

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD A PUBLIC FOOTPATH – Charmydown, St Catherine

(Ward Division: **Bathavon North**)

1. The Issue

- 1.1 An application has been received for a Definitive Map Modification Order (“DMMO”) to be made under section 53(2) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) to modify the Definitive Map and Statement of Public Rights of Way (“the DM&S”) by adding a public footpath at Charmydown in St Catherine.

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) makes a DMMO to record the Application Route between points A and B on the plan contained at Appendix 2 (“the Decision Plan”), and shown by a broken black line, as a public footpath.

3. Financial Implications

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

4. Human Rights

- 4.1 The Human Rights Act 1998 (“the 1998 Act”) incorporates the rights and freedoms set out in the European Convention on Human Rights (“the Convention”) into UK law. So far as it is possible all legislation must be interpreted so as to be compatible with the Convention.
- 4.2 The 1981 Act does not permit personal considerations to be taken into account. A decision relating to a DMMO would be lawful without taking account of personal considerations, as provided by section 6(2) of the 1998 Act, as it would be impossible to interpret the legislation in such a way that it is compatible with section 3 of the Convention.

5. Legal Framework

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

“As regards every definitive map and statement, the surveying authority shall...keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence...of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event”

- 5.2 The ‘events’ referred to above are set out in section 53(3) of the 1981 Act. The ‘event’ to which this Application relates is set out in section 53(3)(c)(i) of the 1981 Act which states that:

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic”

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

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

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

“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

- 5.5 For a way to be deemed to have been dedicated as a public right of way at common law it must have been used by the public for a period which is sufficient to constitute evidence of an intention by the landowner to dedicate the way as public. The facts, taken as whole, must be such that the rightful inference to be drawn from them was

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

that there was an intention to dedicate the way as public. Use must be without force, secrecy or permission (i.e. 'as of right') and each case turns on whether the facts indicate an intention to dedicate.

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

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

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

6. Background and Application

- 6.1 On 5th May 2021, Donald MacIntyre (“the Applicant”) applied to have a public footpath added to the DM&S (“the Application”); 56 user evidence forms and three witness statements were appended to the Application. One additional user evidence form was submitted prior to the Authority starting to process the Application.
- 6.2 The route under investigation commences from a junction with public footpath BA21/9 at grid reference ST 7660 6890 (Point A on the Decision Plan at Appendix 2) and proceeds in a generally north-easterly direction along a track for approximately 105 metres to a junction with public footpath BA21/9 at grid reference ST 7669 6896 (Point B on the Decision Plan). This route is hereafter referred to as “the Application Route.”
- 6.3 During a site visit carried out by the Authority on 1st June 2023, locked field gates were found across the Application Route at points X and Y on the Decision Plan. The gate at point X had a sign attached reading ‘Private Property’ and the gate at point Y had one sign attached reading ‘Private Property’ and another sign reading ‘No Public Right of Way’. Notices were also present in the vicinity of the Application Route relating to i) a planning application and ii) a temporary traffic regulation order; however, neither of these matters relate directly to the Application Route.

7. Consultations

- 7.1 In July and August 2025, the Authority consulted on the Application with the landowner, the Applicant, local and national user groups, the ward members, the parish council and the neighbouring parish council. Additionally, notices were posted on the Authority's website and on site at points A and B on the Decision Plan.
- 7.2 An agent acting on behalf of the landowner Dormie Holdings Ltd ("the Objector") submitted an objection accompanied by two witness statements; a number of photographs were also subsequently submitted to the Authority. The contents and substance of the objection are addressed below.
- 7.3 The Ramblers Bath Group Footpath Officer responded and highlighted issues regarding the possible renationalisation of paths in the area but stated that they *"have no further evidence to provide to support [the Application]."*

8. Documentary Evidence

- 8.1 Extensive archival research was undertaken in the Somerset Heritage Centre (SHC) in Taunton and in the Authority's own records.
- 8.2 The Application Route is not shown on Day and Masters' Map from 1782 (SHC Ref.: D\B\wsm/38/6) and although Greenwood's Map from 1822 (SHC Ref.: A\AUS\60) shows a route in the vicinity of the Application Route it is not possible to determine whether this is the Application Route due to the small-scale nature of the map. The Application Route runs through enclosures 61 and 62 on the St Catherine Tithe Map from 1840 (SHC Ref.: D/P/st.c/3/2/2) but is not demarcated on the Tithe Map and the Tithe Apportionment (SHC.: D/P/baton/3/2/16) records that tithe was paid on both enclosures. The Application Route runs through hereditament 877 on the plans produced by the Inland Revenue under the Finance (1909-10) Act 1910 (SHC Ref.: DD/IR/8/10) between 1910 and 1914 but is not demarcated on that map and no reductions are recorded as having been claimed in respect of this hereditament in the associated Valuation Book (SHC Ref.: DD/IR/B/21/1). Furthermore, the Application Route is not recorded or referred to in the Parish Survey, Draft Map, Provisional Map or DMS. These documents do not provide any evidence relating to the Application Route.
- 8.3 The Application Route is not shown on: the Ordnance Survey (OS) six-inch to the mile maps published in 1884, 1888, 1903, 1924 and 1857; the OS 25 inch to the mile maps published in 1886, 1903, and 1934; the OS 1:10,560 maps published in 1961, 1962, 1981 and 1994; the OS County Series map published in 1873. Furthermore, each of these OS maps show a building across the full width of the Application Route in the vicinity of point Y on the Decision Plan. The 1972 OS 25k Explorer

Map shows the outline of a building at the same location but without the shading used to denote other nearby buildings.

- 8.4 Majority of the Application Route is visible in aerial photography from 2017 and smaller sections are visible in aerial photography from 2006 and 2020; tree cover obscures the other sections in the aerial photography from those three years and the whole of the Application Route in aerial photography from 1975, 1991, 1999, 2005 and 2009. The area in the vicinity of point Y on the Decision Plan is obscured in the aerial photography taken between 1975 and 2009; this area is visible in the aerial photography taken between 2017 and 2020 and no building is visible across the Application Route at this location.
- 8.5 The planning documents relating to application 99/02627/LBA includes a hand drawn Location Plan dated April 1999 and an undated Ordnance Survey map which both show a building across the full width of the Application Route in the vicinity of point Y on the Decision Plan. The planning documents relating to application 02/00963/FUL includes an Existing Site Plan dated November 2000 which shows the eastern half of the Application Route and there is no indication of a building across the Application Route in the vicinity of point Y on the Decision Plan; the western half of the Application Route is outside the mapped area.
- 8.6 Various plans and sections relating to planning applications submitted on behalf of the landowner between 2008 and 2021 inclusive show the entirety of the Application Route. These applications are 08/04769/LBA, 11/02916/COND, 11/02917/COND, 11/05351/COND, 12/01776/COND, 12/01823/NMA, 12-05579-FUL, 12/05580/LBA and 21/04437/FUL; each include plans showing the whole of the Application Route variously labelled '*Driveway*', '*New Entrance Drive*' or '*Access Drive*'. These depictions and descriptions do not indicate whether the Application Route was public or private.
- 8.7 A number of temporary traffic regulation orders (TTRO) and a temporary traffic regulation notice (TTRN) have been made under section 14 of the Road Traffic Regulation Act 1984 to close the sections of public footpath BA21/9 between points A, J, B, K, L on the Decision Plan and onwards to the east for approximately a further 20 metres and between points K and M on the Decision Plan. These were processed by the Authority's Traffic Management Team ("TM") who have not retained the sealed copies of TTROs made during this period.
- 8.8 TM's spreadsheet of TTROs made between December 2010 and November 2019 records that a TTRO was made on 25th April 2012 and came into operation on 1st May 2012. The sealing of the TTRO is recorded in the Legal Admin Team's Sealing Register and they have retained a draft, unsealed copy of the TTRO. The spreadsheet and draft version of the TTRO indicate that the sealed TTRO was operative until 1st November 2012.
- 8.9 On 16th September 2013, Watson Bertram & Fell ("WBF"), the architectural company that oversaw the building works at Charmydown Lodge and Barn applied for a second TTRO. TM's spreadsheet records

that this second TTRO was made on 23rd October 2013 and came into operation on 28th October 2013. The sealing of the TTRO is recorded in the Legal Admin Team's Sealing Register and they have retained a draft, unsealed copy of the TTRO. The spreadsheet and draft version of the TTRO indicate that the sealed TTRO was operative until 23rd April 2014.

- 8.10 On 29th September 2014, WBF applied for an emergency TTRN to come into effect immediately and remain operative until 20th October 2014. An email from TM to WBF confirms that a TTRN was issued. TTRNs are not sealed and do not require the involvement of the Legal Admin Team; consequently, the TTRN would not be recorded in the Sealing Register and Legal Admin would not have received draft copy of the TTRN.
- 8.11 On 17th October 2014, WBF applied for a third TTRO. TM's spreadsheet records that this third TTRO became operative on 20th October 2014 but it also states that it was not sealed until 19th November 2014. The sealing of the TTRO on 19th November 2014 is recorded in the Legal Admin Team's Sealing Register and they have retained a draft, unsealed copy of the TTRO which indicates that it became operative on 24th November 2014 and remained in operation until 24th May 2015. Given that a TTRO cannot become operative before it has been made, it is most likely that the TTRO was operative between 24th November 2014 and 24th May 2015 and that the operative date stated in TM's spreadsheet is an error.
- 8.12 The Department for Transport's National Transport Casework Team's records were lost in a database fire in late 2023 and, consequently, there is no record of whether any of the TTROs were extended beyond their initial operative period.
- 8.13 A fourth TTRO came into operation on 3rd March 2023 and was subsequently extended by the Secretary of State until 2nd September 2024. This fourth TTRO temporarily closed a 39 metre section of public footpath BA21/9 east of the mid-point between points B and K on the Decision Plan and a six-metre section of the same public footpath southwest of point K on the Decision Plan; the notice referred to in paragraph 6.3 above relates to this fourth TTRO.

9. User and Witness Evidence

- 9.1 The Authority received a total of 57 user evidence forms detailing use of the Application Route from 1947 until 2021. The Authority attempted to carry out short telephone interviews with each of these individuals to clarify any ambiguities in their evidence. All of the users have stated that they have never been turned back, seen signs dissuading use of the Application Route, been granted permission to use the Application Route or been prevented from using the Application Route due to an obstruction.
- 9.2 In addition to the user evidence forms, three witness statements were appended to the Application. Witness 1 ("W1") was the Head of Estates for Wessex Water, who owned land in the area; Witness 1 states that

they saw members of the public using the Application Route between 1997 and 2004. Witness 2 (“W2”) lived adjacent to the Application Route from 1985 to 1994 and saw walkers using the Application Route during that period. Witness 3 (“W3”) worked in Wessex Water’s Estates Department from 1989 to 2004 and quite often saw members of the public using the Application Route.

- 9.3 During the site visit carried out by the Authority on 1st June 2023, there was found to be a locked wooden field gate on public footpath BA2/11 at point Z on the Decision Plan and a wooden stile with a public footpath waymarker approximately 4 metres further along a fence line; this is a short distance north of BA2/11’s junction with BA2/12. The Objector states that *“The presence of the gate and signage are overt, effective acts evidencing the landowner’s lack of intention to dedicate any public right of way.”* However, this gate and signage is adjacent to public footpath BA2/11, rather than the Application Route. Members of the public will have passed the gate and signage using the waymarked stile and have walked a further 10m along BA2/11 before they reached the Application Route.
- 9.4 Issues relating to whether the gate at point Z on the Decision Plan was locked, and the associated impact on users of the Application Route on horse and bicycle, are addressed separately in paragraphs 9.14 to 9.16 below. The evidence indicates that the signs and locked gates located at points X and Y on the Decision Plan, and detailed in paragraph 6.3 above, were erected after the Application was duly made.
- 9.5 Two witness statements were appended to the Objection. The Authority carried out short telephone interviews with both of these individuals to clarify any ambiguities in their evidence. Witness 4 is a director of Donovan Construction who were the company appointed to carry out construction work at Charmydown Lodge commencing in April 2012 (“W4”). W4 has made a witness statement and states that *“I recall on occasions members of the public approaching the works compound intending to walk along the driveway [the Application Route]. On each occasion they were informed that the route was private and not a public right of way.”* During the short telephone interviews, W4 stated that these people were usually approaching point B on the Decision Plan and they were looking for the spur of BA21/9 which runs southwest from point K on the Decision Plan. Witness 5 is a director of WBF (“W5”). W5 has made a witness statement and states that: *“On occasions when persons have attempted to use the Track [the Application Route], they have been turned back or informed that it is private”*; W5 clarified during the short telephone interview that it was personnel from Donovan Construction that turned people back. However, all 57 users stated that no one has ever attempted to turn them back or said that they had no right to use the Application Route.
- 9.6 W4 states that fencing was erected across the Application Route *“to restrict access for health and safety reasons, signs were displayed explaining there was no access.”* W5 states that *“for a prolonged period, the access track [the Application Route] was closed off and impassable whilst works were being undertaken as part of the restoration of*

Charmydown Lodge. This period I recollect was from April 2012 onwards and lasted for at least 18-24 months.” Additionally, the Authority contacted Witness 6 who was an employee of WBF; the Authority was aware this individual was previously closely involved with the Charmydown Lodge and Barns building project (“W6”). W6 recalls the Application Route being fenced off when TTROs were in effect and the Charmydown Lodge construction works were taking place.

- 9.7 The Objector has provided seven photographs of the Application Route. The photographs shown Heras-type fencing surrounding the Charmydown Lodge worksite. The extent of the Application Route which is visible is within the fencing, but the photographs do not show fencing or any other obstruction across the Application Route. Photographs 3 and 4 show point A on the Decision Plan and there is no sign of fencing or any other obstruction across the Application Route where it joins public footpath BA21/9. Photograph 7 shows the section of public footpath BA21/9 between points B and M on the Decision Plan; there is a clear gap in the Heras-type fencing where public footpath BA21/9 passes through point J on the Decision Plan and there is no sign of fencing or any other obstruction across the section of public footpath BA21/9 between points B and M on the Decision Plan.
- 9.8 W6 has provided three photographs of the Application Route one taken on 31st October 2014 and two taken on 2nd December 2014. Each show Heras-type fencing surrounding the Charmydown Lodge worksite. A section of the Application Route is visible within the fencing but the photographs do not show fencing or any other obstruction across the Application Route. It is not possible to see point A on the Decision Plan in any of these three photographs.
- 9.9 The user evidence submitted by the Applicant and the witness statements submitted by the Objector conflict with one another in respect of whether use of the Application Route was interrupted during the Relevant Period.
- 9.10 During one of the short telephone interviews conducted in June 2025, and referenced in paragraph 9.1 above, User 2 stated that builder’s netting was put up by the landowner across the full width of the Application Route which blocked its use; User 2 stated that this was “a few years ago” but was not able to be more specific about when that may have been. All 56 other users stated in their user evidence forms that there had never been any obstruction which interrupted their use of the Application Route prior to the submission of the Application; the Authority was able to contact 25 of those users² when conducting the short telephone interviews and each reiterated that there was no interruption to their use of the Application Route.
- 9.11 As detailed in paragraphs 8.7 to 8.12 above, TTROs and a TTRN were made in May 2012, October 2013, September 2014 and November 2014 to temporarily close sections of public footpath BA21/9 for over 18 months. Public footpath BA21/9 runs both north and south from point B

² Users 4, 5, 7, 8, 9, 12, 15, 17, 21, 24, 30, 33, 35, 37, 38, 39, 41, 48, 49, 51, 52, 53, 54, 55 and 57.

on the Decision Plan and is the only physically accessible onward route for members of the public who had travelled in a northeasterly direction along the Application Route. As stated in paragraph 9.6 above, W4, W5 and W6 state that during this period the Application Route was fenced off and inaccessible. However, the user evidence states that the Application Route was not fenced off and it is implied that the TTROs and TTRN did not have a deterrent influence on those using the Application Route.

- 9.12 As detailed in paragraphs 8.3 to 8.6 above, various OS maps published between 1873 and 1994 and the hand drawn Location Plan dated April 1999 show a building across the full width of the Application Route in the vicinity of point Y on the Decision Plan; this conflicts with user evidence which states that the Application Route has been used since 1947. Consequently, in addition to the short telephone interviews referenced in paragraph 9.1 above, the Authority later attempted to contact the 26 individuals who stated that they used the Application Route prior to 1999 and those who responded each stated that there was no building across the Application Route during their respective periods of use. It should be noted that the documentary evidence does not provide evidence of a building or any other obstruction across the Application Route after 1999 and the planning documents detailed in paragraph 8.5 above provide evidence that the Application Route physically existed from November 2000 until at least 2021.
- 9.13 Eight individuals³ have stated that they used the Application Route on horse or bicycle. During the site visit carried out by the Authority on 1st June 2023, there was found to be a locked wooden field gate and an adjacent wooden stile with a public footpath waymarker on public footpath BA2/11 at point Z on the Decision Plan; this is a short distance north of BA2/11's junction with BA2/12. Although the locked gate is on BA2/11, rather than the Application Route, it is relevant to this application because the users who state they used the Application Route on horse or bicycle also state that they accessed the Application Route along BA2/11; pedestrians would have been able to use the wooden stile but a locked field gate at this location would present an issue for horse riders and cyclists.
- 9.14 The Council's PROW asset management system (CAMS) shows that during a site survey conducted on 27th July 2009 there was a metal field gate in a poor state of repair at point Z on the Decision Plan; it is not possible to determine whether the gate was locked in 2009 and the photograph only shows the back of a sign attached to the gate meaning it is not possible to determine from the photograph what was written on the sign.
- 9.15 The user and witness evidence relating to a gate at point Z on the Decision Plan is contradictory. W4 states that: *'There has also always, since I have known the site, been a locked timber gate and 'Private Property' sign at the intersection of PROW BA2/12 and BA2/11'* and W5 makes a similar assertion. User 37, whose knowledge and use of the

³ Users 2, 17, 21, 23, 24, 25, 37 and 48

Application Route is limited to 1985 to 1994, states that there was a locked gate at point Z on the Decision Plan and that they had a key which allowed them to open the gate and continue onwards and along the Application Route. User 2 states that there was no gate at point Z on the Decision Plan until approximately seven or eight years ago. User 24 does not recall there being a locked gate at point Z on the Decision Plan when using the Application Route on bicycle between 1994 and 2010. User 48 states that they are sure there was not previously a gate at point Z on the Decision Plan and that the locked gate was installed when building works first commenced on Charmydown Lodge or Barn.

- 9.16 The user evidence does not provide consistent evidence of width: five users⁴ stated that the Application Route is a width between 0.9 and 1.8 metres; 11 users⁵ stated that the Application Route is a width between 2.4 and 2.9 metres; 14 users⁶ stated that the Application Route is approximately 3 metres wide; 19 users⁷ stated that the Application Route is a width between 3.5 metres and 4 metres; seven users⁸ stated that the Application Route is a width between 4.5 metres and 5 metres. However, the user evidence does consistently state that the Application Route has always been the same width and the Application Route was found to be 3 metres wide throughout when site visits were conducted by the Authority.
- 9.17 The user evidence is consistent that there were no gates or stiles on the Application Route during the Relevant Period and the gates detailed in paragraph 6.3 above were erected after the Application was duly made.

10. Analysis

- 10.1 The Authority is required to weigh all available evidence in the balance and apply to it to the relevant legal principles.
- 10.2 Taken as whole, the historical documentary evidence does not provide evidence of the physical existence of the whole of the Application Route, or the existence of legal rights over the Application Route, prior to 2003. However, the planning document dated November 2000 shows the physical existence of the eastern half of the Application Route and the planning documents submitted between 2008 and 2021 consistently show the physical existence of the Application Route over this period.
- 10.3 Between 2012 and 2014, 43 users⁹ state that they used the Application Route on foot; this represented approximately 29 journeys per week. W4 states that members of the public were only turned back “*on occasions*” during this period; given this relatively high volume of users and that the volume of use does not appear to have altered following this period of challenge, this turning back does not appear to have been

⁴ Users 1, 17, 40, 42 and 45

⁵ Users 4, 5, 11, 24, 25, 31, 34, 41, 44, 49, 51, 52, 54 and 56

⁶ Users 3, 6, 8, 9, 10, 14, 15, 29, 33 and 55

⁷ Users 2, 16, 18, 20, 21, 22, 23, 26, 27, 32, 36, 37, 39, 46, 47, 48, 50, 53 and 57

⁸ Users 12, 13, 19, 28, 35, 38 and 43

⁹ Users 1-6, 8, 9, 11-14, 16, 17, 19-22, 24-28, 30-34, 39, 41-44, 46, 47, 49-55 and 57

sufficient to constitute an effective challenge to public use. Additionally, W4 states that fencing was erected across the Application Route “to restrict access for health and safety reasons”. This is distinct from erecting fencing to call into question the right of the public to use a route.

- 10.4 Section 31(7B) of the 1980 Act states that in the absence of the landowner taking any positive steps to call into question the right of the public to use a route then the ‘date of challenge’ will be the date which the DMMO application was duly made (i.e. 5th May 2021). Therefore, the relevant 20-year period of use for deemed dedication under section 31(1) of the 1980 Act runs from 5th May 2001 to 5th May 2021 (“the Relevant Period”).
- 10.5 23 individuals¹⁰ used the Application Route on foot throughout the Relevant Period and a further 33 individuals¹¹ used the Application Route on foot for at least part of the Relevant Period. This is a relatively high level of usage for a route located approximately 900m from the nearest recorded vehicular highway (Swainswick Lane) and the nearest settlement (Upper Swainswick) and is sufficient to constitute actual enjoyment by the public on foot.
- 10.6 The Objector states that a locked gate and signage at point Z on the Decision Plan is an “*overt, effective acts evidencing the landowner’s lack of intention to dedicate any public right of way.*” However, all 57 users stated that they had never seen any notices on or near the Application Route discouraging use of the Application Route; this indicates that those users did not understand the notice or locked gate at point Z on the Decision Plan to be referring to the Application Route. Members of the public will have bypassed the locked gate using a nearby stile and have walked 10 metres past point Z on the Decision Plan along a recorded right of way before they reached the Application Route. Consequently, a notice or locked gate at point Z on the Decision Plan does not objectively demonstrate a reasonable user would have understood that the landowner had no intention to dedicate the Application Route.
- 10.7 There is conflicting evidence regarding point Z on the Decision Plan but, irrespective of whether there was a locked field gate and signage at this location, the recorded rights of way beyond point B on the Decision Plan are public footpaths. The eight individuals who have stated they used the Application Route on horse or bicycle have not provided evidence of a common, onward route beyond point B on the Decision Plan. In *Moser v Ambleside UDC* [1925],¹² Atkin LJ stated that “*you can have a highway leading to a place of popular resort*”, rather than another highway. However, point B on the Decision Plan does not constitute such a place of popular resort and the evidence does not therefore indicate that Application Route possesses the fundamental characteristics of a public bridleway.

¹⁰ Users 1, 6, 8, 9, 12, 16, 19-21, 24-26, 28, 31-34, 41, 43, 47, 51, 52 and 55

¹¹ Users 2-5, 7, 10, 11, 13-15, 17, 18, 22, 27, 29, 30, 35-40, 42, 44-46, 48-50, 53, 54, 56 and 57

¹² *Moser v Ambleside Urban District Council* [1925] 23 LGR 533 540, [1925] 89 JP 118

- 10.8 TTROs and a TTRN have been made by the Authority to suspend the public rights over the route at the eastern terminus of the Application Route during the renovation of Charmydown Lodge; these were in effect for a cumulative total of over 18 months between 2012 and 2015 (which lies in the middle of the Relevant Period). 18 months is a sufficiently long period of time to constitute an effective interruption of use; however, in *Betterment* [2012],¹³ Patten LJ states that “*for the actions of a third party to be taken into account there must be a physical ouster*” and there is sharply conflicting evidence about whether barriers were in place.
- 10.9 Aside from User 2 who refers to netting being erected during an unspecified period of time, all users state that there were no barriers preventing use of the Application Route during the Relevant Period. This is stated in each of the user evidence forms and confirmed by all 25 users with whom the Authority was able to carry out short telephone interviews. In contrast, W4, W5 and W6 all state that the Application Route was fence off and inaccessible during the construction works at Charmydown Lodge. The photographs provided by the Objector and W6 do show Heras-type fencing around the Charmydown Lodge and the Application Route does appear to be within the development site. However, the photographs do not show any fencing or obstruction across the Application Route including at its junction with public footpath BA21/9; it's important to note that the section of BA21/9 running southwest from point A is a recorded right of way which was not affected at any point by a TTRO or TTRN.
- 10.10 The Authority is required to make a DMMO if evidence is discovered which shows that a right of way “*subsists or is reasonably alleged to subsist*”. In *Bagshaw and Norton* [1994],¹⁴ Owen J. stated on the issue of whether an allegation is reasonable that “*if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist then, it would seem to me, to be reasonable to allege such right.*”
- 10.11 The user evidence states that the Application Route was used as of right throughout the Relevant Period and that the landowner did not effectively communicate a lack of intention to dedicate during this period. This clearly conflicts with the landowner's evidence; however, applying *Bagshaw and Norton* [1994], there is nevertheless a reasonable allegation that the Application Route has been dedicated as a public footpath pursuant to section 31(1) of the 1980 Act.
- 10.12 The user evidence does consistently state that the Application Route has always been the same width and the Application Route was found to be 3 metres wide throughout when site visits were conducted by the Authority. Furthermore, the user evidence states that there were no gates or other structures on the Application Route during the Relevant Period meaning that any rights are deemed to have been dedicated without any limitations or conditions.

¹³ *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250

¹⁴ *R v SSE ex parte Bagshaw and Norton* [1994] 68P & CR402

10.13 The Authority is therefore required to make a DMMO to record the Application Route as a 3 metre wide public footpath without any limitations.

10.14 In *Emery* [1997],¹⁵ Roch L.J. stated “*The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under Section 53(2) made following a Schedule 14 procedure still leaves both the applicant objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public enquiry.*” The decision whether an order should be confirmed would be based on the balance of probabilities and this is distinct from whether there is a reasonable allegation.

11. Conclusion

11.1 The user evidence demonstrates a reasonable allegation that the Application Route has been used without force, secrecy or permission by the public on foot throughout the Relevant Period and that the landowners did not effectively demonstrate a lack of intention to dedicate.

11.2 Consequently, a DMMO should be made to modify the DM&S to record the Application Route as a public footpath.

AUTHORISATION

Under the authorisation granted by the Council on 21st July 2022, the Authority formally resolves to make a Definitive Map Modification Order to modify the Definitive Map and Statement to record a public footpath between points A and B on the Decision Plan.



Dated: 08/10/2025

Craig Jackson
Team Manager – Highways Maintenance and Drainage

¹⁵ *R v SSW ex parte Emery* [1997] EWCA Civ 2064

APPENDIX 1: Decision Schedule

SCHEDULE

PART I

Modification of Definitive Map

Description of path or way to be added

A public footpath commencing from a junction with public footpath BA21/9 at grid reference ST 7660 6890 (Point A on the Decision Plan) and proceeding in a generally north-easterly direction along a track for approximately 105 metres to a junction with public footpath BA21/9 at grid reference ST 7669 6896 (Point B on the Decision Plan).

PART II

Modification of Definitive Statement

Variation of particulars of path or way

A new statement for BA21/13 shall be recorded as follows:

Path Number: BA21/13

Status: Public footpath
Length: Approximately 105 metres
Parish: St Catherine
Width: 3 metres
Limitations: None

| Description of Route | | | | |
|-----------------------------|----------------|-------------------|-----------------------------|----------------|
| From | | General Direction | To | |
| County Road or Right of Way | Grid Reference | | County Road or Right of Way | Grid Reference |
| BA21/9 | ST 7660 6890 | NE | BA21/9 | ST 7669 6896 |

General Description:


A public footpath commencing from a junction with public footpath BA21/9 at grid reference ST 7660 6890 and proceeding in a generally north-easterly direction along a track for approximately 105 metres to a junction with public footpath BA21/9 at grid reference ST 7669 6896.

APPENDIX 2: DECISION PLAN

Bath & North East
Somerset Council

Improving People's Lives

Scale 1:1250

Application Route 
Unaffected Public Footpath 