

Committee report

Committee	APPEALS SUB COMMITTEE
Date	1 SEPTEMBER 2015
Title	APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER – FOOTPATH, SEAGROVE BAY, SEAVIEW, ISLE OF WIGHT
Report Author	RIGHTS OF WAY MANAGER

PURPOSE

1. The report sets out evidence to determine an application under Schedule 14 of the Wildlife and Countryside Act 1981 for an order to modify the Definitive Map and Statement by adding a footpath at Seagrove Bay, Seaview, Isle of Wight.

STRATEGIC CONTEXT

2. The Definitive Map and Statement records the public rights of way network. Delivering statutory duties in respect of it, in conjunction with the Rights of Way Improvement Plan, provides use of sustainable transport options and leisure activities for residents and visitors promoting health and wellbeing.

THE APPLICATION

3. The application (Appendix 1 – Item 1) dated 14 December 2012 claims footpath status and submits supporting user evidence. The applicant is Mr John Trotter of Priory Cottage South, Priory Road, Seaview, Isle of Wight, PO34 5BU.

LOCATION, SITE CHARACTERISTICS AND GENERAL HISTORY

4. The application plan claims use of a path starting at the public conveniences in Ferniclose Road heading north to a spur path to the beach adjacent a property known as Monsterrat; then heading north along a section of the beach to a flight of concrete steps leading onto a sea wall (and adjacent strip of land) fronting a number of properties from and including Sea House to Nodnewel; then continuing north along the beach adjacent to Pier House to a flight of concrete steps leading up to Seaview Bay properties and continuing north in front of those properties to Pier Road.

5. The sections of the claimed route leading from Ferniclose Road, the spur path to the beach and in front of Seaview Bay properties are already recorded on the Definitive Map as public rights of way and therefore for the purposes of this report and determination of the application these sections will be ignored. The plan at Appendix 2 Item 2 confirms the section of the claimed path (ABCD) which, not being recorded on the Definitive Map, is the subject of this report and subsequent determination of the application ("claimed path"). Sections AB and CD are along the beach and section BC is along the top of the sea wall and strip of land behind it (together - "sea wall").
6. Site Maps of the claimed path are in Appendix 2. (Item 1) extract of the current Definitive Map showing recorded rights of way in the area. (Item 2) current Ordnance Survey map with the claimed path (ABCD) marked thereon. (Item 3) Aerial photo map. Annotated photographs (1 to 25) of the claimed path taken by the Isle of Wight Council are in Appendix 6 Item 3. Property and land ownership details, including Land Registry plans, are in Background Papers 3.
7. Section AB: Point A is at the point which the spur path (Public Footpath R105) reaches the beach. The claimed path continues along the beach adjacent to the sea defence walls fronting properties known as The Beach Hut/The Boat House, Rookery Court and East Rookery to reach concrete steps leading onto the sea wall (B). The height and type of beach material in section AB changes constantly and on occasions dramatically. At low beach levels large rocks and boulders immediately in front of The Beach Hut/The Boat House are exposed. These rocks and boulders were placed in this location in 2000/1 during the coastal protection works along the Esplanade to the south and comprise the remains of a concrete groyne and some imported boulders. When beach levels are high, sand and shingle are present around the rocks and boulders making them much less exposed. The point at which high tide reaches is dependent on these changes in beach levels as well as tides (neap/spring) and weather conditions affecting wave action such as wind speeds and direction.
8. Section BC is the sea wall, originally fronting all properties from The Sea House to Nodnewel (approximately 120 metres in length with an average overall width of 6.5 metres). A section of this, fronting The Sea House to The Beach House remains independent from those properties (and is owned jointly by those property owners), but the sections fronting Waters Edge and Nodewel effectively now form part of the grounds to those properties and are part of the titles to those respective properties/owners. The original property known as Waters Edge was bought by the current owners in 2001 and was replaced by the current building. Demolition and land drainage works (also affecting Bonny Blink) started in 2003, construction in 2004 and works were completed in 2008. In 2007 the sea frontage of Waters Edge was landscaped and safety fencing was replaced on both boundaries by three foot chestnut paling extending to the eastern edge of the sea wall. A beach chalet was built on the sea wall at Nodnewel in 2007. A wooden ladder is sometimes present connecting the top of the sea wall at Nodnewel to the beach and there is evidence of the point at which this is attached with a chain. The beach level here changes considerably resulting in a drop from the top of the sea wall to the beach ranging from two to six feet.

9. Section CD runs adjacent to a wall and metal fence forming part of Pier House. It runs along a bank of pebbles which constantly changes in height, but is generally in existence most of the time. The point at which high tide reaches is dependent on changes in beach levels as well as tides (neap/spring) and weather conditions affecting wave action i.e. wind speeds and direction. At point D the pebbles reach the bottom of a flight of concrete steps forming part of the sea defence wall of Seaview Bay which connects to Public Bridleway R66.

BACKGROUND TO THE APPLICATION

10. In 2008 an application was made by Nettlestone and Seaview parish council claiming use of the section along the sea wall (section BC only) (Background Papers 5). The construction of the chestnut paling fencing at Waters Edge in 2007 blocking passage along the sea wall led to that application being made. The Isle of Wight Council determined this application and subsequently made a modification order to add a public footpath along the sea wall to the Definitive Map. However, objections were raised and the order was referred to the secretary of state for determination, whose decision was not to confirm the order due to neither end of the route connecting to an existing highway (Background Papers 6). The current application has been made with a view to overcoming this issue by claiming additional sections of path along the beach at both ends of the sea wall which connect to existing highways (Public Footpath R105 (spur path) and Public Bridleway R66).

CONSULTATION

11. The parish council is the only statutory consultee. A copy of their response is at Appendix 7.
12. The present elected member for the area is a user witness supporting the application.
13. Landowners are contacted to explain the application and procedure for determining it, and invited to submit evidence. Their response is given under "Landowner evidence".
14. Landowners affected by the application are:

Section AB (presumption of ownership to mean high water):

1. Mr Peck and Mr Creasey (The Beach Hut/The Boat House)
2. Mr and Mrs Randall (Rookery Court)
3. Mr Williams, Mrs Williams, Mr Kitson and Mr De Laszlo (East Rookery)
4. Mr Humphrey, Mrs Humphrey and Mrs Smith (West Rookery)

Section BC (joint owners of the sea wall south of Waters Edge):

5. Mr Poland (Sea House)
6. Mrs Howell (Shorestones)
7. Mr Tuckey (Bonny Blink)
8. Mr Ingram (The Beach House)

Section BC (ownership including sea wall frontage):

9. Mr and Mrs R Hancox (Waters Edge)

10. Mr F Bull, Mr R A Bull, Mrs H F Jones and Mrs R M Landrock (Nodnewel)

Section CD (presumption of ownership to mean high water)

11. Mr Izatt and Mr Simpson (Pier House)

Section CD (owner of concrete steps at point D)

12. Seaview Bay Management Ltd (Seaview Bay)

15. All reports on modification order applications are submitted to landowners and the applicant for comment before it is submitted to the committee for decision. No comments have been made.
16. If an order is made, there is a statutory advertisement period of six weeks during which anyone may make representations or objections.

LEGAL BACKGROUND

17. The Isle of Wight Council has a duty under section 53(2)(b) of the Wildlife and Countryside Act 1981 to review the Definitive Map and Statement and to make such modification orders as appear requisite in consequence of events set out in section 53(3). This application concerns the possible addition of a path to the Definitive Map and Statement under section 53(3)(b) or (c).
18. The panel is acting in a quasi-judicial role and the decision must be made on the basis of evidence and law relevant to the fact of dedication of a highway and on no other consideration.
19. Guidance on the provisions of the Wildlife and Countryside Act 1981 relating to the review of the Definitive Map and Statement and the role of the panel is at Appendix 3 (Item 1).
20. To determine the application, the panel will have to decide on the basis of the evidence presented whether a presumption of dedication has been raised or a right of way is at least reasonably alleged to exist. The standard of proof to be applied is the balance of probability.
21. A statutory presumption of dedication is raised if a period of public use has occurred which meets the requirements set out in section 31(1) of the Highways Act 1980.
22. The conclusion that a right of way subsists, or is reasonably alleged to subsist, may be based either on evidence which satisfies the requirements for deemed dedication under section 31(1) of the Highways Act 1980 or on evidence from which dedication at common law can be inferred. Evidence may be user or documentary or both.
23. Dedication is deemed under section 31 of the Highways Act 1980 (Appendix 3, Item 2) if the public have actually used the way as of right and without

interruption for a full period of twenty years counted retrospectively from the date the right of the public was brought into question, unless there is sufficient evidence that there was no intention during that period to dedicate it. Once a presumption of dedication is raised, the onus is on the owner to demonstrate sufficient evidence of negation. Evidence of overt and contemporaneous acts (during the statutory period) are required.

24. For dedication to be implied at common law, there must be intent to dedicate on the part of the owner and acceptance (actual use) by the public. In most cases the user evidence is relied on to prove both requirements. The onus is on those claiming the right to prove the owner's intention to dedicate. The inference of dedication at common law should not be drawn unless there is no other way of explaining the evidence. Proving dedication at common law therefore depends on such factors as the level and length of user, the extent to which the owner was aware of it and what other explanation there might be.
25. Guidance on the law and evaluation of evidence relating to the dedication of highways is at Appendix 3, Item 3 : Section 5 Dedication / User Evidence in the Consistency Guidelines issued to inspectors by the Planning Inspectorate (8th revision – July 2013).

USER EVIDENCE

26. The application was lodged with two user evidence forms, one completed by the applicant and the other by the lead witness, Mrs Mardall. Attached to Mrs Mardall's user evidence form are copies of the application plan signed by 24 additional witnesses. During the investigative period the Isle of Wight Council was invited to interview two additional witnesses, the applicant's wife (Mrs Trotter) and the wife of one of the 24 witnesses (Mrs Bostelmann).
27. The applicant's user evidence form refers to the record of the 2008 application (Background Papers 5). Accordingly, the user evidence in that application including of those persons included in that application, but not user witnesses to the current application needs to be considered.
28. The applicant and lead witness arranged for nineteen witnesses to be interviewed by the council. This number of interviews accords with the council's general practice in modification application cases to interview approximately 75 per cent of user witnesses where possible.
29. Summaries of the user witness evidence are provided in the user witness table and user witness bar chart (Appendix 4, Items 1 and 2).
30. Of the nineteen witnesses interviewed, sixteen indicated that they would be prepared to attend a public inquiry. One witness interviewed (Mrs Bayley) subsequently withdrew her statement for reasons unknown. Her evidence given in the 2008 application remains on public record, but in view of her withdrawal, this should be given little weight for the purposes of determining the current application. One witness interviewed did not provide any evidence of use during the twenty year period, 1987 to 2007 ("statutory period").

31. Four witnesses confirmed they were friends (on visiting terms) with landowners throughout the whole of the statutory period or were friends with a landowner for all of their period of use. One confirmed that they are related to Mr Poland. Evidence by family, friends or employees of a landowner may be given less weight since they can be thought of as having the consent of the landowner, and are not representative of the public at large. Accordingly, the evidence given by these five witnesses should be given less weight for the purposes of determining this application. (A further four witnesses indicated that they were friends with the current owners of Bonny Blink who purchased the property in 1993 and one other witness indicated that she was friends with the owners of Bonny Blink and Shorestones from 2000 onwards).
32. Of the twelve remaining witnesses many used the claimed path as a route to get to Seaview for various reasons and for walking generally, for instance a circular route, and explained that it was preferred due to it being along the coast. All twelve witnesses confirmed that the claimed path was only used at high tide when a through route along the beach (without using the sea wall) was not possible. Seven confirmed use throughout the whole twenty year period. Such use was less than once per week and therefore considered to be occasional. Of the other five witnesses who confirmed use from 1987 to the mid/late 1990s, three used the route less than once per week (occasional) and two used it approximately once per week which is considered to be regular. Frequent use is considered to be more than once a week, but none of the twelve remaining witnesses confirmed such use. All twelve witnesses confirmed that the claimed path was blocked by the fence erected across the sea wall at Waters Edge in the summer of 2007. One witness is known to have complained in 2006 about temporary/construction fencing at Waters Edge blocking a route along the sea wall, but none of the remaining witnesses confirmed any obstructions before the fencing in 2007. All twelve witnesses confirmed that they were not stopped from using the claimed path or told to turn back; they did not see any signs or notices and were not given permission to use it.

Section AB: Eleven confirmed that this section of the claimed path was possible. One explained that use of this section depended on the height of the beach. The majority described it as along sand/shingle with some big rocks/boulders to step over/around and explained that the height and surface type of the beach had constantly changed. The general view of the width of this section was that it was dictated by the tide. Many described it as narrow due to having to walk close to the sea defence walls where the beach was not covered by the sea at high tide. Various widths were given but the average is 1.5 to 2 metres.

Section BC: All twelve witnesses confirmed use along the sea wall.

Section CD: Ten confirmed that this section was possible at high tide and generally on a bank of pebbles. Two confirmed that it was not possible at high tide and they would get wet feet or have to turn back. The width was generally described as being wider than at AB due to the bank of pebbles and the average is considered to be 2.5 metres.

Ladder/wall: Seven witnesses confirmed that the ladder was always there. One said the ladder was not always there, but it was always possible to jump down or climb up. Four said the ladder was not always there and climbing up or jumping down the sea wall was dependent upon the beach level being high.

33. The evidence provided by the five witnesses whose use of the sea wall/strip (BC) may be deemed to be with permission (due to being friends or related to landowners) should also be considered, albeit that their evidence should be given less weight:

Section AB: Three witnesses explained that this section was not possible at high tide. One said there was always a gap and one said it was possible unless very bad weather. The average width given was 1.5 metres. Two mentioned the beach levels changing.

Section BC: Three witnesses explained that they used the seaward edge of the wall. One witness said that there were occasions when both ends of the sea wall were blocked by the sea/tide. One witness (Mr Hermans) explained that he was told by Mrs Wadham that the sea wall/strip was private.

Section CD: It was confirmed by all five witnesses that this section was normally possible at high tide.

Ladder/wall: One witness confirmed that the ladder was always there but the other four said that there were times when it wasn't there (one of which said it was only there in the summer). One witness said that if the ladder was there she would use it, but if the landowner was present she would ask his permission as she considered the ladder to be private. On the occasions when the ladder was not there, three witnesses said that when the beach level was high enough it was possible to climb up/jump down the sea wall.

DOCUMENTARY EVIDENCE

34. Documentation (including photographs) submitted in conjunction with user and landowner evidence is included in "User evidence" and "Landowner evidence" respectively.

LANDOWNER EVIDENCE

35. The landowners affected by the application are listed at paragraph 15 above. Twelve properties border the claimed path. Other than Seaview Bay Ltd, all owners (or a representative thereof) have provided statements, correspondence and/or have been interviewed. A summary of evidence provided by each landowner is set out in the landowner evidence table (Appendix 5, Item 1) and collectively summarised under the following headings:

Mr Bull

36. Mr Bull's family were local builders and ran a tent and deckchair hire business at Seagrove Bay from 1901. They initially leased the land. Tents were situated closely packed on the sea wall as shown in historic photographs, as well as on

the beach itself. Six ladders were provided during the summer months to access the sea wall. This business continued until the 1960s when it gradually wound down and ceased completely when Mr Bull's uncle died in 1976.

37. Mr Bull is able to give details of the history of the area. The Seagrove Estate was sold in 1948 and the Bull family bought the land they had been leasing and built the house Nodnewel in 1957, where Mr Bull still lives. A plot was sold for the original Waters Edge which was built in 1960 by Mr and Mrs Wadham. The frontage was in line with the other houses - it did not include the sea wall and frontage. Mr and Mrs Wadham purchased this from them later (1977). Water's Edge including its frontage to the sea wall was sold to the present owners (Mr and Mrs Hancox) in 2003 after Mrs Wadham's death (2001). The remainder of the sea wall was bought jointly by the other frontagers.
38. Mr Bull confirmed that the ladder at Nodnewel was (and is) his private ladder, but wouldn't stop anyone else from using it. It was put down in the summer (May to October) and taken up in the winter to stop it being washed away in bad weather.
39. Mr Bull confirmed he gave permission for people to keep boats on his section of the sea wall at one stage and he put up a sign saying that the keeping of boats there was with permission only.
40. The majority of the other landowners explained that they considered Mr Bull's ladder to be private and that it was removed during the winter months and at times when it was not present it was not possible to climb up or jump down due to the height from the top of the wall to the beach. Further, the strip of land and sea wall fronting his property is considered to be his private land.

Mrs Wadham

41. Four landowners independently confirmed that during Mrs Wadham's ownership of her section of the sea wall (fronting Sea House to Waters Edge) she would actively stop people from using it, tell them that it was private and turn them away. Comments were made as to the stern manner in which she did this with one landowner explaining that she would shout at people quite ferociously.
42. One landowner sought her permission to keep boats on the strip and another paid a sum of money to her for this purpose. One landowner paid an annual fee to Mrs Wadham to access the beach from his property (Sea House) over the sea wall. The owners of Bonny Blink had to be granted a formal right of way by Mrs Wadham over the sea wall in order to access the beach. Various landowners make reference to the yacht club paying a sum of money to Mrs Wadham to keep boats on the sea wall.

Sections AB and CD and beach levels

43. The landowners contend that section AB is not possible at high tide as the sea reaches the sea wall due to beach levels being low since approximately 2000.

44. One landowner considers AB and CD to be below mean high water (MHW) and to therefore belong to the Crown and another considers MHW to be very close to the top of the beach at AB. One landowner made the comment that when beach levels are low, AB is not possible due to exposed large rocks and boulders. Mr Bull explained that the beach at point C (in front of his property) is not accessible at high tide.
45. One landowner explained that access to the sea wall is not possible on 174 days per year due to tide action.
46. Section AB would not have been possible at the time when two concrete groynes stretched from the sea wall to the sea. There was no gap or steps over them.

Sea Wall (BC)

47. In respect of the section of the sea wall owned jointly by Mr Poland, Mrs Howell, Mr Tuckey and Mr Ingram, comments were made by them that they would never have bought the land if there was a danger or likelihood of it being dedicated as a public right of way. They entered into a trust deed covenanting to use the land only for the purposes of keeping boats and for it to be maintained as a natural/wild garden. One owner explained that he was hesitant in challenging individuals using the strip as he was unsure whether they were neighbours' holiday tenants or friends or visitors of the neighbours. Two of the landowners recall telling people to get off the sea wall. Signs were put up on the sea wall warning people of the danger of the drop to the beach.
48. Mr Hancox explained that the sea wall was overgrown when they bought Waters Edge. There was a chestnut paling fence between Nodnewel and Waters Edge to the edge of the sea wall and no one could have walked through to use Mr Bull's ladder. The fence was a requirement under the deeds when the plot for Waters Edge was purchased.
49. The owner of West Rookery can see the sea wall and the beach generally from his window and there is no evidence of use of the sea wall as a public footpath whereas he sees large numbers of people walking along the beach at low tide.

General

50. The general comment of landowners is that the claimed use is greatly exaggerated and the occasional use that did occur was by property owners themselves or their friends, visitors, tenants or guests or by the public retreating onto it from the beach for recreational purposes connected with the use of the beach at high tide.
51. The majority of landowners state that at low tide people walk along the beach and at high tide they use Pier Road (Public Footpath R105). Boats would often be kept along various parts of the claimed path making walking difficult or impossible. Beach levels have generally been a lot lower since around 2000 possibly as a result of nearby coastal protection works. One landowner provided a photograph taken in 1993 showing very high beach levels with only

a very short drop from the top of the sea wall to the beach (one to three foot). Many landowners expressed the view that use of the claimed path would, on many occasions, be dangerous due to significant wave action which could knock you off the sea wall or sweep you away from the beach.

COUNCIL EVIDENCE

52. Appendix 6, Item 1 contains historic ordnance survey maps dated 1939, 1973 and 1986. The 1939 and 1973 maps show three groynes between points AB. The 1986 map does not show any. This is evidence of these groynes disappearing by sea erosion in the late 70s early 80s.
53. Appendix 6, Item 2 contains photographs included in the Isle of Wight Coastal Management survey taken in 2007. These show low beach levels.
54. Appendix 6, Item 3 contains photographs included in a Royal Haskoning Coastal Protection presentation taken in or around 2005, showing low beach levels.
55. Appendix 6, Item 4 contains Council photographs (1 to 25) showing the claimed path at various dates.
56. Appendix 6, Item 5 contains an email of Ordnance Survey dated 4 March 2015 confirming the methods used to record tidal marks on Ordnance Survey maps.

EVALUATION OF EVIDENCE

User evidence

57. New user evidence forms completed by all witnesses in order to provide evidence of use of the sections not included in the 2008 application (sections AB and CD along the beach) were not provided, despite pre application guidance. The application was lodged with user evidence forms completed by the applicant and the lead witness only with signed plans for the remaining 24 witnesses. Accordingly when evaluating user witness evidence little weight can be given to those witnesses not interviewed due to detailed evidence of use of sections AB and CD not being provided. Even less weight can be given to the five witnesses to the 2008 application (not included in the current application) as their evidence did not relate to the use of sections AB and CD and a signed plan was not provided as part of the current application.
58. In the context of Seaview which is a well populated area, the amount of use is low. All the witnesses are local. This is not surprising given the physical elements of the claimed path which has no obvious public characteristics: There is no defined track on the ground at sections AB and CD as visually these form part of the beach. The ladder at point C is not of an appearance or type one would expect to see for use by the public on a public footpath or to provide public access to and from a beach and is visually “private” in nature. When the ladder is not there the sea wall is a boundary structure between the beach and land above.

59. The evidence of use is low (especially when taking into account the evidential weight of those witnesses who are friends with or related to owners of land crossed by the claimed path) and it is therefore questionable as to whether the use has been by a sufficient number of people to show that it was use by the public. The view may reasonably be taken that use is too low for landowners to be expected to regard it as asserting a right.
60. Two witnesses when questioned at interview reviewed the number of times they used the claimed path quite dramatically when it was pointed out to them that use along the beach at low tide, not using the sea wall at all, cannot be counted towards the frequency.
61. With regard to section AB, many of the witnesses mentioned rocks to step over or walk around. However, none of the witnesses recalled periods in which this would not have been possible due to beach levels being very low and the rocks being so exposed making it impossible to walk and dangerous to clamber over. It is very likely that this type of beach scouring occurred on a number of occasions during 1987 to 2007, but no mention of it has been made by any of the witnesses. This therefore suggests that the witnesses do not recall the claimed path in sufficient detail and/or the frequency claimed. Further, while not relevant to the period of 1987 to 2007, none of the witnesses who confirm use from the 1950s, 1960s and 1970s recalled the fact that there were three groynes along section AB, making this section impossible at all states of the tide.
62. With regards to section BC, evidence suggests that use was along the concrete surface of the sea wall itself or on the land immediately adjacent to it and not along the full width. None of the witnesses recalled periods during the late 1980s and 1990s when beach levels would have been almost as high as the sea wall which would have made use of the sea wall to walk along unnecessary even at high tide.
63. Other than Mr Parsloe who emailed the councillor for the area in 2006, none of the witnesses mentioned the earlier building disruption and safety fencing which had occurred from 2004 until the landscaping and fence at Waters Edge was completed in summer 2007. Although this may have been regarded as a temporary disruption of the way rather than a challenge to the right, it would have been very evident and visible even to the occasional user. The question of obstructions was raised during interviews but the earlier safety fencing was not mentioned. This suggests the witnesses were not using the claimed path as frequently claimed or at all from 2004 to 2007.
64. The witnesses who confirmed use during the 1950s to the mid-1970s must have been aware of the tent and deckchair business run by the Bull family on their own land. It is therefore doubtful that those witnesses who continued using the claimed route after the business ended genuinely believed that section BC was available for use by the public.
65. One witness refers to being told by Mrs Wadham to keep off of the sea wall/strip and this is supported by landowner evidence and is therefore a suggestion of interruption and/or no intention to dedicate.

66. There would have been times during the twenty year period when beach levels at section CD especially around point C would have been so low that walking this section at high tide would not have been possible. There was mention of this by two witnesses but not by them all and again suggests that a clear recollection of the route and the frequency claimed may not have been provided.

Landowner evidence

67. The general consensus of landowners is that the use claimed is greatly exaggerated and not what they have witnessed. Use of the sea wall has been by the owners themselves, their families, holiday tenants or visitors and that any use by the public has not been as a public right of way but as an extension to the use of the beach for recreational purposes, particularly at high tide when retreating from the beach is necessary.
68. Mr and Mrs Hancox consider that the sea wall was not used by the public. Mr Hancox's evidence that the boundary of Waters Edge was always fenced to the sea wall as required by their title deeds is not substantiated by other landowners or user witnesses.
69. Mr Bull maintained a sign on the sea wall to the effect that boats only be stored with permission. While this is evidence of private ownership of the sea wall, a sign of this type could not be regarded as an intention not to dedicate a public right of way as it was not a "no public right of way" sign.
70. Mr Bull did not stop occasional use of his ladder which could be considered as tolerance amounting to "as of right" use. However he has always considered this to be his own private ladder and did not feel obliged to provide a ladder or not to remove it when he wanted to. The fact that he removed the ladder in the winter months is evidence of an action which interrupted use.
71. Mr Bull confirmed he very occasionally saw people climbing up/jumping down the wall. The other landowners consider that this was not possible due to the height. A wall is incompatible with a public right of way. It is a boundary structure between the beach and the land above it and is therefore effectively a barrier. Any climbing up it or jumping down is evidence of use by force.
72. The joint owners put up a notice warning people of the drop from the wall, but regard this as protecting them from occupiers' liability as the wall is unfenced and people climb on it from time to time. This is a reasonable explanation and the sign is not an admission of a public right of way. However, it is insufficient as an intention not to dedicate as it was not a "no public right of way" sign.
73. The information provided in respect of Mrs Wadham preventing use of the sea wall is evidence to negate a presumption of dedication. Her actions were confirmed by the majority of landowners and by one user witness.
74. Two landowners refer to the MHW mark being higher than as is shown on the current Ordnance Survey (OS) Map. One of those landowners claims that

section AB is now below this mark. The delineation of MHW mark shown on an OS Map is an extremely complicated procedure based on very technical surveys (Appendix 6, Item 5). In the event of section AB being entirely below MHW mark the land will be deemed to form part of the foreshore held by the Crown (leased to the Isle of Wight Council) as per the law of accretion and diluvion. The provisions of section 31 of the Highways Act 1980 cannot be used in respect of land held by the Crown.

Council evidence

75. Photographs 1 to 7 (at Appendix 6, item 4) taken at high tide in August 2013 show high beach levels at AB (shingle covering large rocks) and CD (bank of pebbles) with low beach levels below section BC where the sea has reached the foot of the wall. The photos were taken in the summer when the weather was fair with a light sea breeze. These set of circumstances accords with user witness evidence of the claimed path being a “high tide” route - a narrow section to walk along at sections AB and CD providing access to both ends of the sea wall which was necessary to walk along when the beach below it was impassable (subject to photograph 4 which suggests that at very high tide the sea reached the sea wall at one point on section CD).
76. Photographs 8 to 10 taken at low tide show the beach at a very low level and a very high drop from the top of the sea wall to the beach (estimated to be about five to six feet). This would be very difficult to climb up and too high to jump down safely.
77. Photographs 11 to 14 taken 45 minutes to one hour after high tide show that the claimed path could not have been a “high tide” walk as access would have been impossible at high tide and for quite some time before and after it. Photographs 13 and 14 show the exposed large rocks when beach levels are low.
78. Photographs 15 to 19 were taken at high tide on a calm overcast day. On this occasion high tide did not reach the sea walls at any section of the claimed path making use of the section along the top of the sea wall (BC) unnecessary.
79. Photographs 20 to 25 taken approximately one hour before high tide. Beach levels are low at sections AB and below BC and medium at section CD. The latest time it was possible to walk along the beach without using the sea wall was at approximately 10.30am. At that point the sea reached the sea wall below BC. There then followed a 20 minute time slot in which it would have been possible to access either end of the sea wall by using sections AB and CD which hadn't yet been covered by the sea. Photographs 23, 24 and 25 show that by 10.50am section AB was no longer possible.
80. The photographs at Appendix 6, Items 2 and 3 provide evidence of low beach levels, which is likely to have occurred on a number of occasions during the period 1987 to 2007. In these circumstances when the entire length of the beach is scoured, high tide is likely to reach all sea walls along the claimed path at about the same time or there would be a very short time slot either side of high tide when use as claimed would be possible – see below.

81. In conclusion, the claimed use of the path as a “high tide” walk was only possible in very limited circumstances when there were high beach levels at AB and CD but low below BC and on a calm day on a neap high tide (on a spring high tide or during adverse weather such use would be unlikely to be possible). If beach levels were low at AB and CD there would only be a very short period of time (approximately 20 minutes either side of high tide once per day) that would support the claimed use. Use during this time would require a person to regularly monitor beach levels, weather conditions and to time their walk with reference to tide tables (which are in any case approximate). On other occasions high tide does not reach any sections of sea walls along the claimed path making use of section BC along the top of the sea wall unnecessary. None of these varying circumstances were described or explained by the user witnesses, which suggests that there is not a clear recollection of the route. Further, due to the regular change in beach levels and varying tide and weather conditions it would seem unlikely that the claimed path could be used regularly.

CONCLUSIONS ON DEDICATION

Statutory dedication pursuant to section 31 Highways Act 1980

82. To come to a conclusion of deemed dedication under section 31 of the Highways Act 1980 the following matters need to be considered:
- (a) When was the use brought into question?
 - (b) Whether there is a “way over land” (and whether the “way” is of such a character that use of it by the public could not give rise at common law to any presumption of dedication)?
 - (c) Whether the “public” used the claimed path for a full twenty year period?
 - (d) Whether such use was “as of right”?
 - (e) Whether such use was “uninterrupted”?
 - (f) Whether there is sufficient evidence to show that there was “no intention by landowners to dedicate”?
83. All these steps are matters of fact to be decided according to the evidence. For guidance as to interpretation of the wording of section 31, see Consistency Guidelines (CG) Item 3 Appendix 3.

Bringing into question (a) (CG 5.4-6)

84. The means of bringing the claimed right into question must be sufficient to make it likely at least some users will be made aware the owner has challenged their right to use the path as a public right of way. The statutory period is a full twenty years calculated back from the date of bringing into question.

85. User evidence shows that the right was challenged in the summer of 2007 when the owners' intention to permanently interrupt the way was made clear by landscaping and fencing the frontage of Waters Edge right to the eastern edge of the sea wall blocking passage along it. Accordingly, the statutory period for the purposes of deemed dedication is 1987 to 2007.

A way over land and its character (b) (CG 5.65-67)

86. Sections AB and CD: The application plan clearly shows a way in the sense that there is a shaded line which users state they have walked along. However, the issues to consider are firstly whether a path can exist if it is covered by the sea at high tide and whether a way can exist along built up beach material (sand, shingle, pebbles) which is subject to coastal/tidal deposition and erosion.
87. Dealing with land covered by the sea at high tides, it is possible for a way to be dedicated along the shore (limited only by the tide), although in the cases of claims for deemed dedication it is generally considered to be extremely difficult if not impossible to prove the existence of a physical path along the same line as evidence of the path is washed away twice daily. Further, it is difficult to make a distinction between those people using the beach for recreational purposes and those using a route over it and if the latter whether they are walking along a defined way on every occasion or are generally wandering. In this case user evidence shows that a route close to the sea walls (AB and CD) was used and it is therefore possible to identify, prima facie, an area (a corridor) which may be capable of dedication.
88. However, when sections AB and CD were possible it was only because a bank of beach material (shingles or pebbles) existed (see paragraph 75 above). In a public right of way it is the soil of the land and the immediately underlying sub-soil, which is dedicated. It is not possible to dedicate a route or direction of travel. A right of way is created by dedicating the land for use as a public passage – the way has to be a physical feature. If there is no made-up or definite enduring track but merely a temporary or transitory track, that is evidence against a public right of way. Where the soil and sub-soil no longer exists the legal right of passage likewise ceases to exist. If the beach material at sections AB and CD never changed in height or type during the statutory period (or if there was insignificant change) then a defined track or at least a physical strip of land may have been in existence for long enough to be capable of dedication. However, the evidence in this case (user, landowner and council) shows that the beach material at sections AB and CD was constantly and sometimes dramatically changing in height and type and on occasions it was completely washed away - the beach material over which the users walked disappeared on countless occasions during the statutory period. Accordingly there has been no physical feature in the nature of way in existence for a sufficient period capable of being dedicated. Any way that was possible to walk along from time to time was soon destroyed because both the soil and sub-soil of the path (i.e. the shingle or pebbles) has been extinguished through erosion caused by the tidal effect of the sea. For example, when the beach material has been washed away at section AB it exposes large rocks and boulders which are not possible to walk over at high tide. In other areas when the beach material was not present the use claimed (a high tide walk) was not

possible or was only possible for a very short period of time either side of high tide (see paragraphs 79 and 81 above).

89. Section BC: The concrete steps at point B and the route along the sea wall are considered to be a way over land. However, where the claimed path reaches the ladder or the northern end of the wall (C) consideration should be given to “whether there is way over land”. While a ladder is capable of being a limitation on a dedicated public right of way, for example a stile ladder over a dry stone wall, this has to be permanent otherwise the public’s right of way is obstructed by the wall. User and landowner evidence shows that there were periods of time when the ladder was not present. During the periods when the ladder was not present some user witnesses refer to climbing up and down the wall. However, climbing a wall cannot be considered to be a method of exercising a public right of way on foot over land. The act of climbing up and down a wall is disconnected with legitimate passage along a public right of way; it is also of a character which prevents use by the public at large.

Public use for a twenty year period (c) (CG 5.12-20)

90. The public means everyone but it is accepted that many rights of way only have local purpose, so user witnesses representing the public may be from the local community only.
91. Actual acts of use for a period of twenty years are required; it is not sufficient for users to be aware a route was once used, or could be used. Use of a way by different persons, each for periods of less than twenty years, will suffice, if taken together they total a continuous period of twenty years or more. Use should have been by a sufficient number of people to show that it was use by “the public”. It must bring home to a landowner that a right is being asserted against him and he had an opportunity of resistance and interruption. Usage which is of such trivial and sporadic nature that it would not be likely to make a landowner aware of the potential claim of a right fails the test.
92. Evidence of use by family, friends or employees of a landowner should be given less weight, since they can be thought of as having the consent of the landowner, and are not representative of the public at large.
93. User evidence is low in numbers and frequency and in respect of the section along the sea wall it is doubtful that such use amounts to sufficient evidence of a public right of way being asserted. Use at this level would have made it difficult for the landowners to differentiate between those who were permitted to use the sea wall (holiday tenants and visitors of the various properties) and those asserting a public right of way.
94. In respect of sections AB and CD, the landowners could not have known that the public were asserting a right against them as it would have been impossible for them to differentiate between those persons using their sections of the shore for general recreational purposes in connection with the beach (as is generally tolerated by way of an implied licence on the majority of beaches including the Crown in respect of the foreshore) and those exercising a public right of way.

Use as of right (d) (CG 5.21-25)

95. Use as of right means use without force, secrecy or permission.
96. During the periods that Mr Bull removed his ladder subsequent use of the claimed route involving climbing up/down the wall could be considered as use with force.
97. With regards to permission, evidence of use by family, friends or employees of a landowner should be given less weight, since they may be thought of as having the consent of the landowner, and are not representative of the public at large.
98. The subject of toleration should be considered. It could be argued that due to the low level of use and the fact that users were all local residents that use of the sea wall was by way of implied permission or toleration of the landowners. Toleration by a landowner of use of a way is not inconsistent with user as of right - having knowledge of use but doing nothing about it is consistent with use "as of right". However, permission may be implied from the conduct of a landowner in the absence of express statements, notices or records. In this respect Mr Bull, although being aware of the use of his ladder and not objecting to it suggests toleration. However, he also acted in a manner (by removing and placing the ladder whenever he wished) which made it clear that use of it was with his actual permission (as opposed to implied permission or tolerance).

Without interruption (e)

99. In order to constitute an interruption there must be some physical and actual interference which stops the public use for a time. The custom of locking gates to exclude the public on one day a year is a common example.
100. Mr Bull states that he removed his ladder in the winter months. This suggests an actual physical interference which stopped the use for a time, especially when beach levels were very low and the height between the top of the sea wall and the beach could have been as much as six feet. It could be argued that the intention of Mr Bull for removing his ladder in the winter was to prevent it from being washed away as opposed to barring use of a right of way. However, it is not necessary for an interruption to be intended to prevent public use.
101. The evidence provided by the landowners of Mrs Wadham's actions of challenging persons on the sea wall who were not supposed to be there suggests interruptions in use. One user witness confirms that she did not like people walking along the sea wall and was told by Mrs Wadham that the wall was private.

No intention to dedicate (f) (CG 5.26-37)

102. Sufficient evidence to negate presumption of dedication requires evidence of overt acts by the landowners during the statutory period directed at users of the

way to make known the intention not to dedicate. Actions and wording of notices must be inconsistent with the existence of a public right of way. Section 31(5) of the Highways Act 1980 provides for notice to be given to the local authority where notices are torn down, section 31(6) provides a method of negating intention by depositing a plan and statement with the local authority.

103. The signs erected by the joint owners of the sea wall and Mr Bull were not worded in a manner to make known an intention not to dedicate.
104. Interruption and lack of intention to dedicate may overlap. A single act of interruption by a landowner is of much more weight, upon a question of intention, than many acts of enjoyment:
105. The removal of the ladder by Mr Bull which effectively created an obstruction to the route when beach levels were low, suggests evidence of an intention not to dedicate.
106. The evidence provided by the landowners of Mrs Wadham's actions of challenging persons on the sea wall who were not supposed to be there does suggest an intention not to dedicate by her during her ownership. Her challenges were only confirmed by one user witness and the requirement that her "acts" be directed at the users may not therefore be satisfied. However, this witness has lived in the area all his life and has knowledge of the claimed path from the 1950s onwards and his evidence is therefore considered to be credible. User evidence by a person that has faced a verbal challenge is valueless and will usually outweigh evidence of use by other persons - such interrupted user weighs heavily against evidence of other witnesses who attest to uninterrupted user (Halsbury's Laws of England 4th edition Vol. 21, para 125).

Conclusion

107. It is considered that the application fails to satisfy the necessary tests as laid out in section 31 Highways Act 1980 to support a conclusion of deemed dedication because:
 - a way over land is not considered to have existed (paragraphs 86 to 89);
 - the witness evidence is insufficient to amount to use by the public (paragraphs 90 to 94);
 - use has not been as of right as there is evidence of use with force and with permission (paragraphs 95 to 98);
 - use has not been without interruption (paragraphs 99 to 101);
 - there is evidence of there being no intention to dedicate (paragraphs 102 to 106);
 - section AB of the claimed path could now be deemed to be below mean high water mark and therefore held by the Crown. Any claim for public rights of way over land held by the Crown can only arise at common law; the provisions of section 31 of the 1980 Act cannot be used to bind the Crown interest (section 327 Highways Act 1980).

Dedication at Common Law (CG 5.45-49)

108. Dedication at common law can be express or implied. The burden of proof is upon the person claiming the right to show that an owner actually decided to dedicate over his land a public right of way and that there was acceptance by the public. With express dedication the owner will have done something to make his intention clear, but in the more usual case of implied dedication, intention may be difficult to prove.
109. The onus is on the claimant to prove intention from the evidence and in the case of implied dedication this is usually user evidence, which also serves to prove acceptance of the dedication. There is no minimum period or level of use required. However, use by the public must have gone on openly, uninterrupted, as of right and for so long that dedication can reasonably be inferred; the evidence must show use to have been so notorious that the landowner must have been aware of it, acquiesced in it and therefore intended to dedicate.
110. In this case, evidence shows too low a level of use to reasonably draw the inference that the owners were aware a public right of way was being asserted which should be resisted, to the extent that their lack of resistance is evidence of an intention to dedicate. It is therefore concluded that the evidence does not support an inference of implied dedication at common law.

DETERMINATION OF THE APPLICATION

111. It is concluded that the claimed route is not reasonably alleged to exist as a public right of way on the basis of deemed dedication under section 31 Highways Act 1980 or by common law.

LEGAL IMPLICATIONS

112. In the event of an order being made and if no objections are received during the six week statutory advertisement period, the Isle of Wight Council may itself confirm the order as unopposed. If any objection is registered during the statutory period, or if the council considers the order requires any modification, it must be referred to the secretary of state. An independent inspector will be appointed by the Planning Inspectorate to hear the objections and decide whether the order should be confirmed, with or without modification. A public inquiry may be held in modification order cases as there is witness evidence to be heard.
113. The council bears the cost of arranging the inquiry and each side bears their own costs of appearing unless there are exceptional circumstances. An order becomes legally effective only if and when it is confirmed. The decision of the inspector concludes the modification order process.
114. In the event of an order not being made, the applicant may appeal to the secretary of state, who may direct the council to advertise an order which then follows the same procedure described above.

115. The validity of a confirmed modification order can be questioned by application to the High Court during a six week period from the date of publication of confirmation. This is a form of judicial review of the procedure only, not an opportunity to further challenge the evidence on which the order is based. Costs of litigation are awarded in the usual way according to the outcome of the application.
116. Public footpaths and bridleways dedicated after 16 December 1949 are not maintainable at public expense unless dedicated as part of a public path order or agreement or other formal adoption procedure under the Highways Act 1980 or its predecessor.

IMPLICATIONS UNDER THE HUMAN RIGHTS ACT

117. In respect of Article 6 (right to a fair trial) of the European Convention on Human Rights, it is considered that by submission of the report to the applicant and to landowners for comments and by advertisement of an order with the opportunity of independent determination in the event of objection, the council has met the requirements of this Article.
118. In respect of Article 8 (respect for private and family life) and Article 1 of the First Protocol (protection of property), the impacts that the modification order might have on the owners of property affected by any order which may be made and on owners of other property in the area and users of the paths before and after modification have been carefully considered. While there may be some interference with the rights of owners and occupiers if a modification order is confirmed, it is considered proportional to the legitimate aim of the council and in the public interest.

IMPLICATIONS UNDER THE CRIME AND DISORDER ACT 1998

119. The council has a duty to make an order to modify the Definitive Map and Statement or not according to its conclusions on the evidence relating to the dedication of highways. Should a right of way be confirmed, any powers that may be available to the council with respect to public paths and byways for the purposes of reducing crime and disorder could be considered.

FINANCIAL IMPLICATIONS

120. Normal costs incurred in processing this application and resulting from adding the path to the Definitive Map and Statement, should this be the outcome, will be contained within current Rights of Way revenue budgets.

RISK MANAGEMENT

121. In the unlikely event of a High Court application costs follow the decision. Such applications normally involve high litigation costs and should the council be found at fault and costs be awarded against it, the council will be liable for those costs.

122. In the light of the legal and financial implications set out in paragraphs 112 to 120, the committee in making its decision is recommended to carefully follow the legal guidance set out in paragraphs 17 to 26 above and in all parts of Appendix 3. The committee should consider the material user evidence and apply the legal tests which are outlined in this report.
123. The consequences of Options 1, 2 and 3 are set out in paragraphs 112 to 116 and 120 to and 121 above. These consequences are all part of the normal statutory procedures provided by the Wildlife and Countryside Act 1981 for reviewing the Definitive Map and Statement.

OPTIONS

124. The panel has a statutory duty to determine the application by making a decision. Depending on its conclusions on the evidence as to whether a presumption of dedication has been raised, or what public rights exist or are reasonably alleged to exist, if any, the panel will decide on one of the following options.

Option 1

125. Make an order to add the path described in the application to the Definitive Map and Statement.

Option 2

126. Make an order to add the path described in the application modified in some other way from Option 1 to the Definitive Map and Statement.

Option 3

127. Reject the application by making no order.

RECOMMENDATION

Option 3 – In view of the conclusions at paragraphs 107 and 110 it is recommended that the application should be rejected and no order should be made.

APPENDICES

[Appendix 1: Application](#)

1. Application: Mr J M Trotter.
2. Copy application map (annotated).

[Appendix 2: Route description](#)

1. Map 1: Definitive Map extract showing existing recorded paths in the area.
2. Map 2: Ordnance Survey plan of claimed path/area, scale 1/1500.

3. Map 3: Aerial Photo map of claimed path/area, scale 1/1500.

Appendix 3: Legal background and guidance

1. Guidance on provisions of the Wildlife and Countryside Act 1981 relating to the review of the Definitive Map and Statement and on quasi-judicial role of the panel.
2. Section 31 Highways Act 1980.
3. Planning Inspectorate Consistency Guidelines Section 5: Dedication/User Evidence Revision July 2013.

Appendix 4: User evidence

1. User witness table.
2. User witness bar chart.

Appendix 5: Landowner evidence

1. Landowner evidence table.

Appendix 6: Council evidence

1. Ordnance Survey maps for the area 1939, 1973 and 1986.
2. Extract Isle of Wight Coastal Management Survey.
3. Royal Haskoning coastal protection presentation.
4. Photographs 1 to 25.
5. Email of Ordnance Survey dated 4 March 2015.

Appendix 7: Consultation

1. Email of Nettlestone and Seaview Parish Council dated 16 March 2015.

BACKGROUND PAPERS

NB: Background papers 1 to 17 appear in the appendices 1 to 7.

1. Application dated 14 December 2012 – Mr J M Trotter.
2. Application plan.
3. Extract of the Isle of Wight Definitive Map 2000.
4. Ordnance Survey map.
5. Aerial photo map.
6. Legal background and guidance for determining modification order applications.
7. Section 31 Highways Act 1980.
8. Planning Inspectorate Consistency Guidelines Section 5 Dedication/User Evidence Revision 2013.
9. User witness table.
10. User witness bar chart.
11. Landowner evidence table.
12. Ordnance Survey maps 1939, 1973 and 1986.
13. Extract of Isle of Wight Coastal Management Survey.
14. Royal Haskoning coastal protection presentation.

15. Council photographs 1 to 25.
16. Ordnance Survey email dated 4 March 2015.
17. Email of Nettlestone and Seaview Parish Council dated 16 March 2015.
18. Witness evidence forms: Mr Trotter; Mrs Madall ([BP1.2](#)).
19. User witness interview notes ([BP1.3](#)).
20. 2008 user witness evidence forms ([BP1.4](#) and [5](#)).
21. Collective landowner statement ([BP2.1](#)).
22. Landowner statements, emails and letters ([BP2.2](#)).
23. Non-landowner comments and objections ([BP2.3](#)).
24. Landownership details ([BP3.1](#)).
25. Landownership map ([BP3.2](#)).
26. Land Registry official copies ([BP3.3](#) and [4](#)).
27. Isle of Wight Council report dated 18 May 2010 re: 2008 Application and Appendices 1 to 6 ([BP4.1](#)).
28. Background papers to the 2010 report ([BP4.2](#)).
29. Minutes of General Purposes (Appeals) Sub Committee dated 18 May 2010 ([BP4.3](#)).
30. Letter to Planning Inspectorate dated 21 September 2010 with checklist and documents listed thereon ([BP5.1](#)).
31. Letter of Planning Inspectorate dated 10 March 2011 enclosing statements of case ([BP5.2](#)).
32. Salient correspondence relating to objections to 2010 order, referral of order to the Planning Inspectorate and withdrawal of support from the council and application ([BP5.3](#)).
33. Planning Inspectorate order decision dated 23 August 2011 Ref. FPS/P2114/7/2 ([BP5.4](#)).

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