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Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981

Applications for Definitive Map Modification Orders

Claimed Public Rights of Way at Stoke Lodge Fields

Client: Bristol City Council

1.0 Introduction

- 1.1 This report seeks to assist Bristol City Council in the determination of an application (**the DMMO Application**) for Definitive Map Modification Orders to add four Public Footpaths (**the Application Routes**) to the Definitive Map and Statement for the Bristol City Council area.
- 1.2 The Application Routes are shown by broken black lines on **Plan 1 [App 1]** attached to this report as follows:

Claimed Route No	Description	Shown on Plan 1 [App 1]
1	Cheyne Road to Parry's Lane	A-B-C-D
2	Shirehampton Road to West Dene	E-F-G-C-H-J
3	Route 1 to Route 2	B-G
4	Route 1 to Route 2	B-H

2.0 Instructions

- 2.1 I am instructed by Duncan Venison, Network Operations Group Manager of Bristol City Council, Transport Services, 100 Temple Street PO Box 3399, Bristol BS1 9NE (**the Client**). My instructions are to prepare an independent report to assist Bristol City Council (**the Surveying Authority**) with the determination of the Application which seeks to register public rights of way over the routes shown by broken black lines on **Plan 1 [App 1]**.
- 2.2 In carrying out my instructions I am minded that it will ultimately be for the Surveying Authority to make a finding of fact on these matters and that my report should provide as much factual information as possible, so that it will assist them in reaching their decision.

Archive Research etc

- 2.3 As part of my investigations, and as per the instructions of the Client I have only undertaken limited historic research. From this search I have concluded that, in my opinion, it is unlikely that any claim for public rights of way will be supported by historic documentary evidence. This report therefore focuses on the modern user-based case that has been put forward by the Applicant.

Site Visit

- 2.4 Also as part of my investigations, I visited the site accompanied by Officers of Bristol City Council on Thursday 16th May 2024. During the visit I also met the Applicant and representatives of the landowners (Bristol City Council) and Cotham School who lease the fields for sport, recreation and educational purposes. As part of the site visit I walked the Application Routes. During my site visit I witnessed quite a number of people using the fields for recreational purposes and dog walking across the whole of the fields and not necessarily on specific or defined routes.
- 2.5 In conducting my site visit I was also aware of the Village Green Applications which have been submitted in respect of the land crossed by the Application Routes, and which are the subject of ongoing litigation. It is not within my remit to comment on the merits of these applications. I am however obliged to take into consideration the evidence submitted/Inspector's findings in so far as it is material to the determination of the applications for Definitive Map Modification Orders.

Consultation

- 2.6 The Applicant and parties with a land-owning interest have been consulted on the first draft of this report and offered the opportunity to make submissions. Where appropriate those responses have been taken into consideration in the production of this final report.
- 2.7 In the interests of full disclosure, a complete copy of the responses and representations received are appended to the report as Appendices 9-11. These submissions should be considered in full, along with all of the other available and relevant evidence.

3.0 Consultant's Expertise

- 3.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), a Member of the Academy of Experts and a Registered Expert Witness.
- 3.2 My experience is based, most generally, on an expertise that has been developed over a thirty five-year period as a Public Rights of Way & Highways practitioner.
- 3.3 I hold a post-graduate level certificate in Leisure Management from the Institute of Leisure and Amenity Management. I am also a former Treasurer and founding Director of the Institute of Public Rights of Way and Access Management (IPROW). In 2019 I was a Regional Finalist for the Midlands Regions in the Rural Business Awards; and in 2019, 2022 & 2023 I was the recipient of "Lawyer Monthly" magazine Expert Witness Awards.
- 3.4 I have had papers published, on the subjects of: a) highway record management and b) rail crossing closures under the Transport and Works Act 1992, in the journal of the Institute of Public Rights of Way and Access Management. I also have a published Practice Guidance Note on Rights of Way Improvement Plans on the "LexisNexis" legal resource website.
- 3.5 Between 1987 and 2003 I was employed by a number of local authorities as a rights of way and highways practitioner, including six years at principal officer (management) level, during which time I was responsible for the management of the authority's statutory public rights of way functions as well as the maintenance of the authority's highway records.
- 3.6 Since 2003 I have worked as an independent consultant specialising in public rights of way and highway matters, and more specifically on matters relating to the existence, status and extent of public highways. In doing so I have prepared reports for various local authorities and private individuals, as well as giving evidence at local public inquiries, the Magistrates Court, County Court and High Court. I also represented Clients at local public inquiries, hearings and similar fora.
- 3.7 Since the mid-1990's I have been actively involved in the delivery of specialist training on public rights of way and highway issues. I have delivered training and CPD sessions to local authority staff and elected members, volunteers, government bodies (i.e.

Natural England), further education establishments (i.e. UCL Birkbeck) and the local government ombudsman. I was also invited to contribute towards the drafting and development of the Sheffield Hallam University MSc in public rights of way management.

4.0 Legislative Context

- 4.1 Bristol City Council are the Surveying Authority for the purposes of maintaining the Definitive Map and Statement of Public Rights of Way for their area. Section 53 of the Wildlife and Countryside Act 1981 places a duty on the Surveying Authority to keep these documents under a state of continuous review and to make such modifications (by way of Definitive Map Modification Orders) as appear requisite.
- 4.2 Section 53(3)(c)(i) provides that the Definitive Map should be modified upon the discovery of evidence that a highway not shown in the map and statement subsists or is reasonably alleged to subsist.
- 4.3 Schedule 14 of the Wildlife and Countryside Act provides a means by which a member of the public may apply for a Definitive Map Modification Order. It should however be noted that the duty to make a Definitive Map Modification is triggered by the discovery of evidence that the map and statement require modification, and not the submission of an application. In deciding whether or not to make a Definitive Map Modification Order the Authority must follow the evidence, rather than what may be requested within an application.
- 4.4 Section 56 of the Wildlife and Countryside Act 1981 provides that the Definitive Map and Statement are conclusive as to the particulars contained within them, however this conclusive status is without prejudice to any higher or unrecorded rights.

Public Rights of Way - General

- 4.5 Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. 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.
- 4.6 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

- 4.7 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*”¹ applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of local authority administrative order or a Court Order.

Types of Highway

- 4.8 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. who may use it) is dependent upon the specific type of highway status possessed by a given route.

Common Law

- 4.9 Under the common law there were, and indeed still are, only three types of highway. These are:
- Footpaths,
 - Bridleways; and,
 - Carriageways
- 4.10 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).
- 4.11 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.
- 4.12 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled vehicles and motor vehicles.

Statute

- 4.13 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance, under the provisions of the Countryside Act 1968 cyclists are granted a right to use bridleways. Other legislation provides for public carriageways to be subdivided into various categories which include motorways, cycle tracks, restricted byways and byways open to all traffic.

¹ *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

- 4.14 When determining the status of a specific route one must first consider the common law situation, and then apply any necessary restrictions to status imposed by statute in respect of restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

How Highways Come into Being – Basic Principles

Dedication and Acceptance

- 4.15 Subject to a small number of exceptions, before any highway over land can come into being there must be an act of dedication by the landowner followed by the acceptance of the strip of land as a highway by the public, usually (but not always) demonstrated by the public using the way.
- 4.16 The act of dedication may be express or implied depending upon the actions or inactions of the landowner. Acceptance is usually demonstrated by public user, however acceptance of a way as a highway by the Highway Authority may also suffice. The principles of how rights can come into being are further discussed in more detail below.

Statute

- 4.17 It is possible for highways to be created as a result of statutory processes such as enclosure awards, or in more modern times various types of statutory creation order.
- 4.18 The Highways Act 1980, Section 31 has also, to a certain extent, codified the common law (discussed below) by identifying a specific set of circumstance whereby a presumption of dedication may arise. Section 31 provides that:
- (1) Where a way over 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 and without interruption for a full period 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.*
- (2) The period of twenty 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 notice, such as is mentioned in subsection (3) below or otherwise.*

(3) Where the owner of the land, which any such way as aforesaid passes-
(a) has erected in such manner as to be visible by persons using the way
a notice inconsistent with the dedication of the way as a highway,
and
(b) has maintained the notice after the first January 1934, or any later
date on which it was erected,
the notice, in the absence of proof of a contrary intention, is sufficient evidence
to negative the intention to dedicate the way as a highway.

- 4.19 Section 31(1) has two ‘limbs’: the first provides that proof of twenty-years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

Common Law

- 4.20 The establishment of highway rights under the common law is not bound by the “20-year rule” referred to above, with the courts having ruled² that rights can be established in a very short period of time. It may therefore be helpful to look at this area in more detail.
- 4.21 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates* [1938] 2 All ER 237, both quoted with approval by Laws J in *Jaques v SSE* [1995] J.P.L. 1031, who described Scott LJ’s summary as “*a full and convenient description of the common law*”. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC* [1956] 2 Q.B. 439, *Mann v Brodie* (1885) 10 App. Cas. 378 and *Poole v Huskinson* (1843) 11 M & W 827. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J’s judgment in *Nicholson v Secretary of State for the Environment* [1996] EWHC Admin 393 comments further on aspects of these differences.
- 4.22 Halsbury³ states – “*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred*

² *North London Railway Co v Vestry of St Mary, Islington* (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18-month period

³ Halsbury’s Laws of England (Volume 55 ‘Highways’)

against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.

4.23 The inference of dedication may arise in three ways:

- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*⁴ the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public cab rank had been established on part of the bridge. The Justices’ conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages sometime after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that “*As to the erection of the barriers by the appellants, that was done too late to do away with the dedication*”.
- ii) Second, the inference has been 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 occurred⁵.
- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner’s recognition

⁴ (1872) 27 L.T. 672

⁵ See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA), 318-9, 325, 327-8, 331

of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact⁶.

Other Considerations

- 4.24 In reaching a conclusion the Surveying Authority must take into account Section 32 of the Highways Act 1980, which 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 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 complied, and the custody in which it has been kept and from which it is produced.”

Burden and Standard of Proof

- 4.25 The initial burden of proof rests with those asserting the existence of the alleged rights to first prove their case. It is only once this burden is discharged that any person aggrieved by the Order needs to put any case in response. The standard of proof to be applied to a case of this nature is the civil test of the balance of probability.

5.0 Background

- 5.1 The following background history of the matter has largely been provided by the Council’s Education Asset Management Planning Team
- 5.2 The area known as Stoke Lodge Playing Field and the large Victorian house now known as the Stoke Lodge Adult Education Centre, were purchased by Bristol City Council in two Lots. Lot One was purchased on 13th July 1946, for the sum of £6,300 and Lot Two on 19th September 1947 for the sum of £25,500.
- 5.3 From the date of purchase in the mid 1940’s until Local Government Reorganisation in 1974 the land was owned by Bristol City Council. In 1974 the newly formed Avon County Council became the landowner and remained so until 1996 when further local government re-organisation resulted in the creation of the new Unitary Authority of Bristol City Council.

⁶ See e.g. Parker J in *Webb v Baldwin and others* (1911) 75 JP 564 at p565

- 5.4 The land has an area of approximately 22 acres. It is mostly grassland which surrounds the large Victorian house called Stoke Lodge. The whole area was initially held for much needed housing after the Second World War, however within a few years of purchase, the land was re-classified for 'Educational Purposes' by Bristol City Council. The original plan had been to construct a new secondary School on the site to meet the needs of the new housing being constructed in the area. This never came to fruition due to other new Schools being built elsewhere in the surrounding area.
- 5.5 As a result of its designation for educational purposes, large parts of the land were laid out to playing fields, including football and rugby pitches in the winter and a cricket field and athletics track in the summer. The site was used by various Schools for many years until about 2000 when it was used as the detached school playing fields for Fairfield Secondary School. In 2011, the site was assigned to Cotham School, as their detached playing field. The site was let to Cotham School on a 125 year Academy lease. Over many years, the field facilities were also used by local sports clubs under arrangements made with the schools managing the site and/or the local education authority.
- 5.6 In 2011 an application was made by a local resident to register the land as a Town and Village Green (**the first TVG Application**). This resulted in a lengthy public Inquiry overseen by an Inspector (**the TVG Inspector**) appointed by Bristol City Council in their role as the Commons Registration Authority. The Inquiry heard all the evidence in support and objection to the first TVG Application, including representations from Cotham School & Bristol City Council (BCC) in their capacities as landowner and education authority.
- 5.7 Following the Inquiry the TVG Inspector published his findings and recommended that the land should not be registered as a Town or Village Green because the relevant criteria for registration had not been met. The TVG Inspector's findings and recommendations were presented to the Council's Public Rights of Way and Greens Committee (in their role as Commons Registration Authority) and they resolved that they would not follow the TVG Inspector's recommendation and instead it would register the land as a Town Village Green.
- 5.8 Cotham School challenged the Commons Registration Authority's decision in the High Court and it (the decision/registration) was quashed and the matter referred back to the Commons Registration Authority for re-determination. This resulted in a decision to refuse registration.

- 5.9 Two further applications for Town Village Green status were subsequently submitted in 2018 & 2019 (**the second and third TVG Applications**) and these were jointly placed before the same TVG Inspector who was appointed to determine the first TVG Application.
- 5.10 The TVG Inspector decided that because there had already been a comprehensive eleven-day Inquiry in relation to the first TVG Application that he did not intend to hold another inquiry. After an exhaustive exchange of written information and submissions between the parties the TVG Inspector recommended to the Commons Registration Authority that the second and third TVG applications should also be refused because the relevant criteria had not been met.
- 5.11 On the 28th of June 2023 the Council's Public Rights of Way and Greens Committee (in their role as Commons Registration Authority) considered the TVG Inspector's findings and recommendation to refuse the second and third TVG applications, but again decided that it would go against the Inspector's recommendation and register the land.
- 5.12 At the time of writing this report the decision to register the land as Town Village Green is the subject of litigation by way of a claim brought by Cotham School under s14 of the Commons Registration Act 1965 for the rectification of the TVG register to remove the site from the register of Town and Village Greens.
- 5.13 On 1st May 2018 an Application for a Definitive Map Modification Order (the DMMO Application) was submitted to Bristol City Council [**App 2 pg. 1-25**]. This application sought to add the four alleged footpaths shown by broken back lines on **Plan 1 [App 1]** to the Definitive Map and Statement for the Bristol City Council area. The DMMO Application was supported by 155 user evidence forms [**App 3-6 pg. 26 - 523**] alleging user from 1946 to 2018 when the DMMO Application was submitted. The user evidence forms are summarised in **Appendix 7 [pg. 524-530]**.
- 5.14 Given the above background to the case and that the Council is the landowner, as well as the Commons Registration Authority for the purposes of the Town Village Green Application; and the Surveying Authority for the purposes of the Definitive Map Modification Order Application the Council has appointed an independent specialist in public rights of way matters (Robin Carr Associates) to assess the application and

provide this advisory report to assist Bristol City Council (in its role as Surveying Authority) to determine the DMMO Application.

6.0 Statement of Truth

- 6.1 This report has been prepared in line with the requirements of the Civil Procedure Rules on the production of expert reports. As such I am required to include a Statement of Truth:
- 6.2 I understand that my overriding duty is to the Court/Tribunal, and I have complied with that duty.
- 6.3 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
- 6.4 I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:



Robin Carr FIPROW MAE



Date: 14th November 2024

Robin Carr Associates

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Version 2: 14/11/2024

7.0 Summary of User Evidence Submitted in Support of the DMMO Application

7.1 In total, 155 user evidence forms were submitted claiming use of the Application Routes. Of these:

- a) 57 people claimed use of Route 1 between 1946 and 2018;
- b) 39 people claimed use of Route 2 between 1965 and 2018;
- c) 25 people claimed use of route 3 between 1960 and 2018; and
- d) 34 people claimed use of route 4 between 1946 and 2018.

7.2 Copies of the User Evidence Forms submitted in support of the DMMO Application are included in the **Appendices 3 – 6 [pg.26 – 523]**. A summary of the user evidence, and graphs showing the periods of use are also included at **Appendix 7 [pg.524-530]**. The user evidence is assessed and considered against the tests set out within Section 31 of the Highways Act 1980 and the Common Law in Sections 11 & 12 below.

7.3 The existence of public rights of way across this site has not, to the best of my knowledge, been formally considered previously. For the avoidance of any doubt, the user evidence submitted does therefore, in my opinion, meet the required “discovery” tests set out within Section 53 of the Wildlife and Countryside Act 1981.

8.0 Evidence relating to the Village Green Applications

8.1 The TVG Inspector conducted an eleven-day Inquiry into the first TVG Application and what is described as “an exhaustive exchange” of written representations during which a considerable amount of evidence will have been heard. Some of this evidence, and indeed the TVG Inspector’s findings on that evidence will be of assistance in the determination of the DMMO Application.

8.2 Copies of the TVG Inspector’s reports (less any appendices) are therefore appended to this report as **Appendix 8 [pg. 531-678]**.

9.0 Summary of Other Relevant Evidence to be taken into Consideration

9.1 Given that the land originally formed the grounds of a private house (Stoke Lodge) it is unlikely that there is any historic evidence in support of the DMMO Application. Notwithstanding this an assessment of Ordnance Survey maps from the 1880’s onwards has been undertaken. None of these maps provide evidence in support of the DMMO Application. The matter therefore needs to be considered against the available evidence of public use

10.0 Discussion - General

10.1 Firstly I must stress that it is not within my remit to determine whether public rights subsist or are reasonably alleged to subsist over the Application Route. At this stage of the process, that is a matter for Bristol City Council in their role as Surveying Authority. My role is to undertake an impartial and independent assessment of all of the available and relevant evidence and provide guidance and advice to assist the Council in making its own decision.

10.2 Definitive Map Modification Orders do not extinguish or create any public rights of way, they simply seek to amend the legal records to reflect the existing and true situation with regard to the existence and extent of public rights of way. (e.g. an Order which adds a footpath to the definitive map does not create a new public right of way, it simply recognises that the public footpath in question already exists, albeit it is not shown on the Definitive Map). As a result, matters such as desirability, suitability, need, property values, security, privacy and even public safety, whilst all genuine concerns, are not matters that can lawfully be taken into consideration in the decision-making process.

10.3 In making their decision, given the ongoing Town Village Green issue, the Surveying Authority should be minded to take into account the advice offered in *Oxfordshire CC v Oxford CC* [2004] Ch. 253 by Lightman J. at [102]:

“The issue raised is whether user of a track or tracks situated on or traversing land claimed as a green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend on how the matter would have appeared to the owner of the land: see Lord Hoffmann in the Sunningwell case [2000] 1 AC 335, 352h-353a and 354f-g, cited by Sullivan J in the Laing case [2003] 3 PLR 60, 80, paras 78-81. Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the

character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the, the inference should generally be drawn of exercise of the less onerous right (the [public right of way) rather than the more onerous (the right to use a green)”

- 10.4 Turning now to the current DMMO Application, the TVG Inspector’s reports (into the TVG Applications) indicate that it would appear to be common ground that the land is subject to regular use by the public. For the purposes of the DMMO Application however it will also be necessary to be satisfied that use have been of specific linear alignments rather than a general wandering over the land.
- 10.5 One issue in contention in all of the TVG Applications, and which will also be one of relevance in the determination of the DMMO Application, is the existence and wording of signage (erected from the mid-1980’s onwards) at various entry points on the land. Such signage may have an impact on whether alleged usage is “as of right” and also whether the erection of the signs is sufficient to demonstrate a lack of intention to dedicate on the part of the landowner. Another factor, in common with the TVG Applications, will be the issue of Statutory Incompatibility.
- 10.6 Each of the above issue are addressed in more general terms below, before each of the DMMO Application routes are considered separately.

Use of Specific Linear Alignments (as opposed to general wandering over the whole area)

- 10.7 As noted above, it would appear to be common ground that the land is subject to regular use by the public. The question is whether such use relates to specific linear routes (i.e. the Application Routes) or can be attributed to a more general wandering across the land as a whole. Limited observations on site suggest that the public generally wander anywhere across the land, and such use is not consistent with the exercise of a public right of way. The witnesses who have completed user evidence forms [**App 3-6 pg. 26-523**] do however claim to have used specific routes across the field. For the purposes of determining the DMMO Application it may be appropriate

and take the user evidence “as read” and consider them as evidence of use of the Application Routes.

Existence and Wording of Signs at entry Points onto the land

10.8 Section 31(3) of the Highways Act 1980 provides that:

- (3) Where the owner of the land over which any such way as aforesaid passes—
- (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
 - (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,
- the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

10.9 Key considerations will therefore be the location of any such signs, their wording and when they were erected etc. In this particular case it is understood that signs were erected at points **S1**, **S2** and **S3** (on **Plan 1 [App 1]**) in the mid 1980’s with the sign at **S2** being replaced circa 2008 and the sign at **S1** being replaced circa 2018. The precise wording of the signs is unclear, but they are said to have made it clear not to trespass on the playing field and that requests for authorised use were to be made to the Director of Education. This wording might not, however, be deemed to convey the necessary “lack of intention to dedicate” to users of the Application Routes, who may consider themselves to be exercising a public right of way rather than trespassing.

10.10 The signs located at points **S1** and **S2** (on **Plan 1 [App 1]**) will have a direct impact on Application **Route 2 (E-F-G-C-H-J on Plan 1 [App 1])**. I believe that they will also have an impact on Application **Route 3 (B-G on Plan 1 [App 1])** and **Route 4 (B-H on Plan 1 [App 1])**. This is because the continuation of these routes is likely to involve the use of Application **Route 2** to reach West Dene or Shirehampton Road and therefore involves passing the signs located at points **S1** and **S2** (on **Plan 1 [App 1]**).

10.11 The sign located at point **S3** (on **Plan 1 [App 1]**) is not located on any of the Application Routes therefore it does not serve to sufficiently demonstrate a lack of intention to dedicate because path users are unlikely to see it from the Application routes. Its existence may however have some impact on how the public interpreted the signage as a whole (e.g. that they applied to the fields in the wider context rather than to specific routes across the land).

Statutory Incompatibility

- 10.12 I am aware that this issue may be the subject of the ongoing litigation, the outcome of which may have a bearing on both the TVG Applications and the DMMO Applications. The subject has also been comprehensively rehearsed in the TVG Inspector's reports therefore it is not proposed to duplicate what has already been said as the TVG Reports are included in the appendices to this report.
- 10.13 In my own experience, I am aware of various school premises which are crossed by public rights of way, albeit it may be unclear whether such public rights of way came into being before or after the establishment of the school. I am also aware of at least one case where Definitive Map Modification Orders, relying solely on modern user evidence, have been confirmed adding footpaths running across school playing fields, to the Definitive Map. Furthermore, I am aware that The Highways Act 1980 (as amended) includes specific provisions for the diversion and extinguishment of public rights of way across school site. There is therefore at least some acknowledgement that such public rights of way can and do already exist in other locations.
- 10.14 Finally, I am aware that in this particular case, until perhaps more recently, neither the Education Authority or the schools using the land have made any concerted efforts to actually prevent public use and enjoyment of the land. If such use had been incompatible I might have expected greater efforts to prevent it. I am however obliged to acknowledge that there may be some difference between permitting public use to take place when the land is not being directly used by the school, and the dedication of public rights of way across the land.
- 10.15 In view of all of the above, and subject to the above-mentioned Court case ruling to the contrary, I do not consider that there is any Statutory Incompatibility between the existence of a public rights of way across the land and its use for educational purposes.

11.0 Dedication under the Common Law (All Routes)

- 11.1 As discussed at paragraphs 4.20-4.23 above, dedication under the common law may arise in three ways, namely:
- i. that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication)
 - ii. from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact.

- iii. 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.
- 11.2 Halsbury states: *“Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance...An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;...At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.*
- 11.3 In considering the above three options it is therefore important to remember that under the common law the onus rests squarely with those asserting the public right of way to prove an intention to dedicate on the part of the landowner, and that no amount of public user will, on its own, give rise to the establishment of a public right of way.
- 11.4 The Authority should also be mindful of the case: *Folkestone v Brockman [1914] AC 338* which is said to have sounded the death-knell for the vast majority of claims based on common law dedication, because in most such cases the landowner's toleration would be a more probable explanation for the public use having taken place than that the landowner actually intended to dedicate a public right of way.
- 11.5 The erection of signs by Avon County Council in the mid 1980's is indicative that the County Council, as landowners, were aware that the land was the subject of public use for recreational purposes etc. The County Council, and its successor authorities appear to have accepted/tolerated public use but by erecting signs at various entry points onto the land they have sought to confirm such use is not in the exercise of any public right.

Conclusions regarding Dedication arising at Common Law

- 11.6 In conclusion, having taken into account all of the available and relevant evidence, it is my opinion that there is insufficient evidence to give rise to a reasonable allegation in favour of the dedication of public rights of way under the common law, over any of the Application Routes. It must therefore follow that I do not believe that such rights have been shown, on balance of probability, at common law to subsist over any of the Application Routes. This does not, of course, preclude the possible establishment of such rights under the provisions of Section 31 of the Highways Act 1980, the tests for which is different which are considered below.

12.0 Highways Act 1980, Section 31 (All Routes)

Date of Bringing into Question and requisite 20 Year Period

- 12.1 Before the provisions of Section 31 of the Highways Act 1980 come into effect, there must be some act or challenge which brings it home to the public that their right to use the way is being questioned/challenged, thus allowing them the opportunity to respond. The relevant twenty-year period is then calculated back directly from the date of bringing into question. It is not possible to rely on any random twenty-year period. However, in the absence of such a bringing into question, the date of the submission of an Application for a Definitive Map Modification Order may be used to calculate the required twenty-year period.
- 12.2 The Application for the Definitive Map Modification Order [**App 2 pg. 1-25**] was made on 1st May 2018, therefore in the absence of any other qualifying events, the requisite twenty-year period for all four routes will be 1998 – 2018.
- 12.3 Application Route **1 (A-B-C-D on Plan 1 [App 1])** does not appear to be directly affected by the erection of signage etc or indeed any other form of challenge until the submission of the DMMO Application [**App 2 pg. 1-25**] in May 2018 and/or the erection fencing around the site. The requisite period of use would therefore be 1998-2018.
- 12.4 The erection of the signs at points **S1** and **S2** (on **Plan 1 [App 1]**) circa 1985 may be considered to bring into question the existence of Application Routes **2, 3 & 4** as would the replacement of the sign at point S2 in 2008 and point S1 in 2018. This would potentially provide twenty-year periods of 1965-1985, 1988-2008 and 1998-2018 respectively for Application Route **2, 3 & 4** and/or 1988-2008 for Application Routes **2 & 3**; and 1998-2018 for Application Routes **2 & 4**.

- 12.5 Notwithstanding the above, it is accepted that not every user will have used the alleged routes in the manner defined within the report. For instance, users may have used a combination of parts of each path e.g.: using parts of Application Routes **1** and **2**. In which case it be argued that different dates apply. As such it may be appropriate to consider each of the timescales defined above.

Use by the Public

- 12.6 A total of 155 user evidence forms were submitted providing evidence of the four Application routes as follows:
- a) 57 people claimed use of Route 1 between 1946 and 2018;
 - b) 39 people claimed use of Route 2 between 1965 and 2018;
 - c) 25 people claimed use of Route 3 between 1960 and 2018; and
 - d) 34 people claimed use of Route 4 between 1946 and 2018.
- 12.7 Given the urban location of the Application Routes, if public rights of way are to be established it, would be reasonable to expect higher levels of use than in more rural or remote areas. Use is not, of course, limited to those who have completed user evidence forms, but even if that were not the case it is considered that there is sufficient use to support the establishment of the alleged public rights of way.

Use that is “As of Right” and “Without Interruption”.

- 12.8 The term “as of right” means: without force, without secrecy and without permission, and such use is generally trespassory in its nature. Any use in the exercise of private rights or permissions, including paid entry will be considered to be “by right” or in other words, in the exercise of an existing right or permission.
- 12.9 There is no evidence to suggest that use was by force or secretive, however the issue of permission, be it implied or presumed does need to be considered further. This is discussed below.
- 12.10 Consideration must also be given to the fact that permission can be implied from the landowner’s conduct, namely where a landowner’s conduct is such that it demonstrates to users that the use of a route is pursuant to his permission.
- 12.11 In the House of Lords decision of *R. (Beresford) v. Sunderland City Council [2004] 1 AC 889*, a village green case, Lord Bingham stated at paragraph 5:

“I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be

unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

12.12 Whilst the *Beresford* decision was disapproved of by the Supreme Court in *R. (on the application of Barkas) v. North Yorkshire County Council* [2014] 3 All ER 178 in relation to other grounds, the above remains good law.

12.13 An example of such implied permission arose in another village green case in *R. (Mann) v. Somerset County Council* [2017] 4 WLR 170 in which the landowner occasionally held a beer festival and funfair on part of the land for which he charged an entrance fee. Judge Robert Owen QC held that the exclusion of members of the public, except for those who paid the entrance fee, for a few days in the year was sufficient exclusion to demonstrate that public access to the land for the rest of the year was permissive. Having cited from *Beresford*, he stated at paragraph 71:

"From these observations, which I take as authoritative guidance on conduct by an owner which may count as an overt act or as a relevant or demonstrable circumstance sufficient in law to allow an inference of permission, it appears that the owner must make it clear that the public's use of the land is with his permission and that that may be shown by excluding the public on occasional days (per Lord Bingham, para 5; and see para 79 per Lord Walker); he must do something on his land to show that he is exercising his rights (as owner) over his land and that the public's use is by his leave (para 6); there must be a positive act by owner qua public though a notice is not necessary provided the circumstances relied on allows the inference to be drawn (para 59); implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice (para 75); such conduct need only occur from time to time (I should add, perhaps once only during the period under scrutiny) (para 76); such conduct will be expected to have an impact on the public and show that when the public have access (I should add, to all or part of the land) they do so with the leave or permission of the owner (para 83)."

12.14 He went on at paragraph 74 to state that:

“the owners have demonstrated by positive acts from time to time that, as owners, they were exercising and retaining their rights over their land by excluding all comers, subject to payment of an entrance charge. The owners acted in this way without regard to the local inhabitants views and without consultation or so much as a “by your leave”. They conducted themselves as an active landowner and, as the local inhabitants might reasonably be taken to have appreciated, as though the local inhabitants had no right over the land.

It is difficult to see, viewed objectively, how the local inhabitants could not have appreciated that in continuing to use the land they were doing so with the (implied) permission of the owner. The claimant's arguments seriously undervalue the nature and quality of the owner's acts and fail to recognise the significance of the exercise of the owner's right to exclude, albeit expressly over part of the land and on occasions only.”

12.15 It is apparent from such caselaw that implied permission may arise where a landowner excludes users from a route from time to time, even only on one occasion during the relevant twenty-year period. That would be a sufficient overt act to demonstrate to users that the landowner was retaining his rights over the route which the public were therefore using with his implied permission.

12.16 It appears to be accepted that the land is, and has been, used by various schools over many years, with it being set out as various sports pitches and tracks. It may also follow that whilst the schools were actively using those pitches and or tracks, members of the public would not be able to walk across them. In view of the court cases discussed above, it may therefore be possible to imply that use was subject to an implied permission. If that were the case, use would not be “as of right”.

12.17 In order for something to constitute an interruption for the purposes of section 31(1) of the Highways Act 1980 there must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on. An effective interruption requires actual interference with passage by the user, not simply a temporary lack of use, although the nature of the interruption need not necessarily be a physical one. In addition, the circumstances in which a restriction on use takes place and the absence of any intention deliberately to prevent use of the way as of right may be relevant. There is no evidence to support the proposition that the Application Routes were subject to any form of interruption during the relevant twenty-year periods.

Interim Conclusion

12.18 Whilst there are a number of dates (1965-1985, 1988-2008 and 1998-2018) upon which public rights may have been brought into question, there has undoubtedly been use by the general public during all of those time periods. There is however some question over whether the nature of that use can be defined as being “as of right” due to a possible implied permission inferred from the use of the land by the owners/occupiers which involved access being restricted at times. Notwithstanding this uncertainty, it would be reasonable to conclude that there is at least a “reasonable allegation” in favour of the establishment of public rights of way over the Application Routes.

Evidence of Lack of Intention to Dedicate

12.19 Having concluded that there is an initial reasonable allegation in favour of dedication, it is necessary to consider whether there is sufficient evidence of any lack of intention to dedicate public rights of way over the Application Routes. If there is such evidence the initial presumption may be overturned.

12.20 In *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, the House of Lords held that:

- a. to rebut the statutory presumption of deemed dedication the landowner must have communicated its lack of intention to dedicate to the public through overt acts;
- b. the landowner's lack of intention to dedicate does not have to be continuously manifested during the entire 20-year period; it is sufficient if there is no intention at some point during that period;
- c. the test is whether a reasonable user would have understood that the landowner intended to disabuse the user of the notion that the path was a public right of way.

12.21 As discussed above there are three twenty-year periods (1965-1985, 1988-2008 and 1998-2018) under consideration. It is therefore only acts demonstrating a lack of intention to dedicate which fall within those periods that will qualify.

12.22 It would appear that the only evidence of any lack of intention to dedicate would be the installation and subsequent maintenance of the signs. The wording of the signs is however somewhat ambiguous and it does not necessarily show a clear lack of intention to dedicate the Application Routes as public rights of way. This is especially

the case as the signs were not erected at each end of the Application Routes, and one might expect a landowner who is also the Highway Authority to install more appropriately worded signage to make the matter clear. Under the circumstances it would be reasonable to conclude that the signage that was erected is insufficient to meet the requirements of Section 31(3) of the Highways Act 1980.

12.23 The signs do not have a direct effect on Application Route **1** therefore there is no evidence of a lack of intention to dedication in respect of this route.

12.24 Even if the signs are considered sufficient, there is a potential twenty-years use of Application Routes **2, 3 & 4** from 1965 to circa 1985 before the signs were erected.

13.0 Consultant's Conclusions

13.1 Having considered all of the available and relevant evidence, it is evident that this is not a clear-cut case. Whilst there may be some question over whether the case in favour of the establishment of public rights of way over the Application Routes has, on the balance of probability, been met there is a reasonable allegation in favour of their establishment. That being the case the Authority's duty to make a Definitive Map Modification Order has been triggered.

14.0 Legal Process

14.1 If the Council decide to approve the application, or part of it, legal orders known as Definitive Map Modification Orders will be made and advertised. If no objections are received, the Order(s) will be confirmed and come into effect. If objections are received, and not subsequently withdrawn, the Order(s) must be referred to the Secretary of State (via the Planning Inspectorate) for determination. The Secretary of State will appoint an Inspector to hear the case in support and objection to the Order(s) by way of either written representations; a hearing; or a local public inquiry.

14.2 If the Council decide to refuse the application, the Applicant has a right to lodge an Appeal within 28 days of being notified of the decision. Such an Appeal must be lodged with the Secretary of State (via the Planning Inspectorate) who will again appoint an Inspector to review the Council's decision, and the relevant evidence, and may direct the Council to make an Order.

15.0 Options Available to the Council (Decision to be Made)

15.1 If the Council agrees with the Consultant's conclusion that there is evidence to support a "reasonable allegation" of the establishment of public rights of way over the Application Routes, they should resolve that:

- a) A Definitive Map Modification Order, or Orders, be made to record the routes over which they believe public rights have been established, as Public Footpaths;
- b) In the event of objections being received, and not subsequently withdrawn, the Order(s) be referred to the Secretary of State for confirmation;
- c) If no objections are received, or if received they are subsequently withdrawn, the Orders be confirmed by the Council.

15.2 If the Council decide that there is insufficient evidence to demonstrate that public rights of way have been established they should refuse the Application and advise the Applicant of his rights to appeal the decision.

15.0 Recommendation

15.1 Whilst it is the Consultant's view that there are sufficient grounds for making the requested Definitive Map Modification Orders, the Surveying Authority must make its own decision based upon the available and relevant evidence.

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