

**COMMONS AND RIGHTS OF WAY COMMITTEE**  
**23 March 2021**

**AGENDA ITEM:**

**APPLICATION FOR A MODIFICATION ORDER FOR AN ADDITIONAL LENGTH  
OF PUBLIC FOOTPATH CONNECTING STATION ROAD AND BUSHCOMBE  
CLOSE, WOODMANCOTE PARISH, GLOUCESTERSHIRE**

**REPORT OF THE LEAD COMMISSIONER ECONOMY, ENVIRONMENT & INFRASTRUCTURE**

**1. PURPOSE OF REPORT**

To consider application; 573/11/257(3)

**Nature of Application:** A 77m length of footpath connecting Station Road and Bushcombe Close

**Parish:** Woodmancote

**Name of Applicant:** Mrs Spragg

**Date of Application:** 12 June 2006

**Landowner:** Unknown

**Witness Evidence forms:** Total of 5 Public Path Evidence Forms ("PPEFs") submitted by 5 individuals.

**2. RECOMMENDATIONS OF THE CASE OFFICER**

That no Order be made to add the claimed footpath to the legal record of public rights of way on the basis that the user evidence fails to meet the required criteria of the s31 Highways Act 1980 statutory test and at common law.

**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**

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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 proving that the inference arises lies on 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**

A location map at scale 1:25,000 is attached (**JH1**) showing the location of the path in the Parish of Woodmancote, Tewkesbury District. It is found within Ordnance Survey Grid Square SO9727.

- 7.1 A plan at a scale of 1:1250 is attached (**JH2**) on which the claimed path is identified by a black broken line between points A-B. The path runs for a length of approx. 77m between Station Road (3/96 highway) and Bushcombe Close (43154 highway).

- 7.2** Bushcombe Close is a development of 20 bungalows for which planning permission was secured by Leckhampton Estates Ltd in 1959. This report will show that a footpath was conveyed by the developer for use by the purchasers of properties in Bushcombe Close. Land Registry does not however record any unregistered land in the vicinity of the claimed way so it is reasonable to infer that it has been incorporated over the years into the curtilage of adjacent properties.
- 7.3** The Definitive Map Modification Order (“DMMO”) application was formally submitted on 12 June 2006. It included Form 1 and an accompanying plan of the path drawn at 1:1250 scale. The claimed route is drawn by pink marker.
- 7.4** Form 3 was also supplied, dated 12 June 2006, certifying that the landowners were unknown but that following advice from the Rights of Way Technician, Form 2 and the map were attached to structures at each end of the path. Photographs were taken by the applicant on 25 June 2006 to show Form 2 in position.
- 7.5** The applicant gave two reasons for submitting this application. The first was provided in a letter to GCC dated 22 May 2006. She stated “*A public path in Bushcombe Close, Woodmancote, GL52 9HX which had been brought to our attention as a planning application 06/0579/FUL, has recently been submitted to Tewkesbury Borough Council. The owners intend to use the footpath which they do not own, for access to a new bungalow in their back garden*”. A plan of the land owned by the various properties in the vicinity of the claimed way is held **JH3a**. In a subsequent email, dated 12 January 2007, the applicant advised that “*From 12 December 2006, the Tewkesbury Borough Council Planning Committee’s decision was to Permit the above planning application, with conditions. They had deferred the decision to take into account the footpath shown on my house deeds, and all other house deeds in Bushcombe Close....*” This permission was never implemented. A copy of the permission, along with a copy of drawing; 01 (of the permitted work) is held as a background paper to this report. There is no mention of the claimed path.
- 7.6** Incidentally, this report has also established that the owners of Waterside received planning permission in 1992 for a two storey extension to provide enlarged living accommodation. A comparison of before and after maps shows that the extension was constructed as shown on Plan JH3a.
- 7.7** The second potential reason for this application could be found in a letter sent by the applicant to Gloucestershire Highways on 25 June 2007 (subsequent to receipt of the DMMO application) on behalf of residents living along Bushcombe Close. After referencing the likely delay in processing the DMMO claim, the applicant stated “*It seems that our only way forward is to ask County Highways to put a footpath on Bushcombe Lane...With the increased traffic and speed on Bushcombe Lane it is now very dangerous for walkers both day and night. Every morning and afternoon mothers, children & toddlers in pushchairs walk to the village hall. Throughout the day the Lane is used regularly by all ages of the community*”. A photo of Bushcombe Lane is attached **JH3b**.
- 7.8** On 1 July 2006, the applicant wrote to GCC stating that she had had 2 conversations with householders, potentially affected by the route of the claimed path. She wrote “*I would like to update you with feedback from the Modification Order which is posted at either end of the claimed footpath.*”
- 7.9** *29/6/2006; Telephone conversation with Bernard Parkin, Beldon house, Bushcombe lane....He said that the marked (pink) line of the claimed path on the posted*

*Definitive Map should be on the other side of the boundary i.e., on the Waterside House side. He said that if it was not changed, he would remove the posted form/map.*

- 7.10** *30/6/20; Conversation with Robin Smith, previous owner of (recently moved to Prestbury) Waterside, Station Road. He said the footpath has never been in Waterside. The footpath is where Mr Parkin has planted conifer trees”.*
- 7.11** On 30 July 2006, the applicant again contacted GCC, with regard to the claimed path. She wrote *“I would be grateful if you would add the enclosed documentary evidence from my Title Deeds for 18 Bushcombe Close to the above Modification Order. You will note that the First Schedule – Part 1 of the Title Deeds enclosed stated the following; “and together with the right in common with all other entitled to the like right of user of the footpath running alongside Plot 11 on the said plan leading from the Estate to Station Road”. The footpath was clearly assured by Leckhampton Estates in favour of each and every one of the future owners of their development site in Bushcombe Close in the first instant of perpetuity”*. By means of this document, dated 30 September 1960, Leckhampton Estates Ltd, conveyed rights and easements to and restrictive covenants on the purchasers, Mr and Mrs Fear, of Plot No.11. This plot, as identified on the plan appended to the conveyance, became No.11 Bushcombe Close. Extracts from this conveyance and the plan itself are found and discussed in paragraphs 9.3-9.9 of this report.
- 7.12** This conveyance referred to by the applicant, who lived at No.18 Bushcombe Close, actually applied to the owners of No.11. A random check with Land Registry however revealed similar records of conveyance between Leckhampton Estates Ltd and the original purchasers of properties constructed as part of the Bushcombe Development. This included one for No.18 Bushcombe Close (applicant’s address) dated 24 August 1960, between (1) Leckhampton Estates Ltd and (2) Mr & Mrs Smith. The random Land Registry entries are held as background papers to this report and are discussed more fully in paragraph 11.14.

## **8. DESCRIPTION OF CLAIMED PATH (“PATH”)**

- 8.1** The claimed path was visited by the Case Officer on 10 November 2020.
- 8.2** As shown on appendix **JH2**, the path starts at its junction with a section of highway verge (part of Station Road; 3/96 highway) at a point marked A at Ordnance Survey Grid Reference (“OSGR”) SO 9703/ 2752. The path at point B is located at its junction with Bushcombe Close (43154 highway) marked B at OSGR SO 9711/ 2753. As previously stated however, this path is now completely inaccessible due to its being incorporated into the curtilage of adjacent properties.
- 8.3** Photos taken shortly after receipt of the application in 2006 and subsequent photos taken in 2020 are held **JH4 A-C & D-E** respectively.

## **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 A report was commissioned of Gloucestershire Archive. The report received on 28 October 2008 is attached as a background paper to this report. Documents such as Inclosure Award 1847, the Tithe Map 1839, Finance Act Map 1910, the first, second and third edition 25" County Series Ordnance Survey Maps and the papers relating to the survey of public paths under the National Parks and Access to the Countryside Act 1949 were inspected. None however showed the claimed path.

### 9.3 Private conveyance

9.4 As stated in paragraph 7.12 of this report, a random check at Land Registry records conveyances between Leckhampton Estates Ltd and the original purchasers of properties in 1960. It would not be unreasonable to infer that the rights, easements and restrictive covenants conveyed to the purchasers of Plot No.11, as detailed in the next few paragraphs, were similarly conveyed to the other 19 purchasers of properties within the Bushcombe development. A copy of the first three pages of this conveyance and the plan are held **(JH5a, b, c & d)**.

9.5 One of these rights is detailed in Part 1 of the First Schedule;

9.6 "NOW THIS DEED WITNESSETH as follows:-

*1.....the Vendors as beneficial Owners hereby convey unto the Purchasers ALL THAT the land described in Part 1 of the First Schedule.....*

9.7 FIRST SCHEDULE before referred to part 1 Description of the property hereby conveyed

*..... AND TOGETHER with the right in common with all other entitled to the like right of user of the footpath running alongside Plot 11 on the said plan leading from the Estate Road to Station Road subject to the Purchasers contributing a fair proportionate share towards the cost of maintenance thereof"*

9.8 The plan attached to the conveyance identifies plot No.11 by orange marker. The path described above in the conveyance is consistent with the route of the claimed path. The wording used in relation to this footpath suggests that it was private, conveyed to the purchasers of properties within the development who would be required to share the cost of its maintenance. This is acknowledged by the applicant in her letter of 30 July 2006 when she stated "*The footpath was clearly assured by Leckhampton Estates in favour of each and everyone of the future owners of their development site in Bushcombe Close in the first instant in perpetuity*".

9.9 The conveyance references a second footpath for which the Vendor would initially be responsible; "*4. The Vendors hereby covenant with the Purchasers that they will make up the road and footpath on which the land shown edged red on the plan annexed hereto abuts to the standard required for adoption by the local authority*". The annexed plan as described has not been submitted.

9.10 However GCC has within its records a Stopping Up Order of 25 January 1960 executed under the Town and Country Planning Act 1947 permitting the diversion of Public Footpath AWO12 in Woodmancote. The Order specified that "*the new highway shall be provided in accordance with the reasonable requirements of the County Council of Gloucester by Leckhampton Estates Limited*". Further "*The cost*

*of providing the new highway shall be paid by the said Leckhampton Estates Limited*". Parts I & II of THE SCHEDULE, *describe the 'Highway to be Stopped up' and 'The New Highway' as a footpath*. This Order appears to be the 'footpath' noted under point 4 of the conveyance for which the developer would initially be responsible for setting out to a certain standard before its adoption by the local authority on behalf of members of the public. A copy of this Order Plan is appended **JH6**.

- 9.11** The 1960 conveyance therefore referenced two separate footpaths; both of which were set out by the developer. One was to be adopted by the highway authority, thus public, and the other, (along the alignment of the claimed path) was provided for use by the purchasers of properties within the Bushcombe Development, and for which they would all subsequently share the ongoing maintenance costs, thus private.

## **10. CONSULTATIONS**

- 10.1** The application, when made in June 2006, triggered some correspondence with Gloucestershire County Council. The notice being fixed at either end of the path, resulted in letters from Mr Quirk of 11 Bushcombe Close (29 June 2006) and Mr & Mrs Spoor of Greenhills (24 July 2006). Copies of both are held as background papers to this report.

- 10.2** Mr Quirk advised "*in his deeds and the other owners of properties along Bushcombe Close' deeds it says that the path should be maintained by them. He added that nobody had used the claimed path in 36 years and it was now very narrow due to houses on Bushcombe Close encroaching onto it*".

- 10.3** Mr & Mrs Spoor raised their concern about the possibility of a path running along behind the property which they had only purchased a few months prior.

- 10.4** A Public Rights of Way – Landowner Evidence Form (Claimed path) was sent under a covering letter dated 1 February 2007 to the following affected and abutting householders. All responses received are held as background papers to this report.

- 10.5** Mr & Mrs Barton of St. Aubin, Bushcombe Lane  
Mr Quirk of No.11 Bushcombe Close  
Ms Patterson & Ms Watts of Waterside, Station Road  
The Occupier (Mr Mitchell) of Grayswood, Bushcombe Lane  
Mr Williams of Martonia  
Mr & Mrs Britton of Cornerways, Bushcombe Lane  
Mr & Mrs Parkin of Beldon house, Bushcombe Lane  
Mr & Mrs Spoor of Greenhills, Bushcombe Lane

- 10.6** Woodmancote Parish Council, Tewkesbury Borough Council, and County Councillor Nigel Moor were consulted by letter of 11 November 2020. Responses received to this consultation include;

- 10.7** Mrs Bennet, Clerk to Woodmancote Parish Council responded on 13 November 2020 to say "*Woodmancote parish Council are happy to support the opening up of this path*".

## 11. USER EVIDENCE

- 11.1 **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”.**
- 11.2 **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.**
- 11.3 It is first necessary to establish the date at which use of the path was challenged by the landowner in order to evaluate whether sufficient use prior to that date either under statute or at common law has established a presumption of or implied dedication.
- 11.4 The ‘bringing into question’ or challenge of the public’s right to use path was considered by ‘Lord Denning in *Fairey v Southampton County Council* 1956. He said *“In order for the rights 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 might be apprised of the challenge and have a reasonable opportunity of meeting it.”*
- 11.5 The applicant initially made contact with us on 22 May 2006 to raise her concerns regarding a planning application. She stated *“The owners intend to use the public footpath, which they do not own, for access to a new bungalow in their back garden”*. Mr Parkin of Beldon House used one of the Landowner Evidence Forms to refute this allegation. He appended a statement explaining that he purchased 14ft of a surplus 18ft of land to the rear of and between the properties; Grayswood, Beldon House and Greenhills on Bushcombe Lane and Waterside on Station Road directly from the developer in 1963. This left a 4ft strip of land which the developers were obliged to retain for the footpath in accordance with the deeds of the Bushcombe Close properties. This would not therefore constitute a ‘bringing into question’ or challenge of the public’s right to use the path.
- 11.6 The gradual incorporation of this claimed path into adjacent gardens means that there is no date which can be attributed as a ‘challenge’ to public use. In such cases, section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) provides that the date of the DMMO application can be used in accordance with paragraph 1 of Schedule 14 to the Wildlife & Countryside Act 1981.
- 11.7 **For the purposes of s31 HA80 therefore, the year that the public’s use of the path was challenged is taken to be 2006 and thus the retrospective 20 year qualifying period of use to be considered for this report is 1986 to 2006.**
- 11.8 It is not essential for the paths or ways to have been used for the full period of 20 years be 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.

- 11.9 5 Public Path Evidence Forms (“PPEFs”) were completed by 5 individual members of the public in support of this application dating back to 1960 on foot.
- 11.10 In response to question 2 of the PPEF. ‘Have you used the above path? The applicant responded “No”. Although we can consider the detail supplied by the applicant as useful background information, we cannot include her PPEF in the overall number of claimed users of the path. When considering sufficiency of user, in *R. v. SSETR (ex p. Dorset) [1999]* the judge considered that although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test. It follows therefore that the user evidence of the remaining 4 individuals would also fail.
- 11.11 The user evidence fails 3 further aspects of the statutory test;
- 11.12 First, when considering the length of claimed use of the path by the remaining 4 individuals over the statutory qualifying period; 1986-2006, we can see that it falls short of the required 20 years necessary for a claim of presumed dedication. The 4 individuals claimed use of the path from 1960/ 1961, i.e. start of the development and continued for at most 12 years until 1972, when alternative paths in the vicinity were being favoured over the claimed path. As a result of this, its lack of use resulted in it being incorporated into adjacent gardens. A summary of the PPEFs and a useful bar chart of use are held at **JH7 & JH8** respectively.
- 11.13 Second, s31HA80 requires that use must be ‘by the public’. Ross Crail, Barrister ‘Rights of Way Law Review’ wrote “*User must have been by the public. That does not mean that users ... must come from all over the country; in the nature of things, they will usually be drawn from the local community, especially in the case of a claimed footpath or bridleway. But they must represent a wider cross-section of the public than just the owners or occupiers of nearby properties and their visitors – the postman, the dustcart, and so forth*”.
- 11.14 The 4 remaining individuals who supplied PPEFs all live in Bushcombe Close. This report has shown that a private right to use this path was conveyed by the developer, Leckhampton Estates Ltd, to *all purchasers* of properties within the Bushcombe Development for which they all had to contribute towards its maintenance. A random check with Land Registry of 8 (including No.11) of the 20 original properties confirms that all but one was subject to this conveyance. This includes 3 of the 4 remaining householders claiming use of this path. Title for the fourth (or eighth in total); No.14 Bushcombe Close was a Caution against the Property Register only but a comment made by the householder, Mrs Axten, in paragraph 11.16 suggests that this property was also subject to the conveyance. Any use of this path therefore by individuals living in Bushcombe Close would be by a means of a private easement or right, thus not meeting the criteria of use ‘by the public’.
- 11.15 Third, 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. The easement

would also have the effect of failing the 'as of right' test because use was by private easement or permission and thus 'by right'.

- 11.16** This is corroborated by the responses to Q.8 (d) of the PPEF which asks "*Have you ever been given permission to use the path?*"

The applicant, Mrs Spragg responded; "*Permission given to potential house owners by estate agent; 'Young & Gilling'.*"

Ms Axten responded; "*Yes by Leckhampton Estates who owned the land/ path and built the 20 bungalows in Bushcombe Close.*"

Mr Jewell responded; "Yes".

Mrs George responded "*Permission was understood as the land was purposely left by the builders of the then 20 bungalows here.*"

- 11.17** Where an application fails the test for statutory dedication under s31HA80, rights may have been dedicated at common law. This requires consideration of whether the use of the route by the public and the actions of the landowner have been of such a nature that dedication of a right of way could be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person claiming the rights.

- 11.18** This application fails at common law because the 1960 conveyance granted an easement to the householders to use the claimed path. Their use was therefore with a form of permission 'thus beneficiaries of the easement and therefore the claimed use would not constitute use by the 'public'. As such there can be no implied dedication of the claimed route at common law.

## **12. CONCLUSIONS**

- 12.1** 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.

- 12.2** 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).

- 12.3** If Members agree that on the balance of probabilities, the claimed path cannot reasonably be alleged to subsist by statutory or inferred dedication then they should direct that no order is made to record the claimed route as a public footpath.

**12.4 Recommendation:**

- 12.5** That no Order be made to add the claimed footpath to the legal record of public rights of way on the basis that the user evidence fails to meet the required criteria of the s31 Highways Act 1980 statutory test and at common law.

**13. APPENDICES;**

<b>JH1</b>	1:25,000 location map
<b>JH2</b>	1:1250 scale map of claimed path
<b>JH3a</b>	Land Registrations
<b>JH3b</b>	Photo of Bushcombe Lane
<b>JH4</b>	Photos; 29 June 2006 (A-C) & 10 November 2020 (D-E)
<b>JH5a-d</b>	1960 Conveyance & plan
<b>JH6</b>	1960 Stopping Up Order (Diversion); Town & Country Planning Act 1947
<b>JH7</b>	Bar chart of use
<b>JH8</b>	Summary of PPEFs