



Committee report

Committee	APPEALS SUB COMMITTEE
Date	30 NOVEMBER 2021
Title	APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER – FOOTPATH, FRIARS LANE, YARMOUTH, ISLE OF WIGHT
Report Author	DARREL CLARKE, RIGHTS OF WAY MANAGER

PURPOSE

1. This report sets out evidence to determine an application under schedule 14 of the Wildlife and Countryside Act 1981 (WCA81) for an order to modify the definitive map and statement by adding to it a footpath at Friars Lane, High Street, Yarmouth, Isle of Wight, PO41 0PN.

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, supports the Isle of Wight Council (council) Corporate Plan 2021-2025, which contains detailed strategies and plans supporting the council's aim to work together openly and with communities to support and sustain the Island's economy, environment and people.

THE APPLICATION

3. The application (Appendix 1, Item 1) dated 22nd November 2017 submits evidence in the form of 51 user evidence forms (Appendix 6, Item 1). The applicant is Yarmouth Town Council c/o 14 Staplers Road, Newport, Isle of Wight, PO30 2BZ.

LOCATION, SITE CHARACTERISTICS AND GENERAL HISTORY

4. The application claims use of a path known as Friars Lane which is a short path starting on the adopted carriageway, High Street at Yarmouth and heading north for approximately 30-35 metres towards the sea (claimed path). Paths such as this are commonly called "sea lanes". Two such paths are recorded on the definitive map as public footpaths Y14 and Y15 to the west of the claimed path (see appendix 2, item 1).
5. A location map, site map and aerial image are at appendix 2, items 1, 2 and 3 respectively.
6. At appendix 2, item 4 are three site photographs taken by the council to facilitate determination of the application. Photograph 1 is a view of the claimed path from the

start of the path (point A) at the High Street. Photograph 2 is a view of the claimed path taken from its northern end and looking back up to the High Street. Photograph 3 is a view of what exists at the northern (sea) end of the claimed path (point B).

BACKGROUND TO THE APPLICATION

7. At the beginning of 2017 demolition and construction works commenced at a property, Friars House (formerly Florins) adjacent the claimed path. During the course of 2017 access along the claimed path was restricted for health and safety reasons associated with those works and barriers and signage were erected. It is considered that this restriction on the use of the claimed path during the course of the building works precipitated the application being made.

CONSULTATION

8. Yarmouth Town Council is the only statutory consultee and as they are the applicant in this matter consultation with it has been unnecessary.
9. The present elected member for the area is Councillor Peter Spinks who has been consulted as has Councillor Jonathan Bacon as Cabinet Member for Environment, Heritage and Waste Management. Their responses are at appendix 3, items 1 and 2 respectively.
10. Landowners affected by the application are detailed below. A map is at appendix 4, item 1, confirming the location of the various landholdings:

Outright owners of small sections of claimed path (northern end) who also hold land adjacent the claimed path:

John Nicholas May of Yew Trees, High St, Yarmouth, Isle of Wight, PO41 0PN.

The Queen's Most Excellent Majesty In Right Of Her Crown (crown estate) of 1 St James' Market, London, SW1Y 4AH.

Isle of Wight Council (the council hold a lease of the freehold land held by the crown estate).

Owners of land adjoining claimed path only:

Nicholas James Charrington of Friars House, High St, Yarmouth, Isle of Wight, PO41 0PN

Richard John May of and Tamsin Anne Pryce-Jones of Friars Lane Cottage, High Street, Yarmouth, Isle of Wight, PO41 0PN.

11. Landowners are contacted to explain the application and procedure for determining it, and invited to submit evidence. The majority of the claimed path is over land which is unregistered at HM Land Registry and an outright owner is not identifiable (see map at appendix 4, item 1). The council is therefore treating all owners of land adjacent to the path as affected landowners on the legal presumption that adjoining owners are deemed to own half the width of a path or road to the extent of their respective frontages. The response of Mr Charrington of Friars House, Friars Lane is at appendix 3, Item 3. The response of the Crown Estate is at appendix 3, item 4 which confirms

that it has no objection to the claimed path being recorded as a public right of way providing consultation has occurred with its lessees (Mr May and the council). Responses received from Mr May of Yew Trees, Friars Lane are given under 'landowner evidence' below (appendix 7, items 1 and 2). The Council's Commercial Activities Service (which manages the land held under lease from the Crown Estate) has no comment on the application.

12. All reports on modification order applications are submitted to landowners and the applicant for comment before it is submitted to the committee for decision. Other than minor clerical amendments no comments were made by the landowners or the applicant.
13. If an order is made, there is a statutory advertisement period of six weeks during which anyone may make representations or objections.

LEGAL BACKGROUND

14. The council has a duty under section 53(2)(b) WCA81 to review the definitive map and statement and to make such modification orders as appear requisite in consequence of events set out in s53(3).
15. Schedule 14 of WCA81 places a duty upon the council to investigate the matters stated in the application for a modification order and to decide whether to make the order applied for.
16. The panel is acting in a quasi-judicial role and the decision must be made on the basis of evidence before the panel and law relevant to the fact of dedication of a highway and to definitive map and statements and on no other consideration. Guidance on the panel's judicial role is provided at appendix 5, item 2.
17. The council will determine the application under section 53(3)(b) WCA81: the possible addition of a path to the definitive map by way of presumption of dedication pursuant to section 31 Highways Act 1980 (HA80) or by common law i.e. the expiration of a period such that the enjoyment by the public of a way during that period raises a presumption that the way has been dedicated to the public.
18. The question to be determined is whether the evidence shows that a highway exists because dedication has occurred at common law or is deemed by operation of section 31 HA80.
19. 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. Full legal background information and guidance is provided at appendix 5.

USER EVIDENCE

20. The application was lodged with 51 user evidence forms (appendix 6, item 1). As part of the Council's investigative process letters were written to various witnesses to clarify certain information contained in the forms. Where provided the replies have been attached to the relevant user evidence form. At appendix 6, item 2 is a table summarising the evidence contained in the user evidence forms and item 3 is a user witness bar chart.

21. All 51 users confirmed use of the claimed path for leisure purposes: 26 indicated that they used it to gain views of the sea; 20 indicated that they used it to gain access to the sea or shore, mainly for the purposes of swimming; 7 indicated use for the purposes of fishing, crabbing etc; 4 indicated use for the purpose of walking a dog.
22. 36 users stated how many times per annum they used the claimed path. 15 did not provide this information in the form or following being written to by the council requesting clarification. The maximum use is once per week but this only applied to 3 users. The average use is 13 times per annum.
23. Historic use of the path is high with only 4 users indicating that they did not use the claimed path prior to 1997. 34 users indicated use commencing in the 1930s to 1960s; 14 indicating use after 1960s (1 user did not state a period of use). More recent use (past 20 years) is also high: Only 6 users indicated that they did not use the path at all between 1997 and 2017, with 1 other being unclear. 34 users (who also stated the frequency of use) provided evidence of use in the period 1997 to 2017 (24 of those for the whole of that period). A further 10 users also confirmed use during this period but were unable to confirm the frequency of such use. 3 users indicated using the claimed path for visiting friends living in adjacent properties.
24. 21 of the users drew their own maps while the remaining 31 marked the path on an ordnance survey base map. All witnesses indicated the location of the claimed path on their maps. The majority of the users (40) indicated the width of the claimed path to be in the region of 10 feet (3 metres) wide. 5 described it as being wider (12 foot (4 metres); 2 described it as being less (7 foot); and 4 did not state a width.
25. 25 of the users refer to the path being obstructed recently or in 2017 with 19 of those specifically referring to building works being the cause of the obstruction. 1 user refers to it being blocked by a gate in 2016.
26. 26 users indicated a willingness to attend a local public inquiry to give evidence. 20 said they were not prepared to attend and 5 did not indicate one way or the other.

LANDOWNER EVIDENCE

27. The landowners affected by the application are listed at paragraph 11 above.
28. Landowner representations at Appendix 7 consist of two letters from Mr John May dated 1st January and 13th November 2018 (item 1).
29. Mr May's representations of 1st January 2018 relate to what he considers the inappropriateness of the claimed path being a public right of way. He states that the land over which the claimed path runs does not belong to the council and it is not a public footpath. However, in contradiction he does state that the private ownership of the lane is subject to public pedestrian rights of way as a result of the passage of time and common usage; that no one seeks to deny that the public have a right to walk along it; that during his 30 years of ownership it has never been closed to the public with the exception of the blocking during the Friars House building works. In respect of these building works and the closure of the claimed path on safety grounds there was a need for Mr May to enter into an agreement with the owner of Friars House (Mr Charrington) relating to the blockage and interference with access to his property. He refers to a sign erected by the council's highways department in 2006 stating "Friars Lane (leading to the sea)" but it promptly being removed when he and the then owner

of Friars House informed the council that they had no legal right to place a sign on property over which it had no jurisdiction and that the sign was misleading as it gave the impression that the public could gain access to a beach, which only exists at low spring tides. Other hazards in connection with beach access including a 10ft drop from the end of the path to the beach were also highlighted. Mr May refers to his own slipway and path leading to it being extremely slippery and therefore a hazard. Whilst this area is gated from the claimed path he considers youngsters could be challenged to trespass onto this slippery area.

30. Mr May's representations of 13th November 2018 states that any public rights along the claimed path will be subject to existing vehicular rights enjoyed by him and other property owners (including parking, moving boats etc.). He states that the application plan shows the claimed path extending beyond what is actually Friars Lane i.e. the path being claimed continues onto the foreshore.

EVALUATION OF EVIDENCE AND CONCLUSION

Statutory dedication pursuant to section 31 Highways Act 1980

31. To come to a conclusion of deemed dedication under section 31 HA80 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 20 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"?
32. All these steps are matters of fact to be decided according to the evidence. For guidance as to interpretation of section 31, see Consistency Guidelines, Appendix 5 – Item 3.

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

33. 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. The statutory period is a full 20 years calculated back from the date of bringing into question.
34. User evidence shows that the right was challenged in 2017 when the claimed path was blocked on safety grounds due to the demolition and building works at the adjacent Friars House (formerly Florins). Accordingly, the statutory period for the purposes of deemed dedication is 1997 to 2017.

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

35. The claimed path is considered to be a way over land in the sense that there is land in existence and its character would be capable of dedication at common law. A small section of the claimed path is held by the crown estate. Crown land is exempt from the provision s31 HA80. However, if an agreement has been made between the

appropriate authority charged with the administration of the land and a highway authority then the provisions of HA80 can apply; the letter of the crown estate (Appendix 3, Item 4) is considered to be agreement to a public footpath being recorded over its land. Mr May raises the point that the claimed path includes a section of the beach. The user evidence confirms that access was obtained to the beach (e.g. for swimming) and the application map shows the extent of the claimed path to the point of mean high water i.e. to the foreshore.

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

36. 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.
37. Actual acts of use for a period of 20 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 20 years, will suffice, if taken together they demonstrate use over 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.
38. Evidence of use by family, friends, lessees 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. However, only 3 of the 51 users refer to being friends with a landowner.
39. There is a relatively high number of users (20 out of 51) who state that they are not prepared to attend a public inquiry to give evidence. Additionally 5 failed to indicate whether or not they would be prepared to attend. Where a person has indicated that they are not prepared to attend a public inquiry to confirm their evidence, the evidence is generally assessed to have less weight than a person who is prepared to attend as it is unable to be questioned by an Inspector or the opposing party to probe its accuracy or completeness. Half of the users have indicated a willingness to attend a public inquiry.
40. With regard to 20 years' use, the user witness bar chart (Appendix 6, item 3) indicates a high level of users, although the frequency of such use (approximately once per month) is low. This is not surprising as the claimed path is a dead end and therefore it could be considered that you would only walk down it for a specific purpose e.g. to view the sea as opposed to being a regular circular route.

Use as of right (d)

41. Use as of right means use without force, secrecy or permission.
42. In this case use is considered to be very much "as of right". Only 3 of the 50 users indicated using the path for the purpose of visiting a landowner which could therefore be considered use with permission. However it should be borne in mind that the majority of the claimed path is unregistered land with only two very small sections

owned by Mr May and the crown estate. On this basis it could be considered that the 3 users were not using the claimed path with permission in any event.

Without interruption (e)

43. 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. There is no evidence of such interruptions in this case prior to the use being brought into question.

No intention to dedicate (f)

44. 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) HA80 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.

45. None of the user witnesses explained circumstances which could be considered as “no intention to dedicate” for the purposes of section 31 HA80. The council has not received any deposited plans and statements under s31(5) HA80 in connection with the claimed route.

46. Mr May’s representations relate to concerns regarding the safety of the path if it is recorded as a public right of way and to protect any private rights with motor vehicles which may exist. Both of these matters are irrelevant to the fact of whether the claimed path has come into existence by way of presumed dedication. Although not a specific question in the user evidence form, none of the users indicated any health and safety concerns in connection with their use of the claimed path – section 14 of the form provides a space to give any further information concerning the use. If presumed dedication has occurred this would not restrict or otherwise affect any private rights of way with motor vehicles over and along the claimed path. Whilst not a matter requiring determination in this matter, for clarification the recording of a public footpath along the claimed path would not invalidate any private rights of way with motor vehicles which may exist over and along it.

CONCLUSION

47. It is considered that the application satisfies the necessary tests as laid out in section 31 HA80 to support a conclusion of deemed dedication because there is sufficient evidence to show that the claimed path has been used by the public for the 20 years prior to such use being brought into question (closure for building works in 2017) and that such public use has been continuous and without force, secrecy or permission with no evidence of any acts by a landowner which amount to an intention not to dedicate.

DEDICATION AT COMMON LAW

48. 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 case of implied dedication, intention may be difficult to prove.

49. 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.
50. As previously mentioned ownership of the majority of the claimed path is unknown and accordingly there is no outright freehold owner in existence to have carried out an act to make a clear intention to dedicate public rights over his/her land. Further the frequency of use of the claimed path could be considered insufficient to be capable of satisfying the "notorious" use requirement. Due to these factors it is considered that the application fails to satisfy the requirements to support a conclusion of common law dedication.

DETERMINATION OF THE APPLICATION

51. It is concluded that the claimed route is reasonably alleged to exist as a public right of way on the basis of deemed dedication under section 31 HA80.

LEGAL IMPLICATIONS

52. In the event of an order being made and if no objections are received during the six week statutory advertisement period, the 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.
53. 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.
54. 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.
55. 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.
56. 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 HA80 or its predecessor.

IMPLICATIONS UNDER THE HUMAN RIGHTS ACT

57. 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.
58. 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

59. 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

60. 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

61. 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.
62. In the light of the legal and financial implications set out in paragraphs 52 to 60, the committee in making its decision is recommended to carefully follow the legal guidance set out in paragraphs 14 to 19 above and in all parts of Appendix 5. The committee should consider the material evidence and apply the legal tests which are outlined in this report.
63. The consequences of Options 1 and 2 are set out in paragraphs 52 to 62 above. These consequences are all part of the normal statutory procedures provided by WCA81 for reviewing the Definitive Map and Statement.

OPTIONS

64. 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.

- I) Option 1 - Make an order to add the path described in the application to the Definitive Map and Statement as a public footpath.
- II) Option 2 - Reject the application by making no order to add the path described in the application to the Definitive Map and Statement as a public footpath.

RECOMMENDATION

Option 1 – In view of the conclusion at paragraph 47 it is recommended that in response to the application an order be made to add the claimed path to the definitive map and statement as a public footpath.

APPENDICES

Appendix 1: Application

Appendix 2: Site Maps and photographs

- 1 - Location map (and existing public rights of way recorded on the definitive map)
- 2 - Site map
- 3 - Aerial image (2015 data)
- 4 - Site photographs 1 – 3

Appendix 3: Consultation

- 1 - Cllr Peter Spink, Freshwater North and Yarmouth
- 2 - Cllr Jonathan Bacon, Cabinet Member for Environment, Heritage & Waste Management
- 3 - Two emails of Mr Charrington 11th January 2018
- 4 - Letter of The Crown Estate 28th March 2018

Appendix 4: Land ownership map

Appendix 5: Legal background

- 1 - Legal background and guidance.
- 2 - Quasi-judicial role of the panel.
- 3 - Planning Inspectorate Definitive Map Consistency Guidelines, Section 5, pages 4 to 16.
- 4 - Section 31 Highways Act 1980.

Appendix 6: User evidence

- 1 - User evidence forms.
- 2 - User witness summary of evidence.
- 3 - User witness bar chart.

Appendix 7: Landowner evidence

- 1 - Letter of Mr May dated 1st January 2018.
- 2 - Letter of Mr May dated 13th November 2018.

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