

Regulatory Committee:	Commons and Rights of Way Committee - Report of the Lead Commissioner Communities & Infrastructure
Date:	3 October 2023
Chair:	Cllr Graham Morgan
Presenting Officer:	Jaci Harris
Item Type:	For decision
Purpose of Report:	To supply evidence to enable the determination of the following Definitive Map Modification Order application: APPLICATION FOR A MODIFICATION ORDER TO ADD A LENGTH OF PUBLIC FOOTPATH IN LOWER LYDBROOK, LYDBROOK PARISH, GLOUCESTERSHIRE (ref:573/11/141(6))
Recommendations of the Presenting 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.
Background Documents:	Paragraph 8.1 – 2001 Consultation responses
Forthcoming Decisions:	To flag those items that get referred on to Council for determination.
Appendices:	As listed under sub-heading 12: 'Appendices' in the report.
Contact Information (For information on the report)	Jaci Harris, Asset Data Officer (Definitive Map), Highway Records & DMMO Team Telephone: 01452 328981 Email: jaci.harris@gloucestershire.gov.uk (quoting file reference)

1. 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 route would *not* become maintainable at the public expense.

2. SUSTAINABILITY & EQUALITY IMPLICATIONS

No sustainability implications have been identified.

3. 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

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.

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 circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

REPORT

4. BACKGROUND

- 4.1 A location map at scale 1:5,000 is attached (**JH1**) showing the location of the application route in Lower Lydbrook, Lydbrook Parish and is found within Ordnance Survey Grid Square SO 5916.
- 4.2 The Definitive Map Modification Order (“DMMO”) application was submitted by Lydbrook Parish Council on 26 February 2001. It included Form 1, and an accompanying plan, drawn at 1:1250 scale, of the route being claimed from Public Footpath FLY12, adjacent to Colliers Cottage to the Public Footpath RLY17 at the point that it crosses the old railway line. Form 3 was also supplied, certifying that the application had been served upon:-

Mr Charlesworth of Constable House
Railtrack PLC

Sections of the route crosses unregistered land. Notices were therefore erected advising anyone with an interest in the land of the application.

- 4.3 It was apparent that a landowner had not received notice of the application. Messrs L.W.G & C.J. Jones of Coleford were served Notice on 30 June 2003.

5. DESCRIPTION OF CLAIMED ROUTE

- 5.1 A plan of the application route at a scale of 1:1250 is held (**JH2**). The claimed way commences at the boundary with the Statutory Forest at the junction of Public Footpath RLY12 adjacent to the property Colliers Cottage at a point marked A on the attached plan at Ordnance Survey Grid Reference (OSGR) SO 5965/1681 and continues in a southerly direction for approximately 218m along the line of the dis-used railway to the junction of Public Footpath RLY17 at the point that it crosses the old railway line at a point marked B at OSGR SO 5969/ 1659. The application route is identified by a black broken line between points A-B on the plan.

6. HISTORY OF APPLICATION ROUTE

- 6.1 Members should note that the application route is part of a claim for an additional public footpath made by Dr Cahn in February 1984 (reference 573/11/141(1)). A plan showing the original 1984 claim comprising sections; A-F & G-F, is attached **JH3**. The claimed route consisted of the track bed of the railway between Lower Lydbrook Village and the railway viaduct with a spur route connecting the property, Bayhead and the Church. On 19 March 1986, the Commons and Rights of Way Sub-Committee determined that no order be made due to the insufficiency of the evidence. There was no proven 20 years of uninterrupted user since the railway became inoperative in 1960.
- 6.2 The applicant appealed the decision to the Secretary of State (“SofS”) and asked that he consider the claim in smaller individual sections. This request was rejected, the Inspector preferring to examine the entire length of the claimed route as one entity. He did concede however that the spur route from Bayhead to the Church; G-F (highlighted pink on **JH3**), was different in nature. He considered that there was sufficient evidence of use at common law of the spur route and directed the County Council to make an order for it. This was confirmed and added to the Definitive Map as Public Footpath RLY39.
- 6.3 Regarding the main application route, A-F, the SofS noted the following points; until the track was lifted in 1960, British Rail regarded the railway as operational and thus any use of it would have been by trespass and a criminal offence under Statute. Notices to this effect were erected along the line saying, ‘*Trespassers will be prosecuted*’ (noted by one of the individuals who supplied user evidence) until 1960. Part of the British Rail land was leased from the Crown Commissioners of

Woods (now Forestry Commission) who held the freehold until 1978. In 1973 however, both the Crown and British Rail sold the freehold over which the application route crossed, to a private individual who proceeded to erect private signs and bollards along it. Lastly, a certain amount of duplication was noted when examining the user evidence forms submitted in support of the application. Thus, the appeal of the main application route A-F, by Dr Cahn was dismissed.

- 6.4 The application subject to this report today is one of three submitted by Lydbrook Parish Council in the full knowledge that the previous application had not secured the main application route. However, the Parish Council were convinced that there had now been an uninterrupted 20 year user period, during which time the landowners had taken no overt steps to prevent dedication.
- 6.5 The first of the smaller individual routes; B-C, subject to an application dated 5 June 1998 (ref: 573/11/141(4)) and shown yellow on appendix **JH3**, was determined by the Commons and Rights of Way Sub-Committee on 26 July 1999. The Forestry Commission had disposed of their freehold over which the application route crossed in 1973 and British Rail had disposed of their interest in 1960 by taking up the track rails. Sufficient evidence of user was considered to exist, and the County Council were asked to make an order adding this section of route to the Definitive Map. The order was made on 16 March 2004 and objections were received. The objectors, confirmed their position in 2009.
- 6.6 The second of the smaller individual routes; C-F, subject to an application dated 26 July 2006 (ref: 573/11/141(8)) and shown orange on appendix **JH3**, was rejected by the Commons and Rights of Way Sub-Committee on 28 February 2008. Insufficient evidence of use was considered to exist. Lydbrook Parish Council appealed but this was in turn refused by the SofS on the grounds that the appeal was invalid.
- 6.7 The third application, subject to this report, is shown A-B and coloured blue on appendix **JH3**.
- 6.8 The claimed route was surveyed on 30 August 2023 at which time photos were taken to show it's character. These are held (**JH4A-F**).

7. DOCUMENTARY EVIDENCE

- 7.1 **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.**
- 7.2 The County Archivist has examined sources in the Gloucestershire County Record Office to see if this route 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 Asset Data Officer.
- 7.3 **The Severn & Wye Railway & Canal Company;**
- 7.4 The Severn & Wye Railway & Canal Company started as an early tram road network, known as the Lydney and Lydbrook Railway Company, established under an Act of Parliament; *'Making and Maintaining a Railway from the River Wye at Lidbrook to Lower Forge in Lydney'* (49.Geo.iii c.159 (1809)) in the Forest of Dean. Unauthorised access under this Act was trespass and as extracts from newspapers of the time show, could result in prosecution. The purpose of the Act was to facilitate the carriage of minerals to watercourses for onward conveyance to the neighbouring South Wales Railway mainline. Plateways (an early kind of railway, tramway or wagonway, where

the rails are made from cast iron – see photo below) were originally horse drawn but, later on, they were replaced by a locomotive-worked broad gauge edge railway, and then to a standard gauge railway. Further Acts of Parliament from 1810 provided for extensions of the main line to be made, to Lydbrook, Cinderford and Coleford, at which time the opportunity was taken to change the name of the company to the *Severn and Wye Railway & Canal Company*.



Wikipedia

- 7.5** The length of railway, subject to this application, was created under the ‘Severn and Wye Railway and Canal Act’ of 12 May 1870 and on 30 September 1875 it was opened for passenger traffic. In 1885 the Severn & Wye Railway & Canal Company amalgamated with the Severn Bridge Railway Company, before the merged companies were taken over by the Great Western Midland Railway Companies in 1894. The Lydbrook passenger service was decommissioned in 1929, the goods service ended in January 1951 and the track bed was dismantled in 1960. *Whilst operational*, any authorised use of the railway would be by invitation, ‘by right’ and not ‘as of right’ and any unauthorised access of either the tram road or subsequent railway, would constitute a criminal offence under Statute Law and as such, both would preclude a claim of dedication.
- 7.6 Inclosure Award:** None found.
- 7.7 Ordnance Survey 1811 1”:1 mile 1817:** Application route not shown.
- 7.8 1824 Bryant & Greenwoods Maps –** do not show the application route.
- 7.9 Westbury on Severn Tithe Map & Award 1839 (Glos Archives - GDR/T1/192);** The Tithe Map does not show the application route.
- 7.10 Ordnance Survey First Edition; 25”1 mile, Map sheet 31.1 - published 1891- (National library of Scotland);** This is one of the first edition sheets which used colouring. The application route is not shown. The railway line was operational at this time.
- 7.11 Private Estate Maps**
- Survey of West Dean township by F.W. Dibben 1859: route not shown.
 - Driver’s survey of the Forest 1787: Area illustrated too small a scale to be useful.
 - Map of the Township of East Dean 1856: This is a modern to scale hand drawing of an extremely large original, which does not show the area concerned.

- 7.12 Ordnance Survey; Second and Third Editions, 25":1 mile, Map sheet 31.1 – published 1902 & 1923- (National library of Scotland);** The application route is not shown. The railway line was operational at this time.
- 7.13 Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25": 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheet 31/1.** The application route is not shown – the railway line was operational at this time and included in hereditament 3014 which is recorded as being in the ownership of the Severn & Wye & Midland Railways Joint Company.
- 7.14 Statutory Forest of Dean and Public Rights of Way;-** Land owned by a government department, including the Forestry Commission, is Crown land. The Highways Act 1980 and its predecessors do not bind the Crown, and thus any claim for a right of way across land which is, or was at the relevant time, Crown land, cannot rely on the 20-year user provisions in section 31 of that Act but may be considered at Common Law.

However, the National Forest Park Committee (Forest of Dean) produced a report in 1938. Paragraph 8 stating that "*the Forest is well served by roads and tracks and is freely available to the general public. We understand that, although there is not a public right of access to the inclosures, the Forestry Commission, subject always to the need for special precautions for the protection of young plantations, have no objection to controlled access provided care is taken to shut gates and to avoid damage*". This report, which confirms a regulated permissive right of foot over the Statutory Forest, has the effect of making any subsequent use permissive, thus not 'as of right' and hence would not establish a right.

- 7.15 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 ("NPACA 1949"); Glos Archives.** The route subject to this application was not claimed.
- 7.16 Ordnance Survey; 25":1 mile, Map sheet 31.1 – published 1973:** This map shows the application route annotated Path (um).
- 7.18 DOCUMENTARY EVIDENCE CONCLUSIONS;-**

The documentary evidence discovered does not greatly assist this application. No evidence has been found which suggests that the claimed route existed prior to the creation of the 'Lydbrook - Lydney Railway' (tram road) in 1809. The railway was operational until 1960, so any use of the track prior to this date would have been both a trespass and a criminal offence under the relevant railway legislation. A further complication is the fact that part of the application route crossed Crown land for which a permissive right on foot existed. However, as stated in paragraph 6.3 of this report, both the Crown and British Rail sold their freehold interests in the land over which the application route crossed in 1973 at which point a statutory claim of presumed dedication could arise.

8. CONSULTATIONS

- 8.1** In April 2001, a consultation was carried out of; The Ramblers Association, The Parish Council, the local County Councillor, The District Council, and The British Horse Society. Copies of the full responses are held as background papers to this report.
- The British Horses Society (BHS) responded on 23 May 2001 to the effect that "*I have not felt it appropriate in the present Foot & Mouth Disease situation to make a site visit and I cannot make any serious comment.....I hope therefore that it will be possible to postpone consideration of these matters until the FMD restrictions can be lifted*". No further response was received from the BHS.

- The Forest of Dean District Council responded on 4 June 2001, to advise; “... *The section of the railway line in question forms part of a proposal to construct a cycle track....therefore although the District Council would not wish to object to the proposal, neither would it wish to see any obstacle put in the way of implementing its plan policies...*”
- The Ramblers Association responded on 20 September 2001 to say: “*We consider the claimed route would be a useful add-on to the path network*”.
- Messrs L.W.G. & C.J. Jones responded on 14 April 2004 to say “.....*We strongly object to this proposal due to the fact that an established footpath number RLY12 already runs the whole length along the Old Dram Road virtually parallel to the proposed new path with the majority of the existing path being only 10metres or so to the East....* (We cannot take into account issues such as suitability of desirability and therefore the proximity of existing public rights of way would be irrelevant).
- Mr N. Ward responded on 29 April 2004 to say that he “*had no objection to the modification order itself*” but then went on to question the existence of an official route shown on the Definitive Map across his land.

8.2 In August 2023, a further consultation exercise was carried out. The following organisations, user groups and landowners (as identified by Land Registry) were consulted regarding this application: Messrs Jones (landowners), Lydbrook Parish Council, County Cllr Hayle, The Forest of Dean District Council, The Ramblers Association, The British Horse Society, Cycling UK, and The Trail Riders Fellowship. The following responses were received;

8.3 Forest of Dean District Council (24 August 2023):- “*Many thanks for the consultation. The Forest of Dean District Council Local Plans Team has no comments to make on the proposal*”.

8.4 The landowner, Mr L Jones responded by email of 30 August 2023; “*After consideration, we formerly object to the footpath amendment request from points A to B due to the fact that there is already an existing footpath linking RLY12 to RLY17 to few meters to the East*”.

9. USER EVIDENCE

9.1 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”.

9.2 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.

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

9.4 **For this report therefore the user evidence will be assessed over the 20-year period 1981-2001 leading up to the application.**

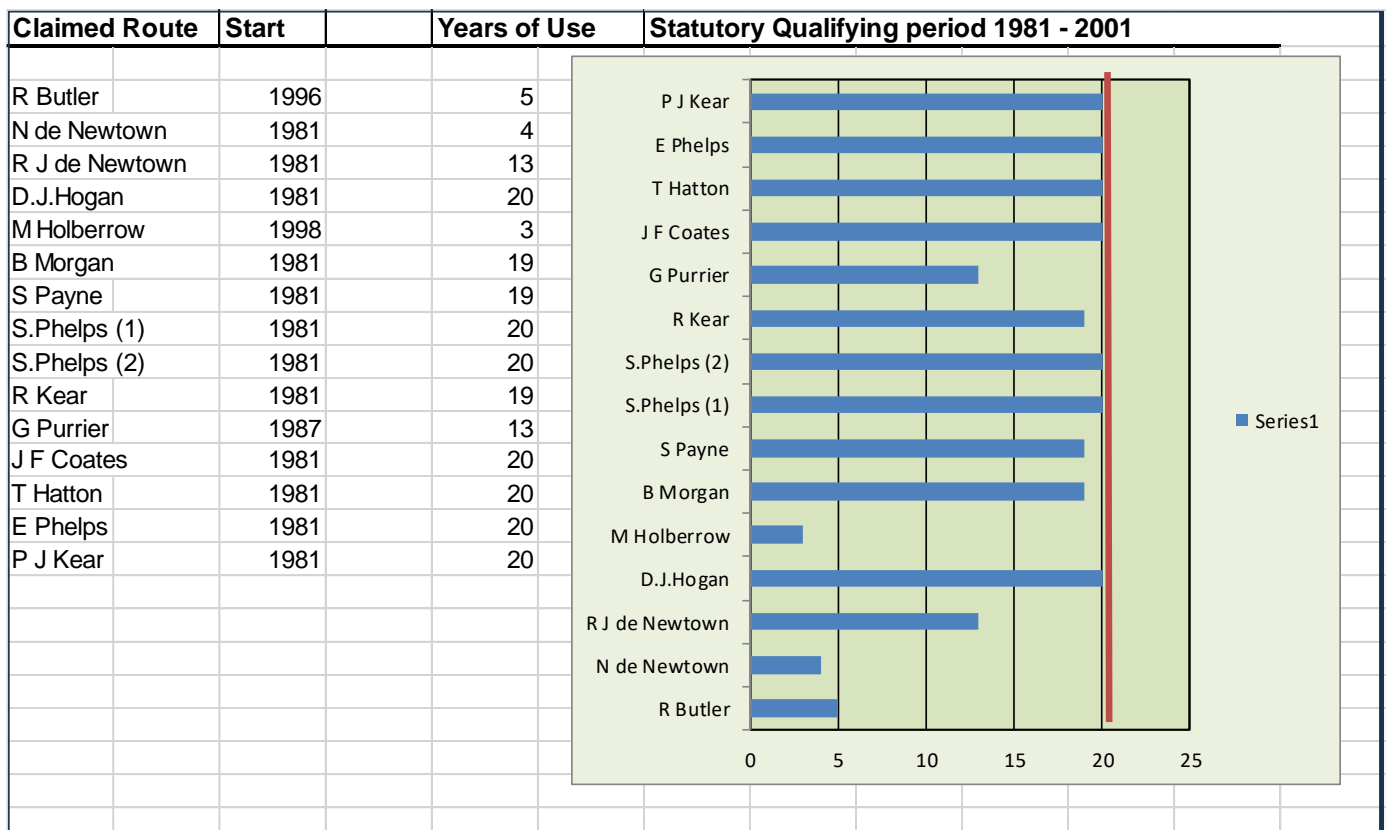
9.5 The application will be analysed under this statutory test as opposed to common law because the user evidence post-dates the disposal of interest by the Forestry Commission (Crown) and British Rail in the land crossed by the application route in 1973.

9.6 The extent and nature of the claimed use;

9.7 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.

9.8 15 Public Path Evidence Forms (“PPEFs”) were completed by 15 individual members of the public in support of this application dating back to 1923 claiming a public footpath. However, any use prior to 1973 must be disregarded for the reasons set out in paragraph 7.18 of this report.

9.9 Members of the public are not expected to be cartographers, but some individuals highlighted the route of Public Footpath RLY12 as the application route. Fresh maps were prepared, and the individuals concerned were asked to re-draw their maps. This report has not included the user evidence submitted by the 20 individuals in support of the original 1984 application because the Secretary of State considered the amount of duplication to be a cause for concern. A summary of the PPEFs is held as a background paper whilst a bar chart summarising the use over the qualifying period 1981 – 2001 is set out below, and appended **JH5** (please note that two entirely different individuals named S. Phelps, living at different locations, submitted evidence of use).



9.10 All 15 individuals claim use of the path over part or all the 20-year qualifying period under analysis. Of those, 7 claim use over the entire qualifying period. 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.

- 9.11 All 15 individuals identified a path which is consistent with the depiction of the claimed route A-B, as shown by the applicant. Considering frequency, 5 claimed daily use, 7 claimed weekly and the remaining 3 claimed use on a monthly basis.
- 9.12 The application route has been used mainly for the purpose of recreation, accessing the shops/ doctors and dog walking.
- 9.13 **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 of the application route was by force, secrecy or permission.

Some of the responses received regarding use, are as follows;

- Mr Hatton – in response to Q.8(d) have you ever been given permission to use the path? *“Permission was not needed, sought, given, withheld or mentioned”.*
- Mrs Kear – in response to Q.9 can you give any further particulars? *“..Through the years we have kept this pathway open, by cutting the rubbish, i.e., brambles, fern, nettles, ash saplings etc which invade the area....”*
- Mr Newton – in response to Q.8(d), have you ever been given permission to use the path? *“Not aware of requirement”.*

- 9.14 The user evidence would be sufficient for a presumption of dedication of a public footpath.
- 9.15 **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”.*
- 9.16 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. As noted in paragraph 8.1 of this report, the landowner, Messrs Jones, submitted a letter of objection in response to the original consultation in 2001 and this was re-stated in response to the 2023 consultation on the basis that Public Footpath RLY12 runs parallel to the claimed route. This objection in itself, would not be sufficient to rebut this claim but there is nothing in the submitted user evidence to suggest either a challenge to the public’s use or ‘overt’ acts, i.e., physical notices or obstructions along the path, or being turned away verbally, which demonstrates the landowner’s lack of intention to dedicate the route as a highway after 1973 when the railway and Crown had disposed of their interest in the land crossed by the application route. Further, no Depositions under s31(6) Highways Act 1980 have been lodged by the landowner with the Surveying Authority, which would, if the process was carried out correctly, be capable of defeating this claim.

10. MAINTAINABLE AT PUBLIC EXPENSE

10.1 Sections 38 & 39 of the Highways Act 1959 (“1959 Act”) introduced a new procedure for establishing public routes (including 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*”.

10.2 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. Section 36 of the 1980 Act set out the following categories of way as being automatically 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.

10.4 The application route is not considered to fit into any of the above categories and the majority of evidence, must be disregarded prior to 1960 whilst the railway was operational. There is no evidence of maintenance carried out by the highway authority and the route was not claimed during the 1949 process of compiling the Definitive Map.

10.5 There is nothing to prevent the application route from being recorded on the Definitive Map however, which 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. If it is considered that highway rights subsist or are reasonably alleged to subsist resulting in the direction that an order should be made to add the claimed route to the Definitive Map, it recommended that it is recorded as not being publicly maintainable because the statutory presumption of dedication took place post 1959 when criteria for ways proposed to be adopted as publicly maintainable was introduced.

11. CONCLUSIONS

11.1 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.

11.2 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).

11.3 Determination of applications to modify the Definitive Map are made upon the discovery of sufficient evidence of use. The original application made by Dr Cahn in February 1984 failed due to insufficiency of use because the application route crossed operational railway land and part also crossed Crown land where there was a right of access in place. Further the Secretary of State had concerns regarding the veracity of the user evidence. The combined effect of these considerations meant that no order could be made.

11.4 The present application, forms part of the original 1984 application, and is considered to be supported by sufficient evidence of use post the disposal of the land affecting the claimed route in 1973 by British Rail and the Forestry Commission (Crown).

11.5 The analysis of the 15 UEFs indicates that members of the public used the application route 'as of right', without interruption in excess of the 20 years required for a statutory presumption of dedication over the timeframe 1981-2001. Further, insufficient 'overt' evidence has been submitted by the landowner to indicate a challenge to public use or show his lack of intention dedicate it as a highway.

11.4 It is submitted therefore that this route subsists along section A-B and must now be protected by being recognised on the Definitive Map as a public footpath.

11.5 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.

12. APPENDICES:

JH1	1:5,000 scale Location Map
JH2	1:1250 scale Application Plan
JH3 A-P	Photos of claimed routes.
JH4	Plan of original 1984 application
JH5	Summary of use