

**COMMONS AND RIGHTS OF WAY COMMITTEE
5 OCTOBER 2021**

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN
ADDITIONAL LENGTH OF PUBLIC FOOTPATH
LECKHAMPTON HILL (ROAD C377) TO FOOTPATH CHL 18 / ASH 42, PARISH OF
LECKHAMPTON**

REPORT OF THE LEAD COMMISSIONER, COMMUNITIES & INFRASTRUCTURE

1. PURPOSE OF REPORT

To consider the following application:

Nature of Application:	Additional Footpath
Parish:	Leckhampton
Name of Applicant:	Ros Trevis
Date of Application:	13 July 2020

2. RECOMMENDATION

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)

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

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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 Leckhampton. The claimed path is approximately 2 miles south of the centre of Cheltenham. The area of interest is within Ordnance Survey Grid Square SO 9419.
- 7.2 A large-scale map showing the whole of the claimed route at 1: 1,500 scale is attached (numbered **1B**). The way is shown running between points A and B. Reference is made to the points shown on map 1B throughout the report.
- 7.3 The path forms a shortcut from the road known as Leckhampton Hill west to the public footpath ASH 42 / CHL 18 which runs roughly north-south along the course of the former Leckhampton Quarry tramway. Point B of the claimed route is on the class 3 road C377 known as Leckhampton Hill, and is almost opposite the entrance to Underhill Avenue. At point A the claimed route joins the public footpath along the old tramway. Directly to the west of point A there is a stile giving access to the fields west of the public footpath ASH 42 / CHL 18. This stile does not form part of the claimed route but is referred to in the user evidence statements as forming part of a longer walk to Leckhampton Church.
- 7.4 The claimed route was inspected on 30 July 2020 with the permission of (and accompanied by) the landowner. The line of the path was distinguishable by a bare earthen surface, approximately 1.5 metres in width in the middle section, but approximately 1 metre in width towards points A and B. There were no structures or boundary features at either point A or B. The path between points A and B crosses a small piece of woodland. At point B the path emerges through shrubs onto the road close to a speed restriction road sign. Photographs taken during the site visit can be seen at **appendix 1E**.
- 7.5 The claimed route is approximately 35 metres in length. It would appear that the used route is more sinuous than that shown on the applicant's map, and if an order were to be made, the used line would need to be first re-surveyed.

8. BACKGROUND

- 8.1 The woodland through which the path passes was formerly in the ownership of Severn Trent Water. The new landowners, Taller Development, undertook tree felling and undergrowth clearance on the site in April and May 2020, and this was interpreted by the then-potential applicant to have been a preliminary to obtaining planning permission for development. According to the landowner, the applicant, Mrs Trevis, was informed by him that the land was private, there was no right of way and that any use of the land was trespass, on 17 April 2020. The woodland contractor Edward Price stated (in a letter of 29 July 2020) “Following a discussion with Paul Laidler [the landowner] I did not feel any tape was needed on the other side of the site as the route was obstructed by fallen trees he advised were cut down to stop people going across the site.”
- 8.2 Ros Trevis enquired about recording the claimed route on the Definitive Map on 11 May 2020. Information sheets on the process for adding the path to the Definitive Map were forwarded on 11 June 2020. Application forms were sent out on 19 June 2020.
- 8.3 On 20 July 2020 the applicant informed the County Council that the path had now been blocked with logs and branches. Inspection on 30 July 2020 showed that barbed wire had also been used in part to obstruct the path.
- 8.4 A planning application was submitted for the land in question on 18 September 2020. Cheltenham Borough Council, as the Local Planning Authority, granted permission in principle on 28 October 2020 for the erection of up to three dwellings on land east of Leckhampton Reservoir, Leckhampton Hill.

9. APPLICATION

- 9.1 An application for an additional length of public footpath was made by Ros Trevis of 376 Old Bath Road, Leckhampton, Cheltenham GL53 9AD and received on 13 July 2020. Notice was served by the applicant on the landowners and she advised the County Council of this and submitted the Form 3 (Certificate of Notice).
- 9.2 It was considered by the County Council, as surveying authority, that the application was fully compliant with both schedule 14(1) and 14(2) of the 1981 Wildlife and Countryside Act.
- 9.3 A total of 9 user evidence statements were submitted in support of the application. A summary of these evidence forms is provided at **appendix 1C**.
- 9.4 The applicant had previously supplied five photographs of the claimed route which were taken on 15 June 2020 (**appendix 1D**).

10. USER EVIDENCE

- 10.1 The application was supported by 9 user evidence statements, completed by 9 individuals. The evidence statements include a statement of truth as to the matters contained.

- 10.2 Use was on foot, for leisure purposes, including dog walking, from the road known as Leckhampton Hill and from Daisy Bank Fields in the east, west to the footpath along the old tramway and to give access to the fields west of the tramway.
- 10.3 If we take 2020 as the date of the bringing into question, then there are seven witnesses who state that they have used the path for a full twenty years. The other two path users both state that they have used the path since 2010 (ten years.)
- 10.4 Use dates back to 1965 (witness 8, Geoff Burch), a period of 55 years. Witness 3, (Mrs Anne Jones), has used the path since 1971 (a period of 49 years.) The use by witness 2 (Laurence Keen) dates back to 1976 (44 years), but there is a gap in his use between 2011 and his resumption in the use of the path in 2020. Three other witnesses describe their use as being from 1985 to 2020 (35 years.)
- 10.5 The more detailed questions contained within the user evidence statement allow witnesses to clarify their level of use, and how this has varied in intensity during their period of use. Witness 4 (Carole Ashford) has used the path since 1985, but only every few months, as has witness 9 (Gavin Huthes-Jones), also since 1985. Geoff Burch (form 8) describes how he used the path less between 1981 and 1995 as he was living in the centre of town, but still continued to use it 'slightly less.' (His use dates back to 1965.)
- 10.6 The user evidence statements are consistent in describing a path that was free of gates, stiles or other barriers. The users state that they have not been challenged in their use of the path or given permission at any time to use the path. They state that there were no notices or signs.
- 10.7 The width of path as stated varies between 1 and 2 metres, and the surface is described as having an earth surface (forms 1, 2, 5 and 9), earth and grass (form 3), stones and earth (form 8), earth with some vegetation (form 6) and with varying degrees of plant undergrowth depending on the time of year (form 7.) The point is made by the applicant that the earthen surface is the result of continual use. The widths expressed in the evidence statements concur with the path widths as noted on the site visit of 30 July 2020.
- 10.8 Gary Blake (form 7) who has used the path since 1995 states "exact route and width varies depending on the time of year and extent of undergrowth." Other witnesses refer to the route of the path being clearly defined on the ground.

11. DOCUMENTARY EVIDENCE

11.1 Inclosure Award 1778 (Q/Ri/88)

Area not shown in detail. Claimed route not shown.

11.2 Tithe Map

Not known for this parish

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

Area not shown in detail.

11.4 Ordnance Survey 25" to 1 mile Glos 31.8, second edition, 1903

That part of the parish was relatively undeveloped at the time. A route is shown just to the north of the claimed route, running parallel to it between the reservoir and the road.

11.5 Ordnance Survey 25" to 1 mile Glos 31.8, third edition, 1923

The 3rd edition OS map of 1923 shows the same features.

11.6 Ordnance Survey 1: 2,500 National Grid SO 9419 (1954)

Similar features shown.

11.7 Ordnance Survey 1: 2,500 National Grid SO 9419 (1971)

Similar features shown.

11.8 Bryant's Map of Gloucestershire 1824

Area not shown in detail

11.9 Greenwood's Map of Gloucestershire 1824

Area not shown in detail

11.10 Inland Revenue, maps compiled under the Finance Act, 1910 based on Ordnance Survey 25" to 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files (D2428)

Area of claimed route is within hereditament 1323 (D2428/3/26/15)
Form 37. No form for hereditament 1323 (D2428/2/95).

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

Nothing relevant.

11.12 Parish Council file, Rights of Way Act, 1932

P198a/SU/1/1-17 – Highway rates, 1803-97 (with gaps). Not checked

P198a/PC/1/1-12 – Parish meeting/Council minutes, 1894-2015 (12 volumes).
Not checked

P198a/PC/39/1 - Correspondence and maps concerning footpaths in
Leckhampton, 1949-98. Checked – not relevant

P198a/PC/39/3 - Correspondence and maps concerning footpaths in
Leckhampton, 1968-2007. Checked – not relevant

11.13 Duplicate copies of tithe or inclosure awards

None

11.14 Private estate maps

P198a/VE/1/1 – Map of Leckhampton parish, 1835. Area shown; claimed route not shown

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

Q/SRh/1811/C/1 - Ink drawn plan on paper of footway from Cheltenham to Leckhampton, showing lands adjoining. Checked – not relevant

Q/SRh/1837/B - Leckhampton: Highways and footpath diversions. Checked – not relevant

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

Q/RUm 15, 26, 42, 54, 66, 94, 122, 147, 215, 232/1,2,3, 287, 336, 390, 426
Not checked

11.17 District Council Clerk's correspondence

DA21/100/1-24 – RDC minutes, 1872-1974 (24 volumes). Not checked

DA21/113 – Highways Committee minutes, 1930-34 (1 volume). Not checked

11.18 County Council Solicitor's correspondence (K596/27/1)

Cheltenham Rural District objections file, 1954. Checked – not relevant

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

K687/1/2 – Parish original submission. Route not claimed

K687/2/1/4 – Objections file for Major J.G. Dugdale. Leckhampton. Checked – not relevant

K687/2/1/41 - Claims for the inclusion of additional tracks by the Ramblers' Association, 1951-57. Checked – not relevant

K687/2/42 - Annotated schedules of objections to draft maps, with papers concerning timetable for hearings, 1951-57. Checked – not relevant

K687/3/3 – Provisional map. Route not claimed.

11.20 Tony Drake archive (Ramblers' Association)

D12676/1/7/2 – Tewkesbury Borough Council Mid Gloucestershire Group file, 1984-2006 (including Leckhampton). Checked – not relevant

D12676/2/6/22 – Leckhampton file, 1955-91. Checked – not relevant

D12676/2/6/47 - Tewkesbury Borough Council Mid Gloucestershire Group file, 1961-95 (including Leckhampton). Checked – not relevant

D12676/4/1/17 – NERC Act 1995-2009, including orders re. tracks on Leckhampton Hill. Checked – not relevant

In conclusion, there are no documentary sources showing the claimed route.

12. LANDOWNER'S EVIDENCE

12.1 Taller Development

Paul Laidler of Taller Development emailed on 14 July 2020 to say that they had received the notice of application and to clarify the process and what steps needed to be taken. Information on the process was forwarded to him on the same day. Copies of the user evidence statements were forwarded to him on 22 July 2020.

The landowner made a deposition under section 31(6) of the 1980 Highways Act on 22 September 2020. It was pointed out on 24 September 2020 that the land was subject to a Definitive Map Modification Order application; they were advised that the 'the DMMO application will need to be noted on the statement, this is not to prejudice the process, but merely to state the application was made prior [to] the date of the deposition.' This deposition does not act retrospectively.

Mr Laidler was supplied on 19 January 2021 with copies of the user evidence statements and a landowner evidence statement for completion. On 9 February 2021 a copy of the archivist's report was also forwarded.

Mr Laidler replied on 23 February 2021:

"In summary Taller Development considers that the application fails to meet any of the criteria required to support dedication of the application route as laid out under Section 31 of the Highways Act 1980, namely that dedication of a route as a public highway is presumed after public use, as of right and without interruption, for a full 20 years (the Relevant Period), unless there is sufficient evidence that there was no intention during that period to dedicate it. Taller Development's position is supported and substantiated by independent documentary evidence as presented detailed within the attached document.

We note that the marked location of the application route on the map provided and within all of the evidence statements is not an accurate representation of the actual application route as it currently crosses Taller Development's land and we anticipate that its accurate location will be a future consideration should the need arise."

The landowners made a full response, dated 22 February 2021. In summary they make the following points:

Evidence Disproving Use

Having stated that the burden of responsibility is not on the landowner to disprove the existence of the application route, they provide a series of images taken from Google Street View, dating to 2009, which show that there was no plausible use of the application route before 2010 due to the absence of an entry point "in the continuous boundary hedgerow and the lack of a trodden path."

Any use of the application route prior to 2011 could only have been by force due to the continuity of the boundary hedgerow.

The emergence of a trodden path only becomes apparent in 2015.

Application and User Evidence Statements

"Those making the claim must prove on the balance of probabilities that the claimed route was used continuously for the whole of the relevant period (i.e. 20

years from July 2000 to July 2020, by the public in sufficient numbers as of right (without force, secrecy or permission).”

Given the evidence of Google Street View:

Use was not as of right, as it was by force and in some cases in secrecy and with permission.

The claimed weekly use by only two users for the duration of the Relevant Period (20 years) cannot be constituted as regular use by the public at large.

The contradictory and inconsistent nature of the user evidence submissions undermines their accuracy and highlights the implausibility of the submitted evidence.

The claimant has failed to prove, on any reasonable level of probability, that the route was used as of right, or for 20 years, or by more than a few individuals (i.e. the public at large) or without interruption.

The landowner was sent copies on 25 February 2021 of the photographs taken by the applicant. They commented that the image showing the stile was disingenuous as it suggested that it formed part of the application route, and wished that this be made clear when making our decision.

The landowner defines force as “passing over, through or around an intentional blockage, such as a fence or other substantial obstruction such as a boundary hedge.”

The assessment on frequency of use is arrived at thus: “Most applicants tick multiple answers to Question 6 on the evidence form. Where multiple answers are selected only the least frequent of these should be considered as a continuous period of use that is ‘regular’ such that it would have demonstrated to a reasonable landowner that a right to use the route was being asserted.”

13. CONSULTATIONS

13.1 Parish Council

Leckhampton Parish Council was consulted on 8 January 2021.

13.2 Cheltenham Borough Council

Mr D Stead, Head of Property and Asset Management at Cheltenham Borough Council, was consulted on 8 January 2021.

13.3 County Councillor

Councillor Ian Dobie was consulted on 8 January 2021.

13.4 Borough Councillor

Martin Horwood, borough councillor for Leckhampton wrote on 4 August 2020: “I am the borough and parish councillor for Leckhampton in Cheltenham and I know GCC is considering an application for a new recognised Public Right of Way from the road at Leckhampton Hill opposite Undercliff Avenue, connecting to pathways 18 and 42 which in turn connect back to the highway in each direction. I would like to register my support for recognising this PROW.”

13.5 Ramblers' Association

Mr M Thornley, the Area Representative of the Ramblers' Association was consulted on 8 January 2021.

13.6 Open Spaces Society

Mr G Stewart, the local correspondent for the Open Spaces Society, was consulted on 8 January 2021.

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 As made clear by the High Court in *Bagshaw and Norton*¹ s.53(3)(c)(i) involves consideration of two tests;
- (a) Test A: Does a right of way subsist? Test A requires clear evidence in favour of the applicant and no credible evidence to the contrary.
 - (b) Test B: Is it reasonable to allege that a right of way subsists? For this possibility to arise it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way to subsists. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.
- 14.3 In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*², Roche LJ held that "...*The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
- 14.4 Roche L J also held that "*Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s.31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication*".

¹ (*R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

- 14.5 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 to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- 14.6 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”.
- 14.7 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.
- 14.8 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).
- 14.9 A 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 each end.
- 14.10 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)).
- 14.11 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.

- 14.12 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*”.
- 14.13 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)*).
- 14.14 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.
- 14.15 There is no evidence provided by either the landowner or by the path users 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 prior to April 2020. There are two possible dates of challenge: firstly, when work was undertaken to clear the site on 17 April 2020, felled trees were left in place with the expressed aim of preventing use and path users were turned away by the landowner and told that the path was not a public right of way. Secondly, in July 2020, when the path was obstructed at each end by the landowner or their agents, with brushwood, branches and barbed wire. In either case, the relevant period for the purpose of section 31(1) of the 1980 Highways Act is 2000 to 2020; however, it is clear that as the actions of physically blocking the path and confronting path users in April 2020 led directly to this application, we should consider April 2020 to be the date of the bringing into question.

- 14.16 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. So you could, in theory, have half the forms covering the first 10 years and half the second. What can be problematic is if there were more User Evidence Statements for one particular period than for the rest. So, say only 2 forms for the first two years, but 13 others which then (taken together) cover the remaining 18 years. There is then a risk of insufficient user evidence for the early period of use. However with this application there are six witnesses who used the path for the full twenty year period, one who used it from 1976 to 2011 and two who used it between 2010 and 2020.
- 14.17 Nor does it matter that the use is not continuous in the sense that it may not have occurred everyday. As set out in the section on User Evidence, use by witnesses 4 and 9 (both from 1985 to 2020) was every few months, but there was daily use by witness 1 (2010-20) and by witness 7 (1995-2020) and weekly use by witnesses 2, 3, 5 6 and 8, whose use dates back to 1976, 1971, 2010, 1985 and 1965 respectively. The landowner asserts that where the witnesses have ticked all of the boxes on the form to say that use was daily, weekly, every few months and once a year then the least frequent occurrence should be considered, but this interpretation, although ingenious, does not seem to be consistent with the evidence supplied.
- 14.18 Use should be by a number of people who together may sensibly be taken to represent the community. Use has been evidenced by inhabitants of Old Bath Road, Leckhampton Hill and Undercliff Avenue (all Leckhampton.) 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.”
- 14.19 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by ‘the public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)
- 14.20 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said: “If twenty witnesses had merely repeated the statements made by the six old men who gave evidence that would not have strengthened the respondents’ case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.
- 14.21 Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. *R. v. SSETR (ex p. Dorset) [1999]* accepted that, although the evidence within five user evidence forms was truthful,

it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.

14.22 In *R (Lewis) v Redcar and Cleveland Borough Council* UKSC 11 (03 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in *Sunningwell* that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In *R (Powell and Irani) v SSEFRA* [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in *Lewis* were not authority for an additional test beyond the tripartite ‘as of right’ test. The judgements in *Lewis* confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use.

14.23 The level and intensity of use is considered within section 10 (User Evidence). There are seven witnesses who state that they have used the path for a full twenty years. The other two path users both state that they have used the path since 2010 (ten years.). Use dates back to 1965 (witness 8, Geoff Burch), a period of 55 years. Witness 3, Mrs Anne Jones, has used the path since 1971 (a period of 49 years.) The use by witness 2 (Laurence Keen) dates back to 1976 (44 years), but there is a gap in his use between 2011 and his resumption in the use of the path in 2020. Three other witnesses describe their use as being from 1985 to 2020 (35 years.)

14.24 In summary, if we aggregate use, there is the equivalent of seven sets of use covering the entire 20 years of the relevant period. Use dates back to 1965, and given that the claimed path is a local short cut to join the well-used footpath along the old tramway, then its use is considered to be sufficient to raise a presumption of dedication, given the case law set out above.

14.25 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...”

14.26 There is no evidence of a lack of intention to dedicate on the part of the landowner. Any actions that have been taken date from April 2020, and are

considered to constitute the bringing into question of the right of the public to use the path rather than evidence of a lack of intention to dedicate.

14.27 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.

14.28 The landowner questions whether use has been ‘as of right’, Use ‘as of right’ must be without force, secrecy or permission (‘nec vi, nec clam, nec precario’). Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate. The landowner has supplied a series of pictures (taken from Google Street View) and dating to 2009, which purport to show that use (at point B on Leckhampton Hill) has intensified since 2010. They further assert that “there was no plausible use of the application route before 2010 due to the absence of an entry point in the continuous boundary hedgerow and the lack of a trodden path.... Any use of the application route prior to 2011 could only have been by force due to the continuity of the boundary hedgerow [and] the emergence of a trodden path only becomes apparent in 2015.”

14.29 There is no fixed boundary alongside Leckhampton Hill at point B. There is no wall, fence or hedge, and nothing that acts as a constraint to use. The so-called hedge is not a solid feature, but is a roadside line of overgrown shrubs and vegetation, between which it is possible to pass. It is most certainly not an ‘intentional blockage.’ It is unclear whether the photographs show that inferred use was much less in 2010. However, it is reasonable to state that the path surface is more worn at point B in 2015 and the gap between shrubs more obvious than in the earlier photographs. However, any inference that the path wasn’t being used in 2010 on the basis of a photograph must be set against the evidence contained within the nine user evidence statements. Given the two tests set out under s.53(3)(c)(i) of the 1981 Wildlife and Countryside Act and clarified by the *Bagshaw Norton* and *Emery* cases, we do not at the determination stage have to decide which evidence is more compelling, where there might be a conflict between the user evidence and photographs of the claimed route.

15. APPENDICES

- A. Location Map, 1: 10,000 scale
- B. Map showing claimed route, 1: 1,500
- C. Summary of public path evidence forms
- D. Photographs of claimed route, as supplied by the applicant, taken 15 June 2020
- E. Photographs of claimed route, taken 30 July 2020
- F. Google Street View photograph of point B, June 2009