

**COMMONS AND RIGHTS OF WAY COMMITTEE
24 MARCH 2020**

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN
ADDITIONAL LENGTH OF PUBLIC FOOTPATH
POPES HILL TO CHESTNUTS INCLOSURE, PARISH OF LITTLEDEAN**

REPORT OF THE LEAD COMMISSIONER, COMMUNITIES & INFRASTRUCTURE

1. PURPOSE OF REPORT

To consider the following application:

Nature of Application:	Additional Footpath
Parish:	Littledean
Name of Applicant:	Chris Vidler
Date of Application:	11 March 2005

2. RECOMMENDATIONS

- (a) That an order be made to add a length of public footpath to the Definitive Map and Statement between points A and B (as shown on map 1B); and
- (b) That the application to add a length of public footpath between points B and C (as shown on the aforesaid map) be refused

3. RESOURCE IMPLICATIONS

Cost of advertising Order in the local press, which has to be done twice, is approximately £500 per notice.

In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application.

If the application were successful, the path would become maintainable at the public expense.

4. SUSTAINABILITY & EQUALITY IMPLICATIONS

No sustainability or equality implications have been identified.

5. STATUTORY AUTHORITY

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section (3). Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such

application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

6. DEPARTMENTAL CONTACT

Andrew Houldey, Asset Data Officer (PROW Definitive Map), Definitive Map Unit, Highway Records, Asset Data Team. Telephone Gloucester (01452) 328984
E-mail: andrew.houldey@gloucestershire.gov.uk

REPORT

7. DESCRIPTION OF PATH

- 7.1 A location map at scale 1: 10,000 is attached (numbered **1A**) showing the position of the claimed path at Popes Hill in the parish of Littledean. The claimed path is approximately 1.6 miles north north-east of Cinderford. The area of interest is within Ordnance Survey Grid Square SO 6814.
- 7.2 A large-scale map showing the whole of the claimed route at 1: 2,500 scale is attached (numbered **1B**). The way is shown running between points A, B and C. Reference is made to the points shown on map 1B throughout the report.
- 7.3 The claimed path commences at point A on map 1B at a junction with the county maintainable roads numbered 43003 and 43004. It runs in a westerly direction, to the north of Rock House, to which it provides a vehicular access, continuing to an area of Forestry Commission land at point B. The claimed way continues as an undefined track across bracken to Chestnuts Inclosure at point C. Chestnuts Inclosure is Forestry Commission owned. The way continues in the wood as a forest path.
- 7.4 The total length of the claimed route is approximately 155 metres. The track A to B is 110 metres in length, and the section B to C is approximately 45 metres long. The path is approximately 5 metres in width between points A and B, and is undefined between points B and C.
- 7.5 The claimed route was inspected on 8 August 2014 and again on 15 November 2019.

8. BACKGROUND

- 8.1 The claimed route runs across land within the civil parish of Littledean but formerly in the parish of East Dean. In 1953, on the dismemberment of East Dean civil parish, Littledean took in part of the Forest to the north including Pope's Hill, Shapridge and Edge Hills.
- 8.2 The path was physically created c.1971, to give access for the Forestry Commission to Chestnuts Inclosure when the surrounding open land was enclosed and sold to Mr R C Adams of Pear Tree Farm. The public path evidence

forms supplied by Mr R C Adams of Pear Tree Farm, Mr R D Jones of Chestnut Cottage and Mr A R Parker of Severn View all refer to the path being provided by the Forestry Commission when the land was sold off to Mr Adams.

- 8.3 The path is first shown as a physical feature on an Ordnance Survey map in 1973. Earlier maps show a way running across unenclosed land, leading north north-west from Rock House to Chestnuts Wood but not on the same alignment as the claimed route.
- 8.4 The Land Registry register entry for the track between points A and B (GR229097, as issued on 7 September 2005) refers to a conveyance of the land in this title and other land made between the Minister of Agriculture Fisheries and Food and Reginald Clifford Adams dated 15 October 1971 and notes that it contains restrictive covenants. The land was then conveyed to the then-owners of Rock House (Lawrence and Janet Poole of Sacksfield Farm, Redmarley) on 23 June 2000 and the register entry notes that the land is subject to the rights reserved by and contained in the Conveyance dated 15 October 1971 referred to above.
- 8.5 The 1971 conveyance includes the track A to B, which is coloured blue on the accompanying plan (**copy at appendix 1I**), and is subject “in particular to the rights of way at all times and for all purposes as heretofore enjoyed over...the southern track [A to B] crossing the said property which is coloured blue on the said plan for the benefit of (a) the owners and occupiers for the time being of Rock House sheds (also known as Bank House sheds) and (b) the general public.” The covenants restrictions and stipulations contained in the Schedule are to bind any successors in title. It is not considered that the wording of this conveyance prevents a right of way coming into being over the section A to B through long user.
- 8.6 The path is within the Statutory Forest of Dean and was designated as access land under Part 1 of the Countryside and Rights of Way (CROW) Act 2000. The Act created new public access rights over ‘access land’ in England and Wales. Access land is defined as: registered common land; open access land; or, where it exists, ‘dedicated land’. Dedicated land is woodland or any other land type that has been voluntarily dedicated under section 16 of the Act (in England and Wales). A plan provided by Natural England, showing the extent of section 16 dedicated land at Chestnuts Inclosure is provided at **appendix 1J**.
- 8.7 Section 16 of the 2000 CROW Act was scheduled to commence two months after the Act was passed. The Act was passed on 30 November 2000, so section 16 was commenced on 31 January 2001.
- 8.8 The majority of the Forestry Commission’s forests are dedicated in perpetuity as open access land under the CROW Act which gives walkers a right to roam across these areas. The right of access on foot extends to 90% of the freehold area. In many of the rest the Forestry Commission operate a permissive right to roam policy. In addition the Commission extend a permissive right to roam to cyclists and horse riders who may use forest roads and tracks.

8.9 Although registered as Access Land, the section of path A to B runs over land that was sold by the Forestry Commission to Mr Adams of Pear Tree Farm in 1971 and then to the owners of Rock House on 23 June 2000.

9. APPLICATION

- 9.1 Clive Hooper, Clerk of Littledean Parish Council, enquired about getting application forms to record the path on the Definitive Map and Statement on 15 July 2004. Application forms were sent out on 6 August 2004. Application forms were also sent to Chris Vidler of Woodbine Cottage, Popes Hill on 13 October 2004.
- 9.2 The application form 1 (notice on the surveying authority) was sent by Chris Vidler to the County Council on 30 November 2004. The form was accompanied by nine completed public path evidence forms. Form 2 (Form of Notice of Application for Modification Order) was also sent to the County Council at this time; this is the notice that should be served on the affected landowners. Mr Vidler was advised that he needed to serve notice on the landowners on 4 January 2005.
- 9.3 Notice was served by the applicant on the landowners and he advised the County Council of this and submitted the Form 3 (Certificate of Notice) on 11 March 2005.
- 9.4 Thus an application compliant with schedule 14(1) of the 1981 Wildlife and Countryside Act was made on 30 November 2004, and an application compliant with both sch.14(1) and sch.14(2) was made on 11 March 2005.
- 9.5 A total of 9 public path evidence forms, completed by 9 named individuals, were submitted in support of the application. A summary of these evidence forms is provided at **appendix 1C**.

10. USER EVIDENCE

- 10.1 The application was supported by 9 evidence forms, completed by 9 individuals. Use was on foot, for leisure purposes, to give access to Chestnuts Woods, Welshbury and Green Bottom.
- 10.2 As previously noted, the claimed route only came into being as a physical feature in 1971, so we should disregard any previous evidence. Mrs D Turner (witness 9) claims use since 1965, while Mr R C Adams (witness 6) has used the path since the time it was created (1971). Two witnesses Mr R D Jones (witness 7) and A R Parker (witness 8) do not state their period of use, but their comments imply that they have known the path since it was physically set-out in 1971.
- 10.3 There is no event that has been identified by which use by the public has been brought into question. The 2006 Natural Environment and Rural Communities (NERC) Act allows us to take the date of the making of an application under s.53 of the 1981 Wildlife and Countryside Act as the date of bringing into question. The application date should be taken to be 30 November 2004.

10.4 If we take 2004 as the date of the bringing into question, then there are three witnesses who have used the path for a full twenty years and one for 19 years. In addition we have the use by Mr Jones and Mr Parker which seems to date from the physical setting-out of the path in 1971.

11. DOCUMENTARY EVIDENCE

11.1 Inclosure Award

None for area of interest

11.2 Littledean Tithe Map 1839 (GDR/T1/114)

Area not shown on the map

11.3 East Dean Township Map (Cinderford) 1856 (D9096/F16/63)

Map of the township of East Dean, showing encroachments with new inclosures pencilled in MS. Surveyed by F W Dibbin of Kensington. Scale 3 chains to 1 inch. In five parts. Area of coverage includes Chestnuts Inclosure and Pope's Hill (both named). Land around the present Rock House is shown as an insular enclosure, formed by plot numbers 2154, 2155 and 2157. Claimed route is not shown; the area in question shown as open unenclosed land. Northern limit of enclosed land is the present southern boundary of the track between points A and B.

11.4 Ordnance Survey 1" to 1 mile, 1st edition, surveyed c.1817

Area not shown in detail.

11.5 Ordnance Survey 25" to 1 mile Glos 31.8, first edition, 1881 (1D)

A route is shown marked by double pecked lines in the general direction of A to B across open land, but not following the same alignment as the claimed route (it runs further north). Its status is undefined.

11.6 Ordnance Survey 25" to 1 mile Glos 31.8, second edition, 1903 (1E)

A path is shown in the same position as on the first edition

11.7 Ordnance Survey 25" to 1 mile Glos 31.8, third edition, 1922 (1F)

The 3rd edition OS map of 1922 shows the same features.

11.8 Ordnance Survey 1: 10, 560 SO 61SE (1955) (1G)

A route is shown by a pair of pecked lines to the north of the present claimed route, running across open land and leading to the gap between Chestnuts Inclosure and Welshbury Woods.

11.9 Ordnance Survey 1: 2,500 National Grid SO 6814-6914 (1973) (1H)

Route shown in present position, by two full lines between points A and B. Route then continues south from point B to join a track which runs roughly north-west to south-east within Chestnuts Inclosure.

11.10 Bryant's Map of Gloucestershire 1824

Area not shown in detail

11.11 Inland Revenue, maps compiled under the Finance Act, 1910 based on Ordnance Survey 252 to 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files (D2428)

Route not shown in current position; way shown to the north on base map by double pecked lines running across an area of open land. This area is numbered lightly in pencil WD3344 (D2428/3/31/8). There is no number 3344 in the Domesday Book for East Dean (D2428/1/28). There is no obvious sign of a hereditament number although part of the map is torn. Rock House is shown as forming hereditament 1525 in East Dean, owned and occupied by George Niblett and described as house and land, size 1 acre 1 rood and 21 perches; the valuation plan shows this hereditament to be comprised of OS 1903 plot numbers 1037 and part of 1036.

11.12 Maps deposited with County Planning Officer under Rights of Way Act, 1932 S1, 3 (CP/D)

Nothing relevant.

11.13 Parish Council file, Rights of Way Act, 1932

Nothing relevant.

11.14 Duplicate copies of tithe or inclosure awards

P110/SD2/1	Parish copy of Littledean tithe map
GDR/T1/120	Tracing of tithe map
MF1127/123	Microfilm copy of tithe map
PC1812/114A & B	Modern hand-drawings of tithe map

11.15 Private estate maps

D3921/IV/8	Geometric plan of the Forest of Dean, 1787. Area not shown in detail, route not shown
Q/RGf1/2	Littledean Walk encroachment map, 1834. Area not shown in detail, route not shown
PC1992a	Modern hand drawing of East Dean township map, 1856. Area not shown in detail, route not shown

11.16 Footpath or highway diversion orders deposited with Clerk of the Peace (Q/SRh)

1819C/2; Q/SR 1873A
Checked, not relevant

11.17 Plans of public schemes deposited with Clerk of Peace (Q/RUm)

Not checked

11.18 District Council Clerk's correspondence

DA24/113- Highways Committee minutes, 1923-30 (1 volume). Not checked.
DA24/132/51- Clerk's Rights of Way correspondence file for Littledean, 1955-75.
Checked, not relevant.

11.19 County Council Solicitor's correspondence (K596/25)

Nothing relevant.

11.20 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 (K687)

K687/1/5 - route roughly following the alignment is shown on the OS base maps for both the East Dean and Littledean submission maps, but is not numbered or claimed on either.

K687/3/7 - A route following the alignment on the OS maps is shown on the base map for the Littledean provisional map, but is not numbered.

12. LANDOWNERS' EVIDENCE

12.1 Forestry Commission

Daniel Howell, Deputy Gaveller for the Dean Forest, replied by e-mail dated 27 November 2019 enclosing a copy of the 1971 conveyance. The Forestry Commission are landowners for the section B to C of the claimed path.

12.2 Lisa Poole and Cameron Swaine, Rock House, Popes Hill

Lisa Poole responded to the consultation by telephone on 13 February 2020. She stated that she and her partner were now the owners of Rock House rather than her parents Lawrence and Janet Poole upon whom notice was originally served. She requested an explanation of the purpose of the application. It was explained that the track A to B was already registered as access land under the 2000 Countryside and Rights of Way Act, and that an application to add a length of public footpath would not affect any existing rights to access Rock House. She stated that she had no concerns about the application.

13. CONSULTATIONS

13.1 Littledean Parish Council

Littledean Parish Council showed an interest in adding the path to the Definitive Map and Statement as a public footpath in 2004, and were sent application forms.

13.2 Forest of Dean District Council

Jackie Lodge of Forest of Dean District Council was consulted on 14 May 2007; no response has been received.

13.3 County Councillor

The County Councillor was consulted on 14 May 2007; no response has been received.

13.4 Ramblers' Association

The Area Representative of the Forest of Dean Group of the Ramblers' Association was consulted; no response was received.

14. LEGAL COMMENTS AND CONCLUSIONS

- 14.1 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.
- 14.2 Section 31(1) of the Highways Act 1980 states that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- 14.3 Section 31(2) states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public is brought into question whether by a notice or otherwise. The twenty years usage must furthermore be “without interruption”.
- 14.4 Section 31(9) of the Highways Act 1980 says that nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. If there is no presumption of dedication under Section 31 of the 1980 Act, then we will also consider whether the evidence is such as to establish, again on a balance of probabilities, dedication at Common Law.
- 14.5 The claimed path runs over land that forms part of the Statutory Forest and which is designated as ‘access land’ under Part 1 of the Countryside and Rights of Way (CROW) Act 2000. This Act created new public access rights over ‘access land’ in England and Wales. Access land is defined as: registered common land; open access land; or, where it exists, ‘dedicated land’. Dedicated land is woodland or any other land type that has been voluntarily dedicated under section 16 of the Act (in England and Wales). The legal effect of this is considered in more detail in the following paragraphs:

Crown Land and Highways Legislation

- 14.6 Land owned by a government department, including the Forestry Commission, is Crown land. The history of the ownership of the land is important in determining rights of way issues and will affect the way in which the claim is determined. Legislation applies to Crown land only if that application is specified in the legislation. Thus rights of way over Crown land are recorded on definitive maps because the provisions in the 1949 National Parks and Access to the Countryside Act and the 1981 Wildlife and Countryside Act do apply to the Crown. However, because the Highways Act 1980 and its predecessors do not bind the Crown, any claim for a right of way across land which is, or was at the relevant time, Crown land, cannot rely on the 20-year user provisions in section 31 of that Act.
- 14.7 The provisions of section 31 of the 1980 Highways Act do not supersede the principles of implied dedication that existed at common law before 1932, these

principles being preserved by Section 31(9) of the 1980 Act which says that nothing in this Section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence shows on the balance of probability that a right of way of a particular description exists. We may thus consider a claim at common law, under which the inference drawn will depend on the facts of the case. *“Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication”*. (Dyson J, *Nicholson v Secretary of State for the Environment* (1996).

14.8 **Statutory Forest of Dean and Rights of Way**

This affects applications where a path falls within the area of the Statutory Forest of Dean. The Forest of Dean was established by statute under the Dean Forest (Reafforestation Act) of 1667. 11,000 acres, being part of the wastelands of the Forest of Dean, were to be inclosed and kept in severalty for the growth and preservation of timber to supply wood for the Royal Navy and for the maintenance of trade shipping. The physical inclosures were to allow the young trees to grow and to be kept free from damage by animals. The Act made it clear that any inclosure made and set out was to “remain in severalty in the actual possession of the Crown forever, freed and discharged and from all manner of right, title and pretence whatsoever ...and shall be made and reputed a nursery for wood and timber only”.

14.9 The provisions of that Act were largely re-enacted in the Dean Forest (Timber) Act 1808. It would seem that there was some doubt as to whether some of the inclosures had been carried out as required and this later Act extended the inclosure provisions to the Stapledge Inclosure, Speech House Inclosure, Birch Wood Inclosure and Buck Holt Inclosure, a total of 676 acres.

14.10 Section 3 of the 1808 Act stated (as in the earlier legislation) that “the said inclosures so made and set out as aforesaid shall remain in severalty in the actual possession of the Crown, freed and discharged of and from all rights of common, and from all manner of right, titles or pretences, or privileges or claims whatsoever, during the period of the same remaining so inclosed for the growth and preservation of timber, and until the same or any part of this Act, according to the purport and true intention of the said recited Acts and of this Act, and shall be made and reputed a nursery or nurseries for wood and timber only”. Whenever the Chancellor of the Exchequer for the time being was satisfied that the woods and trees growing in any inclosure, were beyond the danger of browsing deer, cattle or other “prejudice” they were to be opened up and treated in the same way as any other part of the residue or waste of the Forest.

14.11 Both Acts continued in force until the earlier Act was repealed by the Crown Estates Act of 1961. This Act removed all previous statutory bars preventing the Crown from making grants of estates in the land. The Crown Estates Act has allowed the Forestry Commission to expressly dedicate rights of way within the Statutory Forest of Dean.

- 14.12 The National Forest Park Committee (Forest of Dean) produced a report in 1938. Paragraph 8 states that “the Forest is well served by roads and tracks and is freely available to the general public. We understand that, although there is not a public right of access to the inclosures, the Forestry Commission, subject always to the need for special precautions for the protection of young plantations, have no objection to controlled access provided care is taken to shut gates and to avoid damage”. The Forestry Commission’s view is that access to the Forest is regulated and controlled by the Forestry Commission bylaws. They argue that under these circumstances it would be impossible to show an implied intention to dedicate on the part of the Crown in the Statutory Forest since that date.
- 14.13 Following the National Parks and Access to the Countryside Act 1949, many parishes claimed paths over Crown Land and these were subsequently transferred onto the Draft Stage of the map. The situation regarding public rights of way in the Forest of Dean was reported to the then Highways General Purposes Sub Committee on several occasions and a report was considered on 2nd October 1961. The Forestry Commission expressed the view that no rights of way could be acquired over the Statutory Forest. The report states that a meeting took place in September 1961 when it was agreed that owing to the practical and legal difficulties of establishing the existence of rights of way within the meaning of the 1949 Act, no rights of way should be shown within the boundaries of the Royal Forest of Dean and because of this the draft map should remain blank.
- 14.14 Notwithstanding this agreement, it appears that on the publication of the provisional map some footpaths were erroneously shown within the statutory forest. The Forestry Commission applied to the County Court for declarations under Section 31 of the 1949 Act to confirm that no public rights of way existed. The County Council sought Counsel’s opinion on the matter. From the instructions to Counsel, it appears that the County Council’s view at this stage was that by not showing ways on the map it was not acknowledging that they did not exist, only that they could not be shown. It was the Council’s view that Section 3 of the 1808 Act would have the effect of suspending rights during inclosure, that is, the aim was to protect the growing timber rather than to eradicate any rights of way. The County Council also sought advice on the effect of the 1938 report. It was accepted that after that date it would be difficult to establish a right of way since members of the public should be aware that tracks were open to them on a permissive basis only.
- 14.15 Counsel’s opinion was received in March 1978. Counsel considered that the fact that the Forestry Commission permitted access from 1938 would not affect any accrued right to pass and repass over an established highway. In other words use by licence would not affect any established right of way and would not have the effect of extinguishing something already dedicated. In his view the two Acts do not eradicate any rights that already exist. Inclosure means inclosure in the physical sense. In his view when the land is reopened, any public right of way, if it could be shown to have previously been established, would revive or could be dedicated or presumed from subsequent user.
- 14.16 The National Forest Park Committee (Forest of Dean) report of 1938, paragraph 8, which confirms a regulated permissive right of foot over the Statutory Forest, has

the effect that any subsequent use would be permissive and hence would not establish a right.

14.17 **Access Land and the Right to Roam**

Part 1 of the Countryside and Rights of Way (CROW) Act 2000 created new public access rights over 'access land' in England and Wales. Access land is defined as: registered common land; open access land; or, where it exists, 'dedicated land'. Dedicated land is woodland or any other land type that has been voluntarily dedicated under section 16 of the Act (in England and Wales).

14.18 The majority of the Forestry Commission's forests are dedicated in perpetuity as open access under the CROW Act which gives walkers a right to roam across these areas. The right of access on foot extends to 90% of the freehold area. In many of the rest the Forestry Commission operate a permissive right to roam policy. In addition the Commission extend a permissive right to roam to cyclists and horse riders who may use forest roads and tracks.

14.19 While everyone has a right to individual and family recreation on open access land this right does not extend to holding events or running commercial activities. Forestry Commission byelaws prohibit the use of motorised vehicles on their land without written consent.

14.20 Any such use would operate as a conditional permission to use the land and as such prevent presumed dedication under 31 Highways Act 1980. However, use of the claimed paths for reasons other than for 'air and exercise' could succeed. In *R v SoS for Environment ex parte Billson* [1998] EWHC Admin 189, Sullivan J accepted:

"if a track across a common is not used for the purpose of air and exercise but is being used by the public for some other purpose; as a route between points A and B for example, from the village across a common to a nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act."

Applying this ruling, if the path A to B was being used, not for the purpose of air and exercise but to travel from a highway along a defined route to reach a place of popular resort, then this use could be considered capable of satisfying a claim. The section of claimed path A to B has the character of a track and gives access to an area of land used for 'air and exercise', namely Chestnuts Inclosure. The path A to B, although dedicated as access land, is not in itself a destination.

14.21 A further requirement for a claim of presumed dedication is that the path joins a highway at both its start and end points or connects with a highway at its start point and with a place of popular resort at the other. Public user cannot give rise to a presumption of dedication if it does not. The section of path A to B connects to a highway at its eastern end and to a place of popular resort at its western end, an area of access land to which the public has a right to air and exercise under section 16 of the 2000 Countryside and Rights of Way Act.

14.22 **Section 31 Highways Act**

In considering whether there has been a full 20 years use by the public of the claimed route, we have to ascertain whether there has been an overt act on the part of the landowner to bring it home to users that their right is being challenged. The 20 years use, for the purposes of Section 31, is to be dated retrospectively from this date of challenge (s.31(2)).

- 14.23 There is no fixed method by which the public's right is brought into question, though one (the erection of a notice) is expressly referred to in Section 31(3). The House of Lords in *R (on the application of Godmanchester and Drain) v SSEFRA [2007]* is the most recent case addressing the meaning of s.31(2) as to what act or acts constitute "bringing into question". *Godmanchester* endorses earlier judgments in this regard.
- 14.24 The words "or otherwise" in Section 31(2) leave the matter at large. In *R v SSETR ex parte Dorset County Council (1999)* Dyson J stated that the challenge had to be communicated to the user and that the test to be applied is that set out by Lord Denning in *Fairey v Southampton CC (1956)*. Denning said "*In order for the right of the public to have been brought into question, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it*".
- 14.25 The methods by which the public's right to use the way might be brought into question could include: the locking of a gate; putting up a notice denying the existence of a right of way; seeking a declaration that there is no highway over the land in question or physically preventing a walker from proceeding along a path. Whatever means are employed, it should be sufficient "*to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway... The persons to whom the challenge has to be brought home are the users of the way*". (Lord Dyson in *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset CC (1999)*).
- 14.26 It is not necessary for it to be the landowner who brings into question the right of the public to use the way. The date of calling into question is simply the date when, as the result of some action, the public's entitlement to use the way was put in issue. There are no words in Section 31(2) of the 1980 Highways Act confining this action to be by or on behalf of the landowner. It simply sets the date from "... when the right of the public to use the way is brought into question". This view is confirmed by *Applegarth v Secretary of State for the Environment, Transport and the Regions (2001)* in which it was stated that anybody with an interest could bring into question the right of people to use the path and this needn't necessarily be the landowner. The burden lies on whoever needs to rebut the presumption to show that the owner of the path had not intended to dedicate the path as a public highway. Whilst in practical terms, the bringing into question will be by or on behalf of the landowner, it does not have to be so.
- 14.27 There is no evidence of the right of the public to use the way being brought into question by an event such as a locked gate, the erection of suitably worded signs or direct challenge to use of the path. Section 69 of the 2006 Natural Environment

and Rural Communities Act amends s.31 of the 1980 Highways Act by inserting subsections (7A) and (7B). It clarifies that an application for a definitive map modification order is, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the 1980 Act. The date on which the right is brought under question is to be treated as being the date on which the application is made.

14.28 The application was made in 2005, thence the relevant period for the purpose of section 31(1) of the 1980 Highways Act is 1985 to 2005. It is not essential for the path or way to have been used for the full period of 20 years by the same persons; use by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more. Nor does it matter that the use is not continuous in the sense that it may not have occurred everyday.

14.29 The judgment *R (on the application of Godmanchester Town Council) v S of S for Environment, Food and Rural Affairs; R (on the application of Drain) v S of S for EFRA, 2007* affirms that it is not the case that any evidence of a lack of intention to dedicate is sufficient; there has to be an overt act or acts on the part of the landowner to show the public at large that he has no intention to dedicate.

“A landowner’s intention not to dedicate a way as a highway had to be established objectively and ‘intention’ meant what users of the way would reasonably have understood his intention to be; that ‘sufficient evidence’ that there has been no intention to dedicate required evidence of some overt acts on the part of the landowner such as to come to the attention of the public who used the way and demonstrate to them that he had no such intention, and it was not sufficient for him simply to give evidence that he had not so intended; that...the landowner’s intention did not have to be continuously manifested ‘during’ the whole of the 20 year period but merely at some point during that period...”

14.30 There is no evidence of a lack of intention to dedicate on the part of the landowner.

14.31 Section 31(2) of the Highways Act states that the 20 years use must be without interruption. An “interruption” has been defined as “an actual and physical stopping of the public’s enjoyment” (*Merstham Manor Ltd v Coulsdon and Purley UDC (1937) 2KB 77*) as opposed to an act that merely challenges the public’s right. It is not a mere absence in the continuity of use. Moreover, such interruption must be with the intention to prevent public use. There is no evidence of any interruption.

14.32 Use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ in *R v Southampton (Inhabitants) 1887* said that “user by the public must not be taken in its widest sense...for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.”

15. SUMMARY

- 15.1 The effect of the National Forest Park Committee (Forest of Dean) report in 1938 is that any subsequent use of the section of the path within Chestnuts Inclosure (B to C) on foot would be by permission so it is not considered, on balance of probabilities, that this section of the path has been dedicated as highway.
- 15.2 The section of claimed path between A and B did not physically exist until 1971, and the conveyance document of that date reserved a right of way at all times and for all purposes for the benefit of (a) the owners and occupiers for the time being of Rock House sheds (also known as Bank House sheds) and (b) the general public. It is not considered that the wording of this conveyance prevents a right of way coming into being through long user.
- 15.3 Although the section of the claimed route A to B has been designated as access land under section 16 of the 2000 Countryside and Rights of Way Act, allowing a general right of air and exercise, it is considered that this section of the claimed route is not a destination and forms part of a defined route giving access to a place of popular resort. Following *Billson*, it is considered that long user on foot is capable of establishing a right of way under section 31 of the 1980 Highways Act.

16. APPENDICES

- A. Location Map, 1: 10,000 scale
- B. Map showing claimed route, 1: 2,500
- C. Summary of public path evidence forms
- D. Ordnance Survey, 25" to 1 mile map, 1st edition, Glos 31.8 (1881)
- E. Ordnance Survey, 25" to 1 mile map, 2nd edition, Glos 31.8 (1903)
- F. Ordnance Survey, 25" to 1 mile map, 3rd edition, Glos 31.8 (1922)
- G. Ordnance Survey, 6" to 1 mile map, SO61SE (1955)
- H. Ordnance Survey, 1: 2,500 map, SO 6814 (1973)
- I. Plan accompanying conveyance 15 October 1971
- J. Natural England map of Section 16 Dedicated Land
- K. Photographs of claimed route