: D\D\Rt/A/363) and Inland Revenue documents dated c.1910 (SHC Ref.: DD\IR/128/2/10) do not provide any evidence regarding the Application Route. The Authority has found no evidence to indicate that any public rights over the Application Route have been stopped up or diverted.
- 5.5 An extract from a deed dated 20 March 1939 grants a private right of way '*for all usual purposes*' along what is referred to as '*the back-way*' which is assumed to be at least a section of the Application Route. It is assumed that this particular deed grants a private right to the rear of 21 Handel Road and that similar private rights exist for the occupiers of the other properties which back onto the Application Route. It should be noted that the existence of private vehicular rights does not preclude the existence of public pedestrian rights.
- 5.6 Documents dated from between May 1999 and June 2000 detail the negotiations between local residents and the Authority's Education Department to allow contractors to access the adjacent school in exchange for the resurfacing of the section of the Application Route between points B and D. The Application Route is usually referred to in the documents as either '*lane*', '*rear lane*' or '*access lane*'. However, in one correspondence a local resident refers to it as '*the private lane*' and again states that the lane is '*private*' and in a note to the Authority's Planning Committee the same local resident again refers to the Application Route as '*the private lane*'. The note to the Planning Committee also states that the Application Route is '*used by the general public as a short cut to the High Street*'. The Method Statement for the works which was drafted by the Authority's Building Surveyor states that the '*lane may be subject to a public right of way*'. These documents provide ambiguous evidence regarding the reputation of the Application Route but indicate that the particular local resident referred to above regarded the Application Route to be private.

- 5.7 The documentary evidence therefore indicates that the section of the Application Route between points C and D has been a public footpath since 1950 and the section of the Application Route between points B and C on the Decision Plan has physically existed since at least 1885 but the documentary evidence does not provide any evidence regarding the existence, or otherwise, of public rights between points A and C on the Decision Plan.
- 5.8 There is no evidence of the landowner calling into question the right of the public to use the Application Route and Keynsham Town Council's Application submitted on 18 April 2008 therefore represents the 'date of challenge' by virtue of section 31(7B) of the 1980 Act. Under section 31(1) of the 1980 Act, the 20 year period of use extends from 18 April 1988 to 18 April 2008 ('the Relevant Period').
- 5.9 A total of 40 user evidence forms have been submitted to the Authority which have been completed by members of the public who have used the Application Route between 1953 and 2014 ('the Users'). All of the Users stated that they used the Application Route without force, secrecy or permission on foot only, except Users 31 and 39 who also used the Application Route on bicycle. None of the users appear to have a private right of way such as the private right detailed in paragraph 5.5 above. 30 users⁴ used the Application Route throughout the whole Relevant Period; however, four of these users⁵ did not use the section of the Application Route between points A and B on the Decision Plan. The remaining ten users⁶ used the Application Route for at least a part of the Relevant Period.
- 5.10 The User Evidence Forms indicated that 33% of the Users used the Application Route on a daily basis, 33% of the Users used the Application Route several times per week, 24% of the Users used the Application Route on a weekly basis and 10% of the Users used the Application Route less than once per week. The User Evidence Forms therefore indicate that the Application Route has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, as required by section 31(1) of the 1980 Act.
- 5.11 There is no evidence to indicate that the owner or owners of the land over which the Application Route runs demonstrated a lack of intention to dedicate during the Relevant Period, for example by erecting notices intended to dissuade use, turning back members of the public or making a Section 31(6) Deposit. The landowner has not therefore fulfilled the proviso contained in section 31(1) of the 1980 Act.
- 5.12 The user evidence forms do not provide consistent evidence regarding the width of the Application Route. However, the Authority tried to contact all of the members of the public who completed user evidence forms and those who were contactable confirmed that they used the section of the Application Route which is now tarmaced and that they have never used either the hard-standing areas in front of the adjacent garages or the vegetated areas adjacent to the school. This tarmaced area which has been used by the Users is 3.7 metres wide between points A and B on the Decision Plan, 2.7 metres wide between points B and C on the Decision Plan and 1.4 metres wide between points C and D on the Decision Plan. There is no evidence that there have been any structures on the Application Route during the Relevant Period and the dedication was therefore not subject to any limitations.

⁴ Users 1, 2, 3, 5, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 22, 24, 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39 and 40

⁵ Users 16, 17, 18 and 34

⁶ Users 4, 6, 8, 13, 19, 20, , 23, 26, 27 and 32

- 5.13 The evidence shows that a public footpath subsists over the section of the Application Route between points A and C on the Decision Plan by virtue of presumed dedication under section 31(1) of the 1980 Act. A DMMO should therefore be made to modify the DM&S pursuant to an event under section 53(3)(c)(i) of the 1981. Additionally, the DM&S does not record a width for the section of the Application Route between points C and D on the Decision Plan. The DMMO should therefore also modify the DM&S by recording the widths detailed in paragraph 5.12 above pursuant to an event under section 53(3)(c)(iii) of the 1981.

6 RATIONALE

- 6.1 The Authority has a statutory duty to process the Application and to make a DMMO when the evidence shows that the DM&S requires modification. The evidence shows that a public footpath exists along the Application Route and the DM&S therefore requires modification in this respect.

7 OTHER OPTIONS CONSIDERED

- 7.1 The Authority could refuse to make a DMMO but only if the evidence showed that the Application Route was not a public right of way. As detailed above, the evidence of the existence of a public footpath appears to be considerable.

8 CONSULTATION

- 8.1 On 24 July 2014, the Authority commenced a six-week consultation process. The Authority wrote to the suspected landowners, adjacent landowners, national and local user groups, the ward councillors, the Town Council and the statutory undertakers. Additionally, the Authority erected notices at either end of the Application Route which were checked every seven to ten days and posted the notice on the Authority's website.
- 8.2 The Authority received 16 objections and representations and an additional 11 user evidence forms which are discussed in paragraph 5.9 above. The primary objections and representations are contained at Appendix 3 and additional correspondences are available from the case officer on request.
- 8.3 The objections and representations covered a variety of issues including concerns about criminal damage, vandalism, graffiti, liability, safety, maintenance, private vehicular rights, litter, dog fouling and gating. While the Authority is sympathetic to these concerns, as explained in paragraph 4.9 above, these are not factors which the Authority is legally allowed to taken into consideration when deciding whether or not a DMMO should be made. Queries were also raised about compensation but compensation is not payable for the making of a DMMO because it only records rights which already exist. Some of the consultees state that they believe that the Application Route is a public right of way and detail use of the Application Route; while, other consultees state that they do not believe that all or part of the Application Route is a public rights of way. None of the consultees submitted evidence to indicate that there was a lack of intention to dedicate as required by the proviso in section 31(1) of the 1980 Act.

9 RISK MANAGEMENT

- 9.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Authority's decision making risk management guidance.

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Background papers	Handel Road DMMO Case File
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