

COMMONS AND RIGHTS OF WAY COMMITTEE
24 March 2020

AGENDA ITEM:

**APPLICATION FOR A MODIFICATION ORDER FOR AN ADDITIONAL LENGTH
OF FOOTPATH CONNECTING PUBLIC FOOTPATH RWD10A WITH KIDNALLS
WOOD, YORKLEY, WEST DEAN, GLOUCESTERSHIRE**

REPORT OF THE LEAD COMMISSIONER; COMMUNITIES & INFRASTRUCTURE

1. PURPOSE OF REPORT

To consider the following application: 573/11/243(8)

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| Nature of Application: | A 114m length of footpath linking Public Footpath RWD10A to Kidnalls Wood, Yorkley |
| Parish: | West Dean |
| Name of Applicant: | Mrs D Large |
| Date of Application: | July 2017 |
| Landowner: | Yorkley Court Farm Ltd |
| Witness Evidence forms: | Total of 35 PPEFs submitted by 35 individuals. |

2. RECOMMENDATIONS OF THE CASE OFFICER

That an Order be made to add the claimed footpath to the legal record of public rights of way on the basis of the user evidence supplied.

3. RESOURCE IMPLICATIONS

Average staff cost in taking an application to the Committee- £5,000. 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 implications have been identified.

5. DEPARTMENTAL CONTACT

Jaci Harris, Asset Data Officer (Definitive Map), Highway Authority.
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6.

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.

Section 53(3)(c)(i) 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.

HIGHWAYS ACT 1980 - Section 31: Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...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.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate the way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proof lies with the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

REPORT

7. BACKGROUND

- 7.1 A location map at scale 1:10,000 is attached (**JH1**) showing the position of the village of Yorkley which is situated within the Parish of West Dean. It lies approximately 3km (1.8 miles) north of Lydney (as the crow flies) and is found within Ordnance Survey Grid Square SO6305.
- 7.2 The claimed path crosses land which until recently, formed part of the 180 acre Yorkley Court Estate, the ownership of which has been unclear for many years. A public notice, dated 1 October 2018, placed in the London Gazette under s27 of the Trustee Act 1925 sought surviving family members connected to 23 deceased

people with links to the Grade II-listed farm, buildings and lands. Meanwhile the land has been leased via a trust to a succession of tenant farmers. Land Registry confirms that Yorkley Court Farm Ltd has enjoyed possessory title (GR371316) since December 2014.

- 7.3** The Definitive Map Modification Order (“DMMO”) application by Mrs Large dated 21 July 2017, included Form 1 and an accompanying map drawn at 1:3000 scale. The path was identified by green marker. Form 3 was also supplied, certifying that the application had been served on Yorkley Court Farm Ltd.

8. DESCRIPTION OF CLAIMED PATH

- 8.1** A plan of the claimed path (“plan”) drawn at a scale of 1:1250 is attached (**JH2**). The claimed path is marked A-B and connects Public Footpath RWD10A with Kidnalls Wood. It was surveyed by me as the Case Officer on 14 January 2019 and is described as follows;

- 8.2** A length of strained post and wire fencing topped with a strand of barbed wire, installed in January 2017, marks the start of the claimed path at point A as shown on the plan at Ordnance Survey Grid Reference (“OSGR”) SO 6318/ 0599 at its junction with Public Footpath RWD10A. The barbs have been removed from the section across the claimed route but there is little evidence that it has been damaged or bent out of shape from being climbed over. An unenclosed length of path continues in a south south westerly direction for approximately 107 metres across a field to a second relatively new undamaged length of strained post and wire fence. Approximately 7 metres beyond this fence at a point marked B on the plan at OSGR SO 6313/ 0589 lies an old broken post and wire boundary fence, sections of which are missing. This old fence line is shown as the boundary of Kidnalls Wood by Land Registry for the Forestry Commission under title GR290807 and Yorkley Court Farm Ltd under title GR371316.

- 8.3** Photos of the claimed path are held (**JH3a-f**).

9. DOCUMENTARY EVIDENCE

- 9.1** **Under Section 32 of the Highways Act 1980, when 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 in 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.**

- 9.2** Gloucestershire Archives was commissioned to compile a report into the history of this path. Ordnance Survey, Tithe, Inclosure Award, Finance Act, Bryant & Greenwood Maps have been checked but none show any evidence of the path. The report further shows that the path was not claimed under the National Parks & Access to the Countryside Act 1949 process.

- 9.3** There is no documentary evidence to support this application. As a result, it must be determined upon the supplied user evidence.

10. CONSULTATIONS

- 10.1 The landowner - Yorkley Court Farm Ltd, local representatives of the Open Spaces Society and the Ramblers Association, County Councillor Richard Boyles, Forest of Dean District Council, West Dean Parish Council & the Deputy Gaveller for the Forestry Commission were consulted on 6/ 7 December 2018. The consultation deadline of 18 January 2019 was extended twice (15 February 2019 & 1 March 2019) at the request of Mr Duncan of Ashfords LLP (“Ashfords”), representatives of the landowner, Yorkley Court Farm Ltd.
- 10.2 County Councillor Boyle’s response of 18 December 2018 is held as a background paper to this report but he stated; - *“I have not received any representations from members of the public over this issue. I have not received any representations from the landowner over this issue. I have no direct knowledge of this claim to the right of way. I have nothing else that i can add”*.
- 10.3 Jennifer Jones, Planning Officer, Publica (a company wholly owned by Cotswold District Council, Forest of Dean District Council, West Oxfordshire District Council and Cheltenham Borough Council) responded by email of 24 January 2019. Her response is held as a background paper to this report but stated; *“Thank you for your letter concerning a Definitive Map Modification Order (DMMO) application in Yorkley. I have looked at our planning records and have no evidence that mentions a footpath in this location”*.

11. LANDOWNER’S RESPONSE

- 11.1 Mr Duncan of Ashfords Solicitors LLP (“Ashfords”) responded by letter dated 1 March 2019 on behalf of the landowner, Yorkley Court Farm Ltd. The letter can be read in full at **(JH4)**.

- 11.2 Issues raised (in italics and using their paragraph numbers) are as follows:

11.3 (A) Failure to challenge fence or submit timely Application

6) *“...our client erected a low fence on the border of its property in January 2017”... “Our client has not been approached by anyone since the fence was erected and the first our client has been made aware of an alleged footpath over its land was....6 December 2018”*.

7) *“If the path was used regularly by 35 people....why did none of them seek to raise the issue of access with out client when the fence was being erected....”*

8) *“...”if.. the Application was commenced immediately after the fence was erected in January 2017, the Applicants have taken nearly two years to collate their evidence. Our client has had just over two months to respond....”*

11.4 (B) Background to the Application

10) *“A number of the individuals that are now giving evidence in relation to the Application are linked to earlier litigation.”*

11.5 (C) Rebuttal witness evidence

- 11.6 11) *Our client has in the last couple of weeks spoken to a number of local farmers and tenants who have been based in the area for between the last 10 and 30*

years. These all say that they were unaware of anyone using the alleged footpath, during the period of use which is alleged. Our client's investigations are ongoing, but there are a number of potential witnesses that will be able to give evidence. For example;

- Contractors who assisted with the recent development of a solar park on the Land, lived at the equestrian centre during the works, and did not see anyone using the alleged footpath during their time on the land;
- Contractors who erected the new fence over a period of a number of weeks and did not see anyone using the alleged footpath, nor were ever approached by anyone wanting to use it while they were on the land; and
- A local vermin control specialist who is frequently on and near the Land and has never seen anyone using the alleged footpath.

11.7 12) One of our key witnesses for our client will be Barry Hutchinson (chartered surveyor). Mr Hutchinson is the sole director of Land Agents Limited. Between 1997 and 2015 Mr Hutchinson was employed by the owners/ tenants of Yorkley Court Farm and was intimately acquainted with the property during this period. Despite dealing with a variety of issues relating to existing rights of way, trespass and encroachment at the property Mr Hutchinson has no recollection of the issue of people using the alleged footpath ever being brought to his attention, either by the owner/ tenants of Yorkley Court Farm or any of the numerous contractors/ licensees that he worked with at the property (e.g. construction workers, sporting rights holders, graziers, etc.).

11.8 (D) Historic aerial photographs

11.9 17) Our client has obtained aerial photographs of the alleged footpath covering the period 1999 – 2018 (copies attached). As you will see, the alleged footpath is not visible in any of them. If the alleged footpath had been in use as frequently as has been alleged, one would expect some trace of it to have been visible over the last 20 years.

11.10 18) The historic aerial photographs also show that for a number of years, the field in which the footpath is allegedly located was used for agricultural purposes and was cultivated by heavy machinery. This also is inconsistent with it being used as public footpath on a daily basis.

11.11 (E) Unviability of location of alleged footpath

11.12 19) The alleged footpath leads from an existing footpath (RWD10A) into Kidnalls Wood. However, the point at which the footpath allegedly enters Kidnalls Wood does not match up with any existing known entry points or footpaths within Kidnalls Wood, as shown on the map enclosed with the Council's letter of 6 December 2018.

11.13 20) The fact that the alleged footpath does not lead anywhere other than into a dense and established part of Kidnalls Wood is further evidence that: (i) there has been no period of enjoyment of a right of way by the public such that dedication of the alleged footpath as a public footpath can be presumed; and (ii) the Application has not been made in good faith.

11.14 21) *We also note that the witnesses report the existence of a stile (sic) leading to the start of the alleged footpath. However, the Council should note that the stile was in place to serve the existing footpath that runs across the northern boundary of the field containing the alleged footpath. Its existence therefore does not in any way prove that the alleged footpath has been used and, as mentioned above, nobody has been seen using the suggested alternative route”.*

12. APPLICANT’S RESPONSE TO LANDOWNER’S OBJECTION

The applicant, Mrs Large, responded to Ashford’s letter by email on 18 March 2019. The response can be read in full at **(JH5)**. However the main points made using Ashford’s sub-headings and paragraph numbers are as follows;-

12.1 (A) Failure to challenge fence or submit timely Application

(6); *“Our first correspondence with Gloucestershire County Council was on the 11th of January 2017 by email, once we had obtained the necessary forms to hand out and fill in we then returned them by recorded delivery via Royal Mail to the County Council offices at Shire Hall on the 25th July 2017. At the same time, as required, we also sent by recorded delivery to Yorkley Court Farm Limited form 2 ‘Form of Notice of application for modification order’. We enclose proof of postage given to us by the Post Office and a copy of the submitted form. Therefore Yorkley Court Farm Limited would have been aware of the matter in July of 2017”*

12.2 (7); *“Regarding why none of us felt able to contact Yorkley Court Farm Limited directly before going along the correct route of a modification order, unfortunately due to the previous history of intimidation and assault on walkers using the public footpaths on Yorkley Court Farm, of which there are numerous records with Police Incident numbers we did not feel that this option would be conducive. To corroborate this we would add that in March 2016 Mr Andrew Darke, was assaulted by Mr Dave Aitken on a statutory footpath on Yorkley Court Farm, Mr Aitken was convicted of ‘Assault by Beating’ in April 2017. Mr Aitken was employed by Yorkley Court Farm Limited at this time and told us that he was the ‘Manager’. It is hardly surprising therefore no one felt able to contact Yorkley Court Farm Limited through its Manager”.*

12.3 (C) Rebuttal Evidence

(11); *“...that said plenty of our Group have been witnessed by tractor drivers in that field and on the path over the years. ...The Solicitor mentions the people who worked on the solar panels on Yorkley Court Farm, firstly the holiday cottages at Deanwood House where they stayed do not over look this path. The footpath is some 300m from the closest part of the solar farm.*

(12); *...This footpath is at the farthest end of the farm, not an area that would be visited on a regular basis, is shielded by trees and is not visible from the majority of the rest of the farm. Also please bear in mind that many of us, myself included used this path to walk my dogs, if this was before going to work then it would have been around 7am or after work around 6pm, long before or after normal working hours”.*

12.4 (D) Historic aerial photographs

The aerial photos are of poor quality, also the tree canopy is such that the majority of the footpath area cannot be seen, and some photos show that the land has

been ploughed very close to the fence so any aerial evidence of a path would have been obliterated.Also the photos show an area where part of RWD/10A is but you cannot make out this footpath either and the footpath was also in daily use”.

12.5 (E) Unviability of location of alleged footpath

(19 & 20); “At the very end of Deanwood House garden was a wooden stile, from the stile it is only a few metres to the forestry track which then runs along the boundary of the field. The stile has been noted by several of our group in their forms but unfortunately it has rotted away over time but access to the forest was still possible as there were many areas where the fence was at ground level or very low. As Forestry Commission land is ‘open access land’ it was not a crime to have a path of some two metres onto a main forestry track”.

12.6 APPLICANT’S CONCLUSION

“Records show that the original footpath into the Kidnalls Wood went through the side of the Deanwood House garden but when the then owner applied for and was given permission to extend his house the footpath was closed as the extension in effect blocked the footpath as it went right up to the boundary of his garden. We do not understand why, when the previous path into the woods through the Deanwood House garden was closed there was no official path put in place at the time. It would stand to reason that it would be normal human nature to find an alternative route into the forest and to use the other side of the fence line was the obvious choice to the locals.When we came to live here we only had to ask the locals for the quickest route into the forest to be directed onto this path, it was well used and common knowledge amongst the locals”.

13. ORDER MAKING AUTHORITY’S (“OMA”) RESPONSE TO LANDOWNER & APPLICANT’S COMMENTS

13.1 (A) Failure to challenge fence or submit timely Application

There is no prescribed timeframe within the WCA81 regulations to submit a claim for a Definitive Map Modification Order (“DMMO”).

13.2 The applicant responded to the question of why the landowner was not approached before submitting her claim for this length of unrecorded path in paragraph 12.2 of this report. However, it should be noted that the regulations under schedule 14(2) of the Wildlife & Countryside Act 1981 merely require the applicant to serve Notice on the affected landowner. This was done by recorded delivery on 25 July 2017.

13.3 As previously stated, the consultation deadline of 18 January 2019 was extended twice (15 February 2019 & 1 March 2019) at the request of Mr Duncan of Ashfords LLP, representative of the landowner, Yorkley Court Farm Ltd. On the 18 March 2019, a copy of the applicant’s response to the landowner’s letter of objection was set to Mr Duncan. He was asked if he wished to make any further comments. Chase up emails were sent to him on 1 July 2019 and 13 January 2020, asking him if he wished to respond. Mr Nicholson, partner at Ashfords LLP responded on 30 January 2020 to say “*Michael (Duncan) leaves us today and this matter has been caught up in the handover process. I’ll come back to you next week*”. On 2 March 2020, he advised “*I continue to act and so please continue to correspond with me*”.

13.4 (B) Background to the Application

The criteria as set out in s31(1)&(2) & S32 Highways Act 1980, requires that this application be determined on the basis of evidence, whether documentary or user set against evidence of a lack of intention to dedicate. The issues referred to by Ashfords with regard to previous litigation regarding an unauthorised encampment on his client's land are irrelevant to this application.

13.5 (C) Rebuttal witness evidence

The evidence of anyone working directly for the landowner must be treated with caution. To date however no individual statements have been provided in rebuttal of this application.

13.6 (D) Historic aerial photographs

The 8 aerial photos forwarded by the landowner do not show the route of the claimed path but this does not necessarily mean that the path is not used. The photos similarly do not show the route of Public Footpath RWD10A which also runs along a field edge in this same field.

The claimed route may not be shown for various reasons, including;

- the 1999/ 2005/ 2006 & 2010 photos are limited in their value due to their less than sharp focus.
- the 2006 photo appears to show the field following hay cut for silage and the 2013, 2014, 2017 & 2018 photos show a ploughed field, all of which may have obliterated any evidence of use.
- the claimed path is shown near the field edge which the photos show to be partly obscured by trees or their shadow.
- inspection of the path in January 2019 revealed the field edge to consist of scrub which could obscure evidence of use.

13.7 In paragraph 11.10 of this report, Ashfords note that the field "*in which the footpath is allegedly located was used for agricultural purposes and was cultivated by heavy machinery*". This is irrelevant. The only issue affecting the cultivation of public rights of way from a legal standpoint is whether the occupier has a right to plough a path at all. Generally speaking, unless the dedication of a public right of way is subject to the right of the landowner to plough it up periodically, there is no automatic right to do so. A statutory right to plough, or otherwise disturb, a right of way was conferred by s119 Highways Act 1959 under which the occupier was first required to "*give to the highway authority for the path or way not less than 7 days notice of his intention to plough*" for which in the event of non compliance, he could be fined 40 shillings.

13.8 Although there is no longer a requirement to give 7 days notice of ploughing, there is still no automatic right to plough out a path. S134 Highways Act 1980 provides that a farmer/ landowner is entitled in law to plough or disturb the surface of a footpath or bridleway which crosses a field *if it is not convenient to avoid it* when sowing or cultivating a crop. However he must then ensure that the surface is made good to at least the minimum width so that it is reasonably convenient to use and that the line of the path is apparent on the ground to anyone using it within 14 days of the first disturbance for that crop.

13.9 Farmers and landowners are increasingly reliant on larger and more efficient machinery for farming operations and must comply with any health and safety regulations affecting their use where members of the public have access to public rights of way across their land. It follows therefore that the presence of such machinery in the field over which the claimed path crosses would not preclude an application of presumed or inferred dedication under s31 HA80 or at common law.

13.10 (E) Unviability of location of alleged footpath

The southern end of the path enters Kidnalls Wood from the field. A length of post and wire fencing, which Ashfords confirmed was installed in January 2017 by agents of the landowner, is located approximately 7metres in front of the original old broken post and wire fence boundary with Kidnalls Wood, shown as point B on the plan **(JH2)**. There was little indication found of a path on the ground but a dense layer of leaf debris may have obscured evidence of use. It was also noted that the wire fences at either end of the claimed route were not bent out of shape which suggests that there has not been vast numbers of people climbing over them since their installation.

13.11 Ashfords questioned the existence of the path at this point because the wood is “*dense and established*”. During my inspection of the path, I found that the spacing of the trees and the tree canopy itself permitted easy access and good visibility through the wood. This is indicated by the photos held **(JH3a-f)**.

13.12 The applicant referred to a stile located in the original fence line at point B on the plan **(JH2)** which had ‘*rotted away over time*’. Although the stile was not replaced, the deterioration of the old wire boundary fence along which several sections has disappeared enabled walkers to enter the wood without hindrance. This was found to be the case during my inspection.

13.13 The applicant’s ‘conclusion’ (paragraph 12.6 of this report) suggests that the claimed path subject to this report is a replacement for a previous claimed path which connected the Shaphouse Farm Equestrian Centre (Deanwood House today) driveway to Kidnalls Wood via the farm itself.

13.14 A claim was submitted to the Surveying Authority in August 1990 (“1990 claim”) for a length of unrecorded footpath to be added to the legal record of public rights of way connecting Kidnalls Wood with RWD10A via Shaphouse Farm Equestrian Centre. The claimed path is shown in red between the points ABCD on the plan held **(JH6)** but this was rejected by the Commons and Rights of Way Sub Committee in October 1991 for the following reasons;

- part of the route (C-D) crossed land in the ownership of the Forestry Commission (Forest Enterprise) over which an existing permissive right on foot was enjoyed by members of the public from 1938 as detailed in paragraphs 14.10/ 14.13 of this report.
- The user evidence submitted by 5 individuals was considered to be insufficient.
- Public footpath RWD10A provided a highway connection to the 1990 claimed path, a requirement for any successful claim of presumed or inferred dedication. Part of this footpath however was officially diverted in 1976 with the result that it severed this highway connection and the success of the subsequent 1990 claim. The effect of the 1976 diversion incorporated the extinguishment of the route shown blue between the

points AEF on the plan held **JH6** and the creation of the route shown by black dots in the adjacent field between the blue 'A' and the black 'A'.

13.15 The failure of the 1990 claim effectively denied members of the public access to Kidnalls Wood via RWD10A and the suggestion made by the applicant that this may have prompted members of the public to find another access to Kidnalls Wood is not unreasonable. However, whether this is the case or not, the application subject to this report must be judged on its own merits.

14. USER EVIDENCE

14.1 Section 31(1) of the Highways Act 1980 (“s31HA80”) 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’; without force, secrecy or permission 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”.

14.2 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 to use the way is brought into question, whether through an overt act by the landowner which makes it clear to the public that their right is being challenged or otherwise.

14.3 It is not essential for the paths or ways to have been used for the full period of 20 years by the same persons; the period may accrue as a result of use by different persons for shorter periods (Davis v Whitby (1974)). Nor does it matter that the use is not continuous in the sense that it may not have occurred every day.

14.4 The main issues to be considered in relation to the s31HA80 legal provision are therefore:

14.5 When the status of the claimed route was called into question;

14.6 The applicant, Mrs Large, first contacted Gloucestershire County Council as Surveying Authority by email in January 2017. She advised “*The farm has now been sold and the present owner has been very anti-walkers since he took over. The footpath used for 40 years by local people to get into the top of the woods has now been fenced off and cannot be used*”. This action taken by agents of the landowner challenged the public’s right to use the path as subject to this application.

14.7 For the purposes of section 31 of the 1980 Highways Act therefore, the 20 year qualifying period of use has been taken to be 1997 to 2017.

14.8 As stated in paragraph 7.1, there has been confusion with regard to the ownership of the land over which the claimed path crosses for many years. There is no explicit reference however in section 31(1) Highways Act 1980 to use having to be of a level to have come to the attention of the landowner. It does not speak of a *landowner being deemed to have dedicated* the way, but of the *way being deemed to have been dedicated*, i.e., irrespective of the existence or non-existence of a person capable of dedicating the way. David Braham QC commented in a Rights of Way Law Review dated October 1990 “*This follows the wording of s1(1) of the Rights of Way Act 1932, omitting the additional words which prevented that*

subsection from applying where no-one with the capacity to dedicate had been in possession of the land at any time during the 20 year period. In such cases prescriptive claims had to rely on s1(2) which required proof of 40 years use. The additional words and s1(2) were repealed by s58 of the National Parks and Access to the Countryside Act 1949, so as to make the 20 year period apply in all cases”.

- 14.9** A requirement for a claim of presumed dedication is that the path has definite start and end highway termination points or connects with a place of popular resort. Public user cannot give rise to a presumption of dedication if it does not as shown by the 1990 claim referred to in paragraph 13.14 of this report. The claimed path connects the highway designated Public Footpath RWD10A with Kidnalls Wood which has no highway status. This report needs to consider therefore whether Kidnalls Wood constitutes a place of popular resort.
- 14.10** Kidnalls Wood lies outside the boundary of the Statutory Forest of Dean but has been in the ownership of the Forestry Commission, thus Crown Land, since 1954. Prior to this, Kidnalls Wood was leased from the Lydney Park Estate and managed as part of the Forest of Dean. In 1938, the Forest of Dean was designated as the first National Forest Park in the UK. A document; ‘Report of the National Forest Park Committee (Forest of Dean) 1938’, drawn up by Forestry Commissioners to advise on the suitability of the Forest of Dean as a National Forest Park. Paragraph 2 states that *“we have...included some of the other properties of the Forestry Commissioners ... and which are administered with the Forest of Dean ... Kidnalls Wood”*. The issue of public access was addressed in paragraph 8 which said *“The Forest is well served by roads and tracks and is freely accessible to the general public. We understand that although there is not a public right of access to the inclosures, the Forestry Commissioners..... have no objection to controlled access”* A copy of this document is attached to this report as a background paper.
- 14.11** The above was confirmed by Dan Howell, Deputy Gaveller, Forestry England (subsidiary of the Forestry Commission). He said in an email dated 20 January 2020; *“Yes, the Freehold interest of Kidnalls Wood was acquired 31/12/1954 but the FC (now FE) already held the Lease for Kidnalls from C B Bledisloe from 1938. The open access declaration across general FC land was made in 1964. In 1938 the Dean and some of the neighbouring FC landholdings (including the Kidnalls....) was declared a National Forest Park by the then Forestry Commissioners and as such were inviting people onto the estate (by foot) from that date”*.
- 14.12** For completeness, it is noted that by virtue of s16 of the Countryside and Rights of Way Act 2000, the Forestry Commission dedicated Kidnalls Wood as access land providing unlimited public access on foot.
- 14.13** Kidnalls Wood has been maintained by the Forestry Commission and made subject to public access by licence or permission since 1938 and as such can be considered to be a place of popular resort, thus providing an acceptable terminus for the claimed path.
- 14.14 The extent and nature of the claimed use;**
- 14.15** 35 Public Path Evidence Forms (“PPEFs”) were completed by 35 individual members of the public in support of this application dating back to 1950 on foot. When considering the statutory period, all 35 claim to have used the path for part or all of the qualifying period; 1997- 2017 and 15 claim use of this path across the

whole 20 year period. A summary of the PPEFs and a useful bar chart showing years of use are held as **(JH7) & (JH8)** respectively.

- 14.16** With regard to frequency of use, 5 claim daily use, 19 claim weekly use, 5 claim monthly use and 6 claim infrequent use. This conflicts however with statements made by Ashfords in paragraphs 11.6 & 11.7 of this report where they questioned the alleged claimed use of the path on the basis that contractors of the landowner and some farmers and tenants in the area had never seen anyone using the path.
- 14.17** Ashfords stated in paragraph 11.7 of this report that Mr Hutchinson, who worked for the owner/ tenants of Yorkley Court Farm between the years of 1997 & 2015, *“has agreed to assist our client in relation to this matter and is willing to make contact with the various users of the property mentioned above, i.e. to obtain their evidence in relation to the alleged footpath. This is likely to take some time and our client would be grateful if the Council could refrain from making a decision in relation to this matter until such time as the further evidence has been collated.”* As noted previously however in paragraph 13.3, Ashfords were contacted as late as 13 January 2020 (10 months after this request was made) to establish whether further evidence was forth coming. Nothing more was received.
- 14.18** The applicant’s response to the question of the alleged use of the path is found in paragraph 12.3 of this report; *“this footpath is at the farthest end of the farm, not an area that would be visited on a regular basis, is shielded by trees and is not visible from the majority of the rest of the farm”....“myself included used this path to walk my dogs, if this was before going to work then it would have been around 7am or after work around 6pm, long before or after normal working hours”.*
- 14.19** Use of the claimed routes for part or all of the qualifying period is fairly consistent as being for the purpose of dog walking, leisure and fitness.
- 14.20** The route, as described and marked on the maps accompanying the PPEFs, is consistent in their depiction of the claimed route.
- 14.21** In addition to establishing twenty years user, for a claim to give rise to a presumption of dedication, user must be without force, secrecy or permission. Use that complies with these three requirements is termed user ‘as of right’. The House of Lords in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) reasserted an ancient principle namely, that if sufficient people carry on an activity openly and for long enough without anyone trying to stop them, it is right and proper that the activity should be treated by the law as having a lawful origin. The House of Lords held that it was only necessary to prove that they have made use of the paths without resort to force, secrecy and as if they had a right to do so – that is, without having been granted any licence/ permission by the landowner. There is no evidence of use by force, secrecy or permission.
- 14.22** The PPEFs suggest that stiles were located either end of the claimed path at points A & B as shown on the plan **(JH2)** for many years. Michael Brown claimed use of this path from the 1950s and his wife Judith from the 1960s. Robin and Margaret Phelps claimed use of the path from 1978. They all stated that stiles had been located at both points. The lack of clarity regarding landownership and the succession of tenant farmers makes it impossible to identify the person responsible for the installation of these structures.

14.23 The stiles are no longer in existence; the stile at point A was removed and replaced by post and wire fencing in January 2017.

14.24 Interestingly, 6 members of the public; Dawn & Peter Large (claimed use from 2001), Linda Thomas & Andrew Darke, (both claimed use from 1983), Janet Griffiths (claimed use from 2002) & her husband Gilbert (claimed use from 1987), noted a stile at point B but not at point A. A further 5 people; Rebecca and Nick Wellstead (claimed use from 2010), Mr & Mrs Chappell (claimed use from 2010) & Susan Creen (claimed use from 2002) responded to Q.4- Stiles; *No or None*.

14.25 I clarified the fact that 11 members of the public had not mentioned the stile at point A with the applicant, Mrs Large. She responded by email of 24 March 2019 saying *"Having looked through the forms I have copies of here, which I appreciate is not all of the ones you received, it is clear that people have interpreted question four regarding the stiles very differently, which is only to be expected because the question does not specify whether it is just asking about the claimed path, RWD10A or the whole route that they walk. Of the forms I have here Sally Chappel, Nick Wellstead, Rebecca Wellstead, Dave Chappell and Sue Green have all put a definite no to any stiles, because technically there weren't any actual stiles on the claimed path after the stile at B rotted away some years ago. However, Linda Thomas, Andrew Darke, Gilbert Griffiths, Janet Griffiths, Pete Large and myself have all said yes to a stile but only mentioned a stile at point B which was at the bottom of Dean Wood gardens into the Kidnalls Woods, this stile was the only stile that was on the claimed path, however it was destroyed many years ago and would not have been seen by some people that used the path. For myself the reason I did not mention the stile at A is because firstly I did not have to climb over it as there was no fence and you could walk round it, secondly technically the stile at A was not on the claimed path, it was used to access RWD10A and then once you walked around the stile and onto RWD10A you could walk directly onto the claimed path....."*

In answer to your question, if the hedge had been substantial and we could not have walked around the stile we would have needed to use the stile to gain access to the claimed path from the Northern end. I am surprised that so many people have mentioned that stile because for some considerable time, at least 15 years, the stile has been in disrepair and was dangerous to climb. On the other hand very often the claimed path was accessed from the woods at point B and the stile would not have been used if people had then gone on to RWD10A and gone right towards the farm house".

14.26 To sum up the comments and evidence with regard to stile A; Ashfords stated in paragraph 11.14 of this report that this stile was used to facilitate access to the official footpath; RWD10A. A new kissing gate was found near point A during the January 2019 inspection of the claimed path which also only facilitates access along Public Footpath RWD10A and could be considered to be a replacement for the original stile. The applicant agrees but noted that not only was the stile in a bad state of repair, it also did not have adjacent fencing allowing members of the public to access the claimed path by walking passed the structure. These comments may explain why 11 individuals made no reference to the stile at Point A in their PPEFs.

14.27 With regard to the stile at point B, 13 members of the public recorded its existence. Of those; David & Elizabeth Sleeman, Rose Davis, Sophie Napleton and Janet Griffiths claimed use of the path from 2002 and Alana Rennie claimed use of the path from 2003. David Sleeman stated that this stile was *"destroyed by Forestry"*

Commission when cutting/ replanting trees". This appears to be hearsay evidence however because the applicant, Dawn Large, who along with her husband started using the path in 2001, noted in answer to Q.4; Stiles - "I did not see it myself but I am told by neighbours that there was one (stile) into the woods at letter 'B' on the map". Her husband Peter similarly noted in response to the same question; "I am told that there was a stile at Point B on my map".

14.28 Clarification with regard to the stile at point B was sought from; Andrew Darke, who started using the path in 1983 when he moved to the area, Stephen McCormick, an ex-police officer, who started using the path from 1986 and Gilbert Griffiths, who started using the path in 1987. All confirmed that they had seen the stile at point B. Andrew and Stephen explained that the stile was rotten and had been destroyed by a fallen tree by approximately 1993. However all three agreed that by this time the old post and wire fence had fallen into such disrepair that some sections were missing altogether allowing the public to walk freely from the field into Kidnalls Wood.

14.29 Comments made with regard to the use of this path include;

Alana Rennie who claimed 13 years usage of the claimed path from 2003 for 14 years responded to Q.9; Can you give any further particulars? "*This path has been used for many years when original was closed off – that went through what was equestrian centre*".

Gilbert Griffiths, who claimed use of the path from 1987 for 30 years, responded to Q.9; Can you give any further particulars? "*Permission not required on footpath*".

Peter James Rudd, who claimed use of the path from 1987 for 30 years, responded to Q.9; Can you give any further particulars?; "*I have walked this route regularly for almost 30 years*".

Jonathan Chambers who claimed use of the path from 2002 for 15 years, responded to Q.9; Can you give any further particulars?; "*This path has been in use for many years by many people. It connects at its southern end with a well used path within the forestry woodland*".

Jean Norton, who claimed use of the path from 2015 for 2 years, responded to Q.9; Can you give any further particulars?; "*I stayed at Deanwood Holiday Cottages for six months when I moved here and the path was in regular use by both locals and visitors to this area*".

Mrs S. Screen who claimed use of the path from 1976 for 41 years, responded to Q.9; Can you give any further particulars?; "*There has always been a right of way for pedestrians and motor vehicles through Shaphouse Farm to gain access to the woods as there was a static tank in the wood in case of fire. However this right of way was closed off and the Right of Way was therefore diverted to the side of the building on the opposite side, which is now in repute (author suggests this should read dispute). As this path is the only access for walkers to the woods, it is imperative for it to be kept open. I have lived in the vicinity for over 50 years*".

Barbara Hale, who claimed use of the path from 1970 for 47 years, responded to Q.9; Can you give any further particulars? "*been using the path all my life and 40+ years since diversion around the outside of the house*".

Martyn Hale who claimed use of the path from 1986 for 31 years, responded to Q.9; Can you give any further particulars?; *“wire fence put up and has stopped me and my friends access into a lovely wooded area”*.

- 14.30** When considering the user evidence, 35 members of the public have claimed use of this path on foot over part or all of the 20 year qualifying period of 1997-2017. 15 of those claim use over the whole 20 years. This use is ‘as of right’ (without secrecy, force or permission) and would support a case for deemed dedication as a public footpath.
- 14.31** **Whether there is evidence of a lack of intention to dedicate a public right of way;**
- 14.32** Once use is established as of right and without interruption, the presumption of dedication arises. Section 31 provides for methods which show that during the period over which the presumption has arisen there was in fact no intention on the landowner’s part to dedicate the land as a highway. This could have the effect of defeating a claim under the statute.
- 14.33** Under s31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under s31(5). Under s31(6), an owner of land may deposit a map and statement of admitted rights of way with “the appropriate council”. Provided the necessary declaration is made at twenty year intervals thereafter, the documents are (in the absence of evidence to the contrary) “sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways”. The Planning Inspectorate’s Definitive Map Orders; Consistency Guidelines April 2016
- 14.34** “Intention to dedicate” was considered in *Godmanchester 2007*, which is the authoritative case dealing with s31HA80. In his leading judgement, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held *“in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate”*.
- 14.35** The ‘sufficient evidence’ must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way.
- 14.36** The references to the undamaged post and wire fences at either end of the claimed path which could infer that there has been little use of the way since they were installed and my comment that there was little evidence of a track found from the field to Kidnalls Wood must be disregarded due to the fact that the fencing installed in January 2017 constituted the challenge to public use and as a result analysis of the claimed use covered the 20 years prior to the installation of the wire fences.
- 14.37** There is a conflict of opinion with regard to the perceived claimed use of this path between the landowner and users. The landowner questions the alleged use of the claimed path. Land Registry records that Yorkley Court Farm Ltd has enjoyed possessory title to the land over which the claimed path crosses since 2014. This represents the last 3 years only of the qualifying period; 1997 -2017.

- 14.38** The landowner via his legal representative, Ashfords claims that local farmers and contractors in his employment have advised him that they have never seen members of the public using this path. No first hand evidence however has to date been submitted to this effect.
- 14.39** The landowner also points to 8 aerial photos over the period 1999 – 2018 which did not show any evidence of the claimed route. As noted in paragraph 13.6 however, this could be due to a number of reasons.
- 14.40** These statements are considered insufficient evidence of the landowner’s lack of intention to dedicate. As previously stated in the Godmanchester case, referred to in paragraph 14.31, there must be ‘overt’ acts aimed at challenging the public’s use of the path, thus evidencing his lack of intention to dedicate. No such evidence has been submitted by the landowner prior to 2017.

15. CONCLUSIONS

- 15.1** 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.
- 15.2** 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 discovered by the Council, when considered with all other relevant evidence available, shows that, on the balance of probabilities, the Definitive Map and Statement require modification because a right of way which is not shown on the map and statement subsists, or is reasonably alleged to subsist. The relevant tests are now set out in section 4.4 of the Defra Rights of Way Circular 1/2009, version 2 (October 2009).
- 15.3** On the balance of probability the user evidence suggests that the section of claimed path between A and B has been enjoyed by the public on foot ‘as of right’, without interruption or challenge for a period in excess of 20 years prior to January 2017 when the rights of the public were called into question and is therefore deemed to subsist. It is further submitted that insufficient evidence has been provided by the landowner to show his lack of intention to dedicate the path over the same period. As a result, it is therefore submitted that this section of path must now be protected by being recognised on the Definitive Map as public footpath.
- 15.4** The recommendation therefore is that an Order be made to add the length of public footpath between points A-B to the legal record of public rights of way.

16. APPENDICES:

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| JH1 | 1:10,000 location map |
| JH2 | Plan of claimed path; 1:1250 scale |
| JH3a-f | Photos |
| JH4 | Ashford Solicitor’s response on behalf of the Yorkley Court Farm Ltd (landowner) |
| JH5 | Applicant’s response to Ashfords letter |
| JH6 | Plan of rejected 1990 DMMO claim & 1976 Diverted path |
| JH7 | Summary of PPEFs |
| JH8 | Bar chart of use |