



Report of the Chief Legal Officer

Planning Committee – 6 October 2020

Public Rights of Way – Application for Modification Order to Upgrade Part of Footpath Number 18 to a Restricted Byway

Community of Ilston

Purpose:	To consider whether to accept or reject an application made to this Authority to make a Modification Order to upgrade a part of public footpath number 18 to a restricted byway and thus recording as such on the Council's Definitive Map of Public Rights of Way.
Policy Framework:	The Countryside Access Plan: Policy No.4.
Statutory Test:	Section 53 Wildlife and Countryside Act 1981 Section 31 Highways Act 1980
Reason for Decision:	The evidence is not considered sufficient to satisfy the statutory tests set out in this report and to make a Modification Order to record a restricted byway on the Definitive Map and Statement.
Consultations:	Legal, Finance and Access to Services and all the statutory consultees, including local members, landowners and the prescribed organisations.
Recommendation:	It is recommended that the application be refused and that no Modification Order is made to upgrade the status of part of public footpath number 18.
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1. Introduction

- 1.1 An application was made to this Authority on the 5th December 2014 for a Modification Order to upgrade part of footpath no. 18 to a restricted byway along its length running from the north end of Park Wood to the B4271 at Llethryd. A plan showing the route of the claimed restricted byway A-B can be viewed on the map attached to this report. (See Appendix I)
- 1.2 The application is based on evidence of long-term use by the public of the claimed route for cycling. Twenty-nine users have submitted completed evidence questionnaires in support of the application.
- 1.3 The purpose of this report is to establish whether it would be possible to acquire restricted byway rights based on this evidence of use and if so, whether this evidence is sufficient to show that there has been dedication of the route claimed as a restricted byway.

2. The Law

- 2.1 The application was made under the provisions of the Wildlife and Countryside Act 1981. Section 53(3)(b) requires the Council to modify the Definitive Map and Statement following the expiration of any period such that the enjoyment by the public of a way raises a presumption that the way has been dedicated as a public path.
- 2.2 Section 31 of the Highways Act 1980 raises the presumption that a way has been dedicated as a highway if the route has been used by the public “as of right” (not by force nor stealth nor permission) and without interruption for a period of 20 years unless there is sufficient evidence that there was no intention during that period to dedicate it. This is known as “statutory dedication”.
- 2.3 If the tests for “statutory dedication” are not satisfied, it may be appropriate to consider whether there has been “common law dedication”. This would require consideration of three issues; whether any current or previous owners of the land had the capacity to dedicate, whether there was express or implied dedication and whether there was acceptance of the highway by the public.
- 2.4 For “common law dedication” the landowner would need to have not just acquiesced to public use but also in some way facilitated or encouraged that use and a lesser period than twenty years may be sufficient. Evidence of use by the public ‘as of right’ may support an inference of dedication and may also show acceptance by the public.
- 2.5 The different classes of highway that can be recorded on a Definitive Map and Statement are as follows:

- 2.5.1 A footpath – this is a highway over which the public have a right of way on foot only but which is not a pavement or footway at the side of a public road.
- 2.5.2 A bridleway – this is a highway over which the public have a right of way on foot and on horseback or leading a horse. It should be noted that if a way is classified as a bridleway then since section 30 of the Countryside Act 1968 was introduced, such a highway may also be used by cyclists, but in exercising that right cyclists shall give way to pedestrians and persons on horseback.
- 2.5.3 A Byway Open to All Traffic (BOAT) – this is a highway over which the public have a right of way for vehicular use and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are used.
- 2.6 A Restricted byway is a new category of highway introduced by Section 47 of the Countryside and Rights of Way Act 2000. It is defined as a highway over which the public have a right of way on foot, on horseback or leading a horse, and in a vehicle other than a mechanically propelled vehicle, thereby giving a right of way for pedal cyclists and drivers of horse drawn vehicles.
- 2.7 The Countryside and Rights of Way Act 2000 amended the provisions of the Wildlife and Countryside Act 1981 to include express reference to restricted byways. Section 53(3)(b) above is therefore amended and thus requires the Council to modify the Definitive Map and Statement following the expiration of any period such that the enjoyment by the public of a way raises a presumption that the way has been dedicated as a public path or restricted byway.
- 2.8 Applications for Modification Orders to amend the Definitive Map by the addition of or the upgrading to a public restricted byway are therefore made in the same manner as for footpaths and bridleways under section 53(2) of the Act.
- 2.9 Section 31(1A) has also been inserted into Section 31 of the Highways Act 1980 by the Natural Environment and Rural Communities Act 2000 so the test set out in paragraph 2.2 above now applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway.

3. Preliminary Considerations

- 3.1 If the section of footpath number 18 subject to this claim (A-B) were to be upgraded to a restricted byway it would not link to another highway of similar or equal status, as the path would continue through the forestry land to the South of point B on the plan as a public footpath.

This would create a cul-de-sac path for cyclists. There would be no legal right for cyclists to proceed from point B.

- 3.2 There is an official Natural Resources Wales sign south of point B on land owned by NRW that states 'Pedestrian access only'. (See Appendix II). However, a representative of Natural Resources Wales (NRW) has advised that the public are permitted by the NRW to cycle over the forestry land to the south of point B.
- 3.3 As the NRW has advised and the applicant has conceded that he is aware that cyclists use the forestry land with the permission of NRW, if the application was granted, the restricted byway that would be recorded along A-B would lead to the NRW land which is not a public highway and which is land used subject to a revocable permission.
- 3.4 Section 31(1) of the Highways Act 1980 states that a right can only be established over a way if it is a way of such a character that could give rise to statutory dedication. The case of *Oxfordshire County Council v Oxfordshire City Council* [2004] considered the true meaning of this statement. Put more clearly the use must be a 'right of passage' over a more or less defined route. This definition excludes ways which do not connect to any other highway, ways that do not connect to a highway at one end or ways when use depends on a revocable permission to use an access route at an end of the way.
- 3.5 In this application, the route in question is therefore not a route of such a character that public use could give rise to a presumption of dedication, as the claimed route would form a dead end for cyclists or any other users who claim to use the route as a restricted byway. Therefore, this application does not satisfy the legal test under Section 31 of the Highways Act 1980 and statutory dedication cannot be deemed to have occurred.

4. Consultations

- 4.1 Those consultees listed on the first page of this report have been informally consulted regarding the application in accordance with advice given in Welsh Government Guidance to Local Authorities and a draft version of this report was sent to the applicant and the landowner for comment.

5. Evidence for Statutory Dedication

(a) Calling into Question

- 5.1 The character of the way is just one part of the legal test under section 31 of the Highways Act 1980 in order to establish whether statutory dedication can be deemed to have taken place. It would also be necessary to consider whether the length of use of the way is sufficient. The relevant twenty-year period described in paragraph 2.2 of this

report would first need to be determined. This period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. This can occur when the path is obstructed to public use or when the landowner makes it clear to the users of the way that he or she does not consider that a public right of way exists for that particular category of user. This could be by the erection of signs showing his non-intention to dedicate. In the absence of a clear calling into question, the Natural Environment and Rural Communities Act 2006 has established that the date of the application can be taken to be a calling into question and thus can be used to calculate the relevant twenty-year period.

- 5.2 Section 31(3) of the Highways Act 1980 states the following: Where the owner of the land 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 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.
- 5.3 In the present case it is therefore necessary to consider the signs erected on the footpath, which refer specifically to cycling on the path.
- 5.4 The Council erected a no cycling sign on the gate at point A on the accompanying map, facing the southerly direction, (See Appendix III) and another such sign on the gate at point B on the accompanying map facing the northerly direction. (See Appendix IV) These signs were erected in 2003 and remain in situ. Therefore, it is accepted that the right of the public to use the way was brought into question in 2003. As such, the relevant twenty year period described in paragraph 2.2 is calculated retrospectively from this date, and will be recognised as 1983 to 2003.

(b) User Evidence

- 5.5 Twenty-nine witnesses have submitted witness questionnaires as evidence in support of the application, twenty-three of whom claimed to use the path for all or part of the relevant period.
- 5.6 Three of the twenty-nine witnesses did not indicate a period during which they used the path, and three others claimed to use the path outside of the relevant twenty year period.
- 5.7 Several witnesses have claimed to have used the path many years before the relevant period, one as far back as the 1950's, and many through the 1970's.

5.8 Of the twenty-three witnesses who have submitted relevant evidence for consideration, all twenty-three have said that they use the path to cycle, and most of those have also said that they use the path on foot.

6. Conclusion

6.1 The route in question is not a route of such a character that public use could give rise to a presumption of dedication, as the claimed route would form a dead end for cyclists or any other users who claim to use the route as a restricted byway. This does not mean that the path is a dead end in terms of a physical obstruction but rather a dead end as the legal right for cyclists to pass along the route would suddenly terminate at point B. Therefore this application does not satisfy the legal test under Section 31 of the Highways Act 1980

6.2 As it is recognised that Statutory Dedication has not occurred, it is necessary to consider whether dedication has occurred under Common Law.

6.3 Common Law dedication cannot be deemed to have occurred in this case as the landowner has not set out a path for use and has not encouraged the public to use the path for cycling.

6.4 Therefore it is recommended that the claim be rejected.

7. Financial Considerations

7.1 There are no financial implications to this report.

8. Equality and Engagement Implications

8.1 The Council is subject to the Public Sector Equality Duty (Wales) and must, in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

Our Equality Impact Assessment process ensures that we have paid due regard to the above.

8.2 An EIA Screening Form has been completed with the agreed outcome that a full EIA report was not required.

Background Papers

1. ROW-00204090/KAO

2. EIA Screening Form

Appendices:

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| Appendix I | Plan showing route claimed as a Restricted Byway. |
| Appendix II | Photograph of sign at Point B on the plan at Appendix I, erected by Natural Resources Wales asserting that the path and beyond (in a southerly direction towards Parkmill) is to be used for pedestrian access only. However, NRW have confirmed they grant permission for cycling on their land beyond point B. |
| Appendix III | Photograph of sign at Point A on the plan at Appendix I, facing the claimed route in a southerly direction and showing an illustrative sign indicating that cycling is not permitted, and a no cycling sign. |
| Appendix IV | Photograph at Point B on the plan at Appendix I, facing the claimed route in a northerly direction towards Llethryd Bridge, and showing a no cycling sign. |