

**COMMONS AND RIGHTS OF WAY COMMITTEE  
16 MAY 2022**

**AGENDA ITEM:**

**APPLICATION FOR A MODIFICATION ORDER TO ADD A PUBLIC FOOTPATH  
CONNECTING SPINNEY COURT WITH THE ROUNDABOUTS, BRIMSCOMBE,  
MINCHINHAMPTON PARISH**

**REPORT OF THE ASSISTANT DIRECTOR: TRAFFIC & TRANSPORT**

**1. PURPOSE OF REPORT.**

To consider the following application: 573/11/147(11)

<b>Nature of Application:</b>	To add a public footpath connecting Spinney Court with The Roundabouts, Minchinhampton Parish
<b>District:</b>	Stroud
<b>Name of Applicant:</b>	Mr C. E. Morriss, on behalf of Minchinhampton Parish Council
<b>Date of Application:</b>	4 November 2019
<b>Landowner:</b>	Unregistered
<b>Witness Evidence forms:</b>	Total of 15 Public Path Evidence Statements ("PPESs") submitted by 15 individuals.

**2. RECOMMENDATIONS OF THE CASE OFFICER**

That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B.

**3. RESOURCE IMPLICATIONS**

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which must 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 not become maintainable at the public expense.

**4. SUSTAINABILITY & EQUALITY IMPLICATIONS**

No sustainability or equality 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 which (when considered with all other relevant evidence available to them) 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.

### **INFERRED 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, rests 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.

## **7. ISSUES TO BE DECIDED**

- 7.1 The primary issue to be decided is whether there is evidence to show that public rights 'subsist' or are 'reasonably alleged' to subsist. It is not necessary therefore for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map and Statement ("DMS") can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, an order should be made so that the evidence can be tested at a public inquiry.
- 7.2 Where a Definitive Map Modification Order ("DMMO") is made, the process allows for objections to the order to be submitted. Further evidence could potentially be put forward for examination along with an objection. In these circumstances, the County Council

cannot confirm the order, and the matter would need to be referred to the Secretary of State.

- 7.3** Where an order has been made and no objections are received, the Order Making Authority (“OMA”) can confirm it.
- 7.4** In the event of an application under Section 53 being refused, the applicant has the right to appeal against the decision to the Secretary of State, who may direct the OMA to make the order that is sought.

## **REPORT**

### **8. BACKGROUND**

- 8.1** A location map at scale 1:5,000 is appended **JH1** showing the position of the claimed path at Brimscombe, Minchinhampton. It is found within Ordnance Survey Grid Square SO 8602.
- 8.2** A plan of the claimed path at a scale of 1:1250, is appended **JH2**.
- 8.3** The DMMO application made by Mr Morriss on 4 November 2019, included Form 1 and an accompanying unscaled plan of the claimed path which is highlighted in red. Form 3 was also supplied, certifying that the application had been served upon the following householders *abutting* the path: -
- Mr & Mrs R Amor, Laburnum Cottage, Walls Quarry, Brimscombe, Stroud, Glos, GL5 2PA.
  - Mr & Mrs N.R.C Sykes, 5 Weavers Row, Brimscombe, Stroud, Glos, GL5 2PX
  - Mr J Tibbles, Yew Tree Cottage, Burleigh, Stroud, Glos, GL5 2PJ.
- 8.4** Land Registry (“LR”) shows part of the claimed path as unregistered and part within the curtilage of No.5. Weavers Row. LR does not purport to show the precise extent of boundaries and the 1:1250 scale Ordnance Survey (“OS”) base map used for the LR Title Plan View has a 1m tolerance. It should be further noted that on a map at this scale, where there are 2 boundaries within one metre of each other, OS will only show the predominant feature. This is corroborated by a conveyance plan, dated 12 August 1971, which shows the claimed path subject to this report excluded from the curtilage of No.5 Weavers Row. The conveyance plan is appended **JH3**.
- 8.5** Stroud District Council’s historic ‘Permission for Development’ notices under the site reference S.6654 were inspected. This residential curtilage encompassed Weavers (originally Church) Row, the garages, Spinney Court, and the claimed path. One of the applications under this site reference: 16345, dated 1 February 1971, was submitted by Hatherley Developments Ltd who used the following addresses: No’s 1 or 2 Weavers Row, Burleigh, Stroud, or No.41 Rodney Road, Cheltenham, for their applications. Certificate A, which forms part of this application, declared that Hatherley Developments Ltd was the landowner. Although this application does not refer to the steps or the claimed path, an accompanying plan under the same application reference, shows manholes and storm water drainage pipes located under the claimed path which is shown having a series of steps. Hatherley Developments Ltd can be found online today but as a business it only dates to May 2010. A copy of the Planning Permission, Certificate A and the accompanying plan are held as background papers to this report.

**8.6** It is unclear whether anyone associated with Hatherley Developments Ltd retains a legal interest in the land crossed by the claimed path. As LR shows the land to be unregistered, impersonal notices to 'Owners and Occupiers' were authorised, to notify anyone with an interest of the claim. These notices were located at either end of the path and photographs were taken as proof that this was done.

## **9. DESCRIPTION OF CLAIMED PATH**

**9.1** The claimed path commences at a point marked A on the plan at Ordnance Survey Grid Reference ("OSGR") SO 8663/ 0203 at its junction with Spinney Court (publicly maintainable highway 45987) and runs in a generally north easterly direction for approximately 17 metres and then in a generally north westerly direction for a further 19m metres to a point marked B on the plan at OSGR SO8663/ 0206 at its junction with The Roundabouts (publicly maintainable highway 41436). The path, inspected on 10 November 2021, was found to consist of intermittent sets of double concrete steps with an approximate width of 1.5m between the boundaries of Laburnum Cottage and No.5 Weavers Row.

**9.2** Photos taken on 10 November 2021, showing the character of the claimed path, are appended **JH4**.

## **10. DOCUMENTARY EVIDENCE**

**10.1** **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.**

**10.2** A report was commissioned of Gloucestershire Archives. The report received on 21 December 2020 is appended as a background paper to this report. The County Archivist has examined sources to see if this path is marked in any way and has identified other sources which might be useful in establishing the status of any right of way along this route. These sources have then been checked and added to by the Case Officer.

**10.3** There was no Inclosure Award and the Tithe and Finance Act maps do not show the claimed path. Commercial map makers such as Bryant, Greenwood and Ordnance Survey similarly did not show it and the path was not claimed as part of the National Parks & Access to the Countryside Act 1949 process.

**10.4** As previously stated, Stroud District Council's historic 'Permission for Development' notices over the period July 1965 to July 1995 under the site reference S.6654 were checked. No specific reference was found however to the construction of steps along it.

**10.5** The LR Titles for the properties in Weavers Row refer to a conveyance between T. D. A. Wilson, Esq (& his mortgagees) of No. 2 Weavers Row & the owners of the other 4 cottages in Weavers Row. This conveyance granted a private easement to the rear of all 5 properties. The earliest is dated 12 August 1971 pertaining to No 5 Weavers Row. Part II ,4, of the conveyance provided for the following easement, "*The right for the Vendor and his successors in title the owners and occupiers for the time being of all or any part of the Vendor's adjoining property and his or their respective servants and licensees a right of way from time to time and at all times hereafter by day or night and fall all*

*purposes connected with the use and enjoyment of the Vendor's adjoining property but not for any other purpose whatsoever to use the footpath coloured yellow on the said plan subject to the payment of a fair proportion of the expense of maintaining and keeping such pathway in repair". The plan attached to the conveyance for No.5 Weavers Row (JH3) shows the path subject to the easement connecting with the claimed path, the latter of which is shown to have a series of double steps in a similar manner to the physical path found during the survey.*

- 10.6** Mrs Griffiths, a resident of Spinney Court since 1976 confirmed that the claimed path with concrete steps existed when she moved to her property. Mr Amor of Laburnum Cottage stated in his consultation response (detailed in paragraph 11.2 of this report); *".... It is my understanding that when the developer requested that the path be adopted originally, it was declined because the council surveyor at the time was not happy with the quality of the concrete steps. (He lived locally so had observed them during construction). Originally the path to the cottages had been compacted soil/ stone as far as I recall"*.
- 10.7** A letter issued by the County Surveyor at Gloucestershire County Council, dated 12 January 1978, to Hatherley Developments Ltd of 48 London Road, Stroud, records that Spinney Court, Burleigh was *"adopted as maintainable at public expense"* under the statutory provision of the Highways Act 1959. However, a comment was added; *"This does not include the steps down to the existing county road which are not in an acceptable condition for adoption"*. A copy of this letter is appended **JH5**. The claimed path is not recorded on the List of Streets (record of publicly maintainable highways).
- 10.8** Documentary evidence does not greatly assist this application. The conveyance of August 1971 suggests that the claimed path with the steps existed at this time and was intended to be submitted for adoption as part of the public highway along with Spinney Court. However, records show that the claimed path was rejected in 1978 due to the condition of the steps. It should be noted however that the List of Streets is not concerned with the status of a way, merely its public maintenance liability. This would not therefore preclude a statutory presumption of dedication or an inferred dedication at common law.

## **11. CONSULTATION**

- 11.1** The owners of Yew Tree Cottage, Laburnum Cottage, 5 Weavers Row, Stroud District Council, Minchinhampton Parish Council, County Councillor Rachel Smith, The Ramblers' Association, and the Open Spaces Society were consulted on 19 February 2021. The following responses, which can be read in full as background papers to this report, were received;
- 11.2** Mr Amor of Laburnum Cottage responded to Natasha Reeves, Asset Data Technician (PROW Definitive Map) by email on 22 February 2021. He said *"Following our conversation this afternoon, I am writing to confirm that I am not the owner of the land on which this footpath is situated..... Having lived in this immediate area nearly all my life, I can confirm that the path in question was used by all the terraced cottages before they were developed and when they were known as Church Row and not Weavers Row as now. (I had relatives who lived in one of the cottages in the 1950s). There was also a pedestrian access at the other end of the terrace coming out onto The Roundabouts. It is my understanding that when the developer requested that the path be adopted originally, it was declined because the council surveyor at the time was not happy with the quality of the concrete steps. (He lived locally so had observed them during construction). Originally the path to the cottages had been compacted soil/ stone as far as I recall"*.

11.3 Stroud District Council responded by email on 22 February 2021; “... *Having considered the proposed addition to the Definitive Map, given that SDC does not own any land that may be affected by this. I can confirm that it has no objection nor any comments to make.....*”

11.4 The Ramblers Association responded by email of 7 April 2021 to the effect “... *The South Cotswolds Group of the Ramblers Association support this Modification Order*”.

## 12. USER EVIDENCE

12.1 **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”.**

12.2 **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 through an overt act by the landowner which makes it clear to the public that their right is being challenged.**

12.3 **When the status of the claimed route was called into question;**

12.4 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 challenged. Where no action was taken to question or challenge the public’s use of the path, as with this application, 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.

12.5 **For this report therefore the user evidence will be assessed over the 20-year period 1999-2019 leading up to the application.**

12.6 Hatherley Developments Ltd claimed ownership of the land ©1971 and as such submitted the path along with Spinney Court, for highway adoption. In the absence of paperwork, the legal “presumption of regularity” is applied. This is a legally accepted presumption that things have been properly done, with the appropriate procedural steps having been taken, unless the contrary can be shown. However, there is no explicit reference in section 31(1) HA80 of 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 paths.

12.7 **The extent and nature of the claimed use;**

12.8 Under s31HA80, after a period of 20 years user ‘as of right’, it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that he has taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner’s intentions. The analysis of the user evidence is detailed in the following paragraphs.

- 12.9** 15 Public Path Evidence Statements (“PPESs”) were completed by 15 individual members of the public in support of this application. A summary of the PPESs and a useful bar chart of use are attached to this report. The summary & bar chart are held as **JH6 & JH7** respectively.
- 12.10** All 15 individuals identified a path which is consistent with the depiction of the claimed route A-B, as shown by the applicant. User No.5 (Mrs Westcott) extended the claimed path at either end to include existing highways, Spinney Court and The Roundabouts. These sections are already subject to a public pedestrian right of access and are thus excluded from this report. User No.3 (Mrs Newby) clarified by email of 2 December 2021 that she had lived at her property since 2004 and thus had used the path for 17 years as opposed to the 5 as claimed on her PPES.
- 12.11** All 15 individuals claim use of the path over part or all of the 20-year qualifying period under analysis. 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.
- 12.12** Use dates back to 1976 on foot. Mr Flagg, Mrs Flagg & Mrs Griffiths claim use of the path over the whole 20-year qualifying period, Ms Elias, Ms S Ross, Ms K Ross & Ms Newby, who lives within metres of the path, claim use of the path over a 10 - 20-year period and the remaining 8 individuals claim less than 10 years use. With regard to sufficiency, 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. In a semirural area such as this, it would be generally accepted that the amount of use of a way may be less than a way in an urban area.
- 12.13** Mrs Thompson, Mrs Westcott, Mrs Griffiths & Mrs Dunant all commented on the poor condition of the steps. Following clarification with the applicant, Mr Morriss and separately with Mrs Newby, who lives within metres of the claimed path, both confirmed that local people have kept the steps clear of brambles and nettles over the years, but no-one has maintained the concrete steps. Maintenance is therefore an important issue to consider because the claimed path is wholly comprised of a series of steps.
- 12.14** There is nothing in law to prevent anyone with the lawful capacity from expressly dedicating a way as a highway, however there are restrictions if it is to be publicly maintainable.
- 12.15** Sections 38 & 39 of the Highways Act 1959 (“1959 Act”) introduced a new procedure for establishing public paths (footpaths & bridleways) and roads which would be formally adopted as public highways, maintainable at public expense. They were to be recorded on the List of Streets, a public record all highway authorities were required to maintain under s38(6) 1959 Act. This document although conferring a permanent right of way for members of the public to pass and repass along a defined route, was merely a record of public maintenance liability and inclusion of a way gave no guidance as to the nature of the rights that existed over it (other than the fact that inclusion on the list proved that at least a right of way on foot existed). Sections 39(2) & (3) required that such ways were “*of sufficient utility to the public to justify its being maintained*” and “*made up in a satisfactory manner*”.
- 12.16** The requirement to maintain a record of highways maintainable at public expense, following the same criteria was replicated under sections 36 & 37 Highways Act 1980 (“1980 Act”) which replaced the 1959 Act.

**12.17** Further, section 36 of the 1980 Act set out the following automatic categories of way as publicly maintainable;

- A highway which immediately prior to the Act was maintainable at the public expense, by virtue of the previous 1959 Highways Act.
- A highway constructed after the Act by a highway authority (the recent Court of Appeal decision in *Barlow v Wigan MBC (2020)* held that for a highway to be considered a highway maintainable at public expense, it must be constructed by an authority acting in its capacity as a highway authority after 1959).
- A highway constructed by any council under part II of the Housing Act 1985.
- A footpath, bridleway or restricted byway created by a public path creation agreement.
- A footpath, bridleway, or restricted byway created by a public path creation order.
- A footpath, bridleway, or restricted byway created by a public path diversion order.
- A footpath, bridleway, or restricted byway, created by or diverted by an order made under s247 or 257 of the Town & Country Planning Act 1990.
- A footpath, bridleway, restricted byway, or a way over which the public have a right of way for vehicular and all other kinds of traffic, created in consequence of a special diversion order.
- A footpath, bridleway, or restricted byway, created in consequence of a rail crossing diversion order.
- A footpath, bridleway, or restricted byway, created in consequence of a Harbours Act 1964 order.
- A footpath, bridleway, or restricted byway, created in consequence of a Transport and Works Act 1992 order.

**12.18** As previously noted, Hatherley Development Ltd submitted Spinney Court and the claimed path for adoption as publicly maintainable highways under the 1959 Act, in the 1970s. Spinney Court was accepted as detailed in the letter of adoption dated 12 January 1978, but the claimed path was rejected on the basis that the “*steps down to the county road were not in an acceptable condition for adoption*”.

**12.19** The Definitive Map, unlike the List of Streets, provides legally conclusive evidence of its status (as provided by statute) compiled by means of records and evidence of public use, which may or may not be publicly maintainable. As previously stated, although the claimed path was rejected for adoption on the List of Streets, this would not preclude either a statutory claim of express or presumed dedication, or a claim of inferred dedication at common law, of a path to be added to the Definitive Map as a highway.

**12.20** If it is considered that highway rights are reasonably alleged to subsist resulting in the direction that an order should be made to add the claimed path to the Definitive Map, it recommended that the path is not accepted as publicly maintainable for the same reason that it was rejected previously; public rights along this path have come into being post 1959 when criteria for paths proposed to be adopted as publicly maintainable was introduced. The steps as they are today, are still not considered to be of an acceptable standard for adoption.

**12.21 Use by the ‘public’:** 13 of the 15 individuals claiming use of the path live either at Weavers Row or Spinney Court. Consideration therefore should be given to whether this constitutes use by the ‘public’. “*There appears to be no legal interpretation of the term ‘the public’ as used in s31. The dictionary definition is “the people as a whole, or the community in general”. Hence, arguably, use should be by a number of people who*



*together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) 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.” Wildlife & Countryside Act 1981 – Definitive Map Orders: Consistency Guidelines (5.2.12) 27 January 2022.*

**12.22** Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local community.

**12.23** The user evidence shows that all individuals used the claimed path to access local schools, work, or walking dogs. Observations made by some of the 15 individuals include;

- Mrs Elias of Weavers Row (12 years claimed use) stated; *“As a family we use the footpath daily. My children use the path to walk to and from school and to get to their bus. I use it most days to walk down to work or school”.*
- Mrs Griffiths of Spinney Court (43 years claimed use) stated; *“We have lived here since 1976 and used the steps until their condition became poor. My children used them daily between 1991 – 1999 on their way to catch a bus to school. I observed other children and adults who lived in Spinney Court or Weavers Row using the steps on a regular basis during the late 70s and through the 80s”.*
- Ms Holloway, previously of Weavers Row (8 years claimed use) stated; *I used the path when running. My children used the path every day to get to schools, work, to access bus stop on Brimscombe Hill”.*
- Mrs Westcott, of Weavers Row, identified as No.5 in the summary of user evidence forms stated, *“The application route is not just used by all neighbours, but also by the general public, visitors to the church etc”.*

**12.24 Use ‘as of right’ (without force, secrecy, or permission);** 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 that use was by force or by secrecy.

**12.25** With regard to use by permission Kelsey Ross, identified as No.9 in the summary, lived at No.1 Weavers Row for part of her 27 years. In response to Q.15, she stated that part of her use of the path was because of a *“Private right of way as granted in the title to 1 Weavers Row, Walls Quarry, Brimscombe, GL5 2 PX”.* This easement refers to the conveyance as noted in paragraph 10.5 of this report. An easement was conferred on all 5 properties making up Weavers Row granting a private right of access across the rear of the properties to the claimed path. It did not include the path itself and therefore this would not constitute permission capable of rebutting the claim.

**12.26** This application would therefore support a case for deemed dedication as a public footpath.

**12.27 Whether there is evidence of a lack of intention to dedicate a public right of way;** “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*”.

**12.28** 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. None of the 15 individuals supplying evidence of their use noted stiles, gates, notices, or obstructions along the path and none were challenged or verbally turned away.

**12.29** Although it is not known whether anyone associated with Hatherley Developments Ltd, retains an interest in this land over the 20-year period being considered for this application: 1999-2019, it is important to remember that this company tried to expressly dedicate it as a public highway in the 1970s.

### **13. CONCLUSIONS**

**13.1** 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.

**13.2** 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 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) and discussed below.

**13.3** Analysis of the 15 accepted PPEs indicates that the claimed route, as described and marked on the accompanying maps, has been used by members of the public, on foot, ‘as of right’ and without interruption for over 20 years. In the 1970s Hatherley Developments Ltd proposed to expressly dedicate the path as an adopted highway and no evidence has been provided of any subsequent challenge to public use leading up to the application in 2019. It is submitted that this path is deemed to subsist and must now be protected by being recognised on the Definitive Map as a public footpath. Thus, the recommendation is as follows:

- That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B.

### **14 APPENDICES:**

- JH1** 1:5,000 scale Location Map
- JH2** Claimed path plan; 1:1250 scale
- JH3** 1971 Conveyance & plan
- JH4** Photos of claimed path
- JH5** Highway adoption record: 12 January 1978
- JH6** Summary of User Evidence Statements
- JH7** Bar chart of use; 1999 - 2019