

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 WESTBURY ON SEVERN & NEWNHAM PARISHES, GLOUCESTERSHIRE (ref:573/11/159(1))
Recommendations of the Presenting officer:	<ul style="list-style-type: none"> • That no order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B-C due to insufficiency of user across the property of the White Hart Inn, thus allowing the landowner to identify use of the route as a highway as opposed to a visitor to his establishment and have the opportunity to resist it. • 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:	<ul style="list-style-type: none"> • Paragraphs 8.4/ 8.6 & 8.9 'Consultations'. • Paragraph 9.8 – Summary of User Evidence Forms
Forthcoming Decisions:	To flag those items that get referred on to Council for determination.
Appendices:	As listed under sub-heading 12: ' <i>Appendices</i> ' 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. DEPARTMENTAL CONTACT

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4. 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

5. BACKGROUND

5.1 A location map at scale 1:25,000 is attached (**JH1**) showing the location of the application route across the parishes of Westbury on Severn & Newnham. It lies approximately 3.2km southeast of Cinderford (as the crow flies) and is found within Ordnance Survey Grid Squares SO 6911 & 6912.

5.2 The Definitive Map Modification Order (“DMMO”) application was submitted by the Newnham Riverside Path Group on 4 April 2022. It included Form 1, a report, and an accompanying plan, drawn at 1:4500 scale, of the route being claimed from Severn Terrace, Newnham to The White Hart, Broadoak, Westbury on Severn. Form 3 was also supplied, certifying that the application had been served upon:-

Mr Kerr, Culver House, Newnham
The Crown Estate Commissioners, London
The Network Manager, Gloucestershire County Council,
Hawthorn, The Community Pub Co.
The White Hart, Broadoak

5.3 Sections of the application route are unregistered. Permission, therefore, was granted to erect Form 2; ‘*Notice to Owners and Occupiers*’. Photos, taken on 4 April 2022, were supplied by the applicant, showing the notices in place at the start of Severn Terrace and on the flood defence bank just before the White Hart overspill car park.

5.4 Concern was raised by Mr Puttock of Newnham House and Mr Dickie of Hulins Cottage, both of whom claim riparian ownership but had not been contacted directly about the claim. The issue of riparian ownership is not addressed in any detail in this report. The River Severn, in the vicinity of this application, is tidal and therefore the foreshore (area between high and low water mark of ordinary tides) is vested in the Crown. Land Registry does not record ownership of the remaining strip of land between the high water mark and the adjacent properties. The applicant clarified however on 12 July 2023; *“In addition, we wrote to all the properties (adjacent to the river) on 2nd October 2021 explaining about the application we were making, reporting that the Land Registry showed the application route on Severn Terrace and along the riverbank to the car park to be unregistered land, and asking them to let us know if they thought their land extended onto the application route as we had a legal obligation to contact them formally. None of the property owners replied to the letter to say that they had ownership or claim on the application route. We wrote again to the same property owners on 4th April 2022, reminding them of the previous letter and informing them that, as recommended, the official notice of the application (Form 2) was now displayed at the start of Severn Terrace and further along the route near the White Hart”*. Messrs Puttock and Dickie were subsequently sent copies of the consultation paperwork and their responses are held in sub-section 10 of this report.

6. DESCRIPTION OF CLAIMED ROUTE

6.1 A plan of the application route at a scale of 1:6000 is held (**JH2**). The claimed way connects Severn Terrace, Newnham, to the White Hart Inn at Broadoak, Westbury on Severn, and is identified by a black broken line and marked A-B-C on the plan. The applicant subsequently requested that the claimed way be amended to exclude the section across the White Hart Inn at Broadoak, Westbury on Severn. A plan showing the amended application route A-B is held (**JH3**).

- 6.2 In terms of quantity, there are sufficient individuals who claimed use of the original application route A-B-C to warrant an investigation of the claimed way in its entirety. All references therefore to the application or claimed route in this report will refer to the original route A-B-C.
- 6.3 Part of the application route, (identified by green hashed lines within a red outline) was designated on 10 June 1977 as a village green (VG20) under section 6(2) of the Commons Registration Act 1965: Register of Town and Village Greens, for the purpose of lawful sports and pastimes which would include organised or ad-hoc games, picnics, fetes, and similar activities.
- 6.4 The claimed route was surveyed on 14 July 2021 at which time photos were taken to show its character. These are held (**JH4A-O**). The application route has an overall length of approximately 1.531km and runs between the A48 highway and the foreshore. Whetstones Brook and Vostells Brook feed into the river under the application route.
- 6.5 The route commences at the junction of Severn Terrace and Church Road at a point marked A on the plan **JH2** at Ordnance Survey Grid Reference (OSGR) SO6917/1171. Notices, fixed to a wall and fence on each side of this private road state; "*Pedestrians Only–No unauthorised vehicles*". The route runs along Severn Terrace for approximately 55 metres, the first 34 metres of which is comprised of uneven tarmac which then becomes scrub. The application route turns in a southerly direction for approximately 52 metres before turning back on itself and passing through overgrown grass and scrub for approximately 300m. The route then proceeds along the embankment where the first 50m has a loose tarmac surface adjacent to Newnham Car Park & Toilets (maintained by Forest of Dean District Council, although the land is unregistered). An outfall sluice, controlling the discharge of water from Whetstones Brook into the River Severn and crossing a short area of Crown land, is located under the application route at this point. This pipe is maintained by the Environment Agency ("EA"), by virtue of a Deed of Grant executed in 1990 between the Crown Estate and the EA's predecessor, the National Rivers Authority.
- 6.6 The next 200m or so is well maintained by Newnham Parish Council and has benches & waste bins along it. An old photograph, courtesy of the '*Francis Frith Collection*', ©1955 shows that it is largely unchanged.



Courtesy of the
Francis Frith
Collection
©1955



2023 – View of promenade – benches moved to top of embankment.

- 6.7** The next 600m or so of the claimed route is very overgrown, with short sections of boardwalk covered in wire netting. The applicant advised that Newnham Parish carries out some maintenance of this section. The section of application route leading to the boundary of the White Hart Inn overflow car park, comprises an embankment which is maintained by the Environment Agency. Another outfall sluice crossing Crown land is located under the application route, immediately before the car park. This area of land at OSGR SO 6972/ 1276, shown as point B on the plan, is the termination point for the amended application route.
- 6.8** The White Hart Inn overflow car park is surfaced with recycle bins to one side (Forest of Dean District Council website shows this to be a local recycling site, which the owners of the site permit the public to use). There are no designated parking spaces, and it was empty on the day of inspection. There is an exit/ entrance adjacent to this overflow car park leading directly onto the A48 highway. The application route however continues passed the Inn itself and across the northernmost car park, which is smaller with designated parking spaces. The termination point of the claimed route is at its junction with the A48 highway identified as point C on the said plan at OSGR SO6987/ 1292.

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 Ordnance Survey Maps; The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

7.4 Ordnance Survey 1811 2":1 mile Pen & Ink on Paper Drawing by Robert Dawson (Newent OSD174) Wikimedia -This drawing shows the A48 public highway but does not show the application route.

7.5 Ordnance Survey First Edition; 25":1 mile, Map sheet 32.13 - published 1881- (National library of Scotland); This is one of the first edition sheets which used colouring. This map identifies the foreshore (the area between the High and Low Water Mark of Ordinary Tides). Two areas of foreshore extend across the application route to the A48: 1) area abutting the current extended car park belonging to the White Hart Inn & 2) Newnham Car Park. This map further suggests that use of the section of application route between Severn Terrace (point A) to Newnham Car Park would have involved walking over land designated as foreshore. An unenclosed track is shown by means of double pecked lines along the section of application route between Newnham Car Park to the Sawmill near Hawkins Pill (today the Silver Fox Café). Vostells and Whetstones Brooks are shown flowing under the A48 but across the application route. Extracts of this map are held **(JH5)**.

7.6 Ordnance Survey; Second and Third Editions, 25":1 mile, Map sheet 32.13 – published 1902 & 1922- (National library of Scotland); These maps both show the application route as described above for the 1st edition.

7.7 Ordnance Survey; 25":1 mile, Map sheet 32.13 – published 1973: This map shows the foreshore nearer the river allowing access along the application route between Severn Terrace (point A) to Newnham Car Park. The areas of foreshore at each car park (as described in paragraph 7.5) are still shown extending to the A48. The brooks are now culverted and running under the application route. The section of route shown by double packed lines between Newnham Car Park to the Sawmill near Hawkins Pill (today the Silver Fox Café) is annotated 'path' **(JH6)**.

7.8 1824 Bryant & Greenwoods Maps – do not show the application route.

7.9 Westbury on Severn Inclosure Map/ Award 1851; There is no known Inclosure Award for the area of interest.

7.10 Newnham Inclosure Map/Award – no known documents.

- 7.11 Newnham Tithe Map & Award 1839 (Glos Archives - GDR/T1/129);** This Tithe Map covers the area of application route Severn Terrace to Hawkins Pill. It does not identify the route itself. The foreshore is shown abutting the A48.
- 7.12 Westbury on Severn Tithe Map & Award 1839 (Glos Archives - GDR/T1/192);** The Tithe Map does not show the application route.
- 7.13 National Archives - 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 32/13 (D2428).** The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. To ascertain the value of all land as of 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (1898 -1902 in Gloucestershire) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.
- 7.14** Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist but are unlikely to be good evidence that rights of way do not exist.
- 7.15** Because the base map used for this process is the OS 25" second edition map, the application route is shown as described in paragraph 9.5 of this report. The route available between Newnham Car Park and the White Hart Inn car park is numbered 631 and recorded as wasteland in the ownership of the Duchy of Lancaster. The hereditament in which the White Hart Inn is located is numbered 201 and was in the ownership of the Stroud Brewery Company Ltd. No deductions were made for public rights of way.
- 7.16 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.
- 7.17 Conveyance granting a private right of access to section of application route between Newnham Pill and Broad Oak -14 May 1924**

Sir Anselm Guise (Duchy of Lancaster- private estate owned by the British Monarch), granted a private license in 1924 ("1924 license") to members of the public '*under the control*' of Newnham Urban District Council over the foreshore between Newnham pill and Broad Oak as a promenade and for the holding of fairs. It was not binding on successors in title and one shilling was paid annually on the 1 April for the conferred rights.

7.18 DOCUMENTARY EVIDENCE CONCLUSIONS;-

The documentary evidence, consisting of Ordnance Survey maps, and a private Agreement conveying a private license to a specific group of people, is not considered to be sufficient on its own, to establish the dedication of the application route.

8. CONSULTATIONS

In June 2022, the following organisations, user groups and landowners (as identified by Land Registry) were consulted regarding this application: The Crown Estate, Admiral Taverns, Hawthorn Leisure Limited, County Cllr Hoyland, The Environment Agency, The Forest of Dean District Council, Gloucestershire Wildfowling and Conservation Association, Newnham Parish Council, The Ramblers Association and Westbury on Severn Parish Council. Copies of all the emails received in response are held in full as background papers.

Emails were received from Mr Puttock and Mr Dickie, both of whom own properties near the river, in the vicinity of point A. They were concerned that they had not received direct notification of the application as riparian owners. Land Registry does not record this claimed ownership but the existence of an area of unregistered land, required the installation of impersonal notices at either end of the application route, (as noted by Mr Dickie). Both gentlemen were given the opportunity to respond to the consultation. Mr Puttock and Mr Dickie's responses are set out below.

8.1 **The Crown Estate responded on 23 June 2022:** *"We were aware of the application to add the public footpath to the Definitive Map, having been contacted by the Secretary of the Newnham Riverside Route Group. Accordingly, we have assessed the potential impact on Crown Estate foreshore through an in-house records conflict checking process and also a site visit by our regional managing agent.*

It is worth mentioning that The Crown Estate's only interest in the locality is the foreshore running along the River Severn and the riverbed. There is a permissive right of access for pedestrians to walk along The Crown Estate's foreshore.

The draft Definitive Plan suggests that parts of the foreshore may intersect the proposed footpath at The White Hart. Our agent has commented that there is already a public footpath by the road from the SW car park entrance. Looking at the plan in the public notice (see attached), the applicant has drawn its line straight through the car park; if this line was used 'literally' the pedestrian would walk through some of the buildings erected in the car park! We have granted a lease of a sliver of foreshore to enable the proprietors of The White Hart to build over and support the edge of the car park. So, our view is that in practice the proprietors of The White Hart will not want a footpath to go through their car park as there is an existing footpath but if it does it will not go near the sliver of former foreshore and so The Crown Estate will be unaffected. Could you comment on this, please and confirm our conclusion is correct, or otherwise? Have the proprietors of The White Hart been consulted?

There is one very small part of The Crown Estate's ownership that for sure will be affected by the footpath, namely the Unlawater Outfall, which is the responsibility of the Environment Agency (EA) (formerly the National Rivers Authority). I enclose a copy of a Deed of Grant that shows the location of the land in question. Presumably the footpath will not adversely affect the outfall, its operation and maintenance? Has the EA been consulted?"

Upon seeking clarification of whether the Crown Estate considered the route to be foreshore, the following response was received on 3 February 2023: *The foreshore doesn't extend underneath the footpath. However, there are two pieces of land where the outfalls are located that are still in the ownership of TCE...*

8.2 **The Environment Agency responded on 12 July 2022:** *"As the route is open and already used by the public, the Environment Agency would not have any objection to this right of way".*

8.3 The Forest of Dean responded on 6 June 2022: *“Thank you for this email. I can confirm that we do not hold any data on file regarding the use of this route. However, I must admit that I have personally used it about 7 or 8 years ago!”*

8.4 TLT Solicitors LLP responded on behalf of Hawthorn Leisure LTD, the freehold owner of The White Hart Inn at Broadoak. The letter is held as a background paper to this report, but the points raised can be summarised as follows:

- 1) *Notices at either end of the car park read “Car Park for Patrons Only”. This is considered to be sufficient evidence of the landowner’s lack of intention to dedicate the route as a public right of way.*
- 2) *A barrier is located across the northern car park, and when this barrier is closed, it would prevent access. Closure during Covid & re-surfacing of the car park would constitute an interruption.*
- 3) *Use of a public house is by invitation and use would be “by right” and not “as of right”.*
- 4) *The route used across the area of the White Hart Inn and its car parks by members of the public who submitted user evidence forms was questioned.*
- 5) *Members of the public who submitted user evidence forms claim less than 20 years use and have walked a variety of routes through the property.*

8.5 Mr Smith responded on 16 July 2022; *“I live at No 2 Severn Terrace Newnham Gloucestershire GL141AU. I wish to enlighten you to the problems of making the said stretch of the Riverbank into a registered footpath, I have enclosed a couple of photo showing how the bank/walkway looks at the moment, and a couple of photos showing the said walkway at high tide. As a Riparian Owner I have no problem with the locals finding their way across the riverside, but if registered safety, liability, and definitely maintenance would of great concern. I trust you will take my points into consideration when making your decision.”*



8.6 Mr. Puttock responded on 10 August 2022. His email is held in full as a background paper, but the pertinent points are set out as follows:

1; You have stated, presumably the applicants did, that there are no applicable landowners. This is incorrect. I am the landowner of the bank between Hulin Cottage and the old Wharf. It is title GR 186812. The river boundary may appear less than the current mean water line. This is Riparian land and as such there is a presumption in law that this boundary changes as does the watercourse and changing bank. Otherwise, the register would need constantly updating. My title is the whole of the flat land of the bank to the mean high tide level, which constitutes the slope of the bank. The initial plan represented the land to the mean high-water mark at the time.... If you consult the latest Crown Estate map of their ownership it clearly shows, they own the riverbed to the top of the slope as the mean high-water level but specifically exclude my land.

2; None, literally none of, the group of applicants have previously habitually or even occasionally, walked this route. They have "gathered" 48 people to assert they have. This is likely true of the safe and well used route from the car park to Broad Oak. It is categorically not so over my land.

3; Clearly illustrating their lack of knowledge of the potential route, the route as applied for has been impassable since 2018.

4; The 2006 google earth picture clearly evidences that the car park (north end) level ground was fenced off. This was due to the dangers of use by strangers to the area. It could only be accessed by climbing over a fence thus knowing it was not a footpath. The fence is still there but bank build up makes the flat ground twice as wide. Your letter to Mr. Dickie references the exact route of the route applied for. Google earth evidences that such a route has not been usable for the required 20 years over the same ground. Any footfall has varied significantly in its route. There is no continued use for 20 years. Similarly, as explained above, the direct route from Severn Terrace in a line to the riverbank has been impassable for four years. Currently people walk from the car park to the blockage and back. It does not allow anyone to pass and repass to an area of amenity land or road as required.

5; I have never objected to Newnham residents traversing my land. Indeed, when using an 8-ton digger to build flood defences I levelled an area to allow better passage for them. The area I levelled did not exist 15 years ago when I purchased it. Where they walk now cannot have had the required 20 years use. It was river or steep bank below the mean high-water mark. Such passage was with my tacit permission and within my control.

To illustrate this, I have twice given one of the applicants, Mr. Penny, both directions to leave my land and also refused him permission to access his garden with a mini digger. I can evidence this. This demonstrated that any use was, and is, permissive.

6; This application is not supported by the Parish Council.

7; The applicants have informed the PC and published that highways will be responsible for such a routes maintenance indicating no burden on the PC. My understanding is that the truth is diametrically the opposite. I cannot be as landowner as the topsoil will not be owned by me. Could you advise who will be responsible for the surface of the route please?

8; The council has failed to inform me, as landowner. The Council has wrongly stated it belongs to Crown Estates. I am unsure why this has not been established correctly. However, the stage this matter is at is now procedurally faulty.

9; as any use during my tenure of 15 years has had, different and varying routes allowing no precise route to be drawn, , is currently blocked, and impassable with a drop and has been for some years, had been deliberately blocked by fencing at the north end preventing lawful access, is impassable at the south end as applied for, the required 20 years is failed at many levels.

Due to the concealment of the notice by the applicants and the failure of the Council to notify me as landowner I reserve the right to add addition points. I have not had time to fully consider this matter and as such any decision could be considered ultra vires unless the matter is paused. To find by chance I only had another 3 days is unacceptable. I strongly object and indeed will appeal if this application is granted. Mr. Puttock was asked if he would like the consultation paperwork but did not respond.

8.7 Westbury on Severn parish Council responded on 21 June 2022: "This matter was discussed at last night's Parish Council Meeting, and I can inform you that the Councillors are fully supportive of the creation of this route."

8.8 Newnham Parish Council responded 19 August 2022: *“Please find below an exchange with a number of villagers concerned that the parish council did not respond to the consultation letter sent out with regard to the above footpath. As you will see from the minutes of the June meeting, no response was given as the PC had already sent in a letter of support some months ago. That support still stands.”*

8.9 Mr Dickie, Hulins Cottage responded 5 July 2022: *His email is held in full as a background paper, but the pertinent points are set out as follows; “As owners of a property with riparian rights to the center of the River Severn, we have been disappointed with the lack of communication regarding the proposed footpath along the boundary of our land. The Formal Notice of Application for Modification Order was posted in such an obscure position near Severn Terrace that we – along with our neighbours – did not know of its existence until eight weeks after it was posted, and then it was purely by chance.....*

At the moment the remaining route is well-trodden by frequent use and is easily passable in the summer months. However, in the winter the high tides reach such a high level that the river floods into our garden, leaving the proposed footpath impassable and very muddy as the tide recedes. These tides have the effect of adding to the instability of the land in question and reshaping the riverbank accordingly. Again, we have photographic evidence of this.



..... Old maps of the village which show the shape of the riverbank and its adjoining properties – before and after Hulins Cottage was built – indicate that there was no land between them and the river. In other words, there is no suggestion that this site for the proposed footpath is here to stay and reinforces the evidence that the land is unstable.

As long as the land is apparently stable, of course, it makes a pleasant walk, and we actually have no objection to people walking on the foreshore. However, this frequently changing strip of unstable land is, in our opinion, unsafe, and not suitable to be officially recognised as a public footpath.... For the time being, we formally object to the proposed footpath for the reasons stated.” Mr. Dickie was asked if he would like the consultation paperwork. This was accepted but no further response has been received.

8.10 County Councillor Hoyland responded on 8 June 2023: *“Thank you for this, I know as a local resident that the path is used on a regular basis. I will walk the whole length and report back to you*

after that in writing. I am a member of the CROW committee so I presume will need to declare my interest”.

9. USER EVIDENCE

- 9.1 The sluices in the vicinity of the two car parks are located on Crown land. This application cannot give rise to a presumption of statutory dedication, as set out under Section 31 of the Highways Act 1980, because the Highways Act and its predecessors do not bind the Crown. Section 31(9) of the Highways Act 1980 states however 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. This report will therefore consider whether the evidence is sufficient to infer dedication at Common Law.
- 9.2 The principals of statutory dedication regarding use, i.e., ‘by the public,’ ‘as of right,’ ‘without force, secrecy, or permission’ & ‘without interruption’, equally apply at common law. “*Halsbury Laws (comprehensive encyclopaedia of law in England and Wales)*, states, *Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance...An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;...At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication*”. ‘Wildlife and Countryside Act 1981;- Definitive Map Consistency Guidelines, updated 27 January 2022’. No minimum period for the use is required and in some cases relatively short periods have been accepted to infer that there was an intention to dedicate at common law. In the case of *R v Petrie* (1855) the evidence showed that a street had been laid out and used as a highway for 6 to 8 years, when the defendant obstructed it. The jury were directed that they might infer a dedication from the evidence of the user.
- 9.3 Rodley Manor, which included the land over which the application route crossed, was sold at public auction in 1986. The applicant advised that “*The executors of the late Lord of the Manor, Sir Anselm Guise, sold the land and the lordship of the manor at auction in the mid 1980’s when both were purchased by a Hugh McGeough*”. This was before the compulsory registration of land in 1990 and Land Registry shows the land to be unregistered. The whereabouts of the landowner is unknown.
- 9.4 The claimed route in its entirety, runs above the historic line of foreshore, (the body of water between the high and low water mark of ordinary tides) of the tidal River Severn. The first Ordnance Survey maps however, showed that historically this sections of this route would have crossed land designated as foreshore, i.e., the section running parallel to the river between Severn Terrace (point A) to Newnham Car Park and two areas of foreshore which extend directly across the application route to the A48: 1) area abutting the current extended car park belonging to the White Hart Inn & 2) Newnham Car Park. Case law, *Blundell v Catterall* 1821, (which has not been overturned), rules that there is no lawful public right of access over the foreshore of a tidal river because it belongs to the tidal owner, the Crown (unless sold off, or the right has been expressly dedicated) and it further suggests that rights can’t be gained by statute or common law, through long use.
- 9.5 As detailed in paragraph 7.7 of this report, the later OS National Grid map (published 1973) indicated that the foreshore had moved closer to the river, thus allowing access along the application route between Severn Terrace (point A) to Newnham Car Park. This map however still shows the two areas of historic foreshore extending under the application route to the A48. The 1990 Deed of Grant for the outfall sluice at Newnham Car Park suggests that they have both been in location, under the application route, for over 30 years. The Crown Estate was contacted and

asked whether they consider these two areas of land in their ownership, to retain the designation of 'foreshore'. An email dated 3 February 2023, from Mr Famure, Crown Estate Asset Manager (Coastal) said; "*The foreshore doesn't extend underneath the footpath. However, there are two pieces of land where the outfalls are located that are still in the ownership of The Crown Estate.*" Dedication of the application route in its entirety, is not therefore considered to be defeated by foreshore.

9.7 THE EXTENT AND NATURE OF THE CLAIMED USE;

9.8 48 User Evidence Forms ("UEFs") were completed by 48 individual members of the public in support of this application, dating back to 1947. A summary of the UEF's ("summary") in their entirety is held as a background paper. This report must however consider the fact that some of this claimed use would have involved crossing 2 areas of foreshore for which neither statutory nor inferred dedication could take place prior to the construction of the outfall sluices. The Deed of Grant, executed in 1990 between the Crown Estate and the Environment Agency provides a date from which we can infer that the outfall sluices were no longer considered by the landowner, the Crown Estate, to be foreshore. Use of the application route by D Jaynes & R Stephens ceased before 1990 and is therefore not included. A bar chart of use for the remaining 46 individuals is held (**JH7**). In terms of years and frequency, the use can be broken down in the following (separate) tables):

Years			FREQUENCY	
30 – 32 years:	16		Daily	12
20+ years:	10		Weekly	27
10+ years:	9		Monthly	7
Less than 10:	11			

The application route has been used mainly for the purpose of recreation, accessing the café & White Hart Inn and dog walking.

9.9 46 individuals claimed use of the route on foot, but 3 individuals, identified in the summary as No's 30, 31 & 41, also claimed use of the route by bicycle. This use however is not compelling. In Dorset (1999) it was accepted that, although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test of dedication. Therefore, the evidence supplied by the 3 individuals of bicycle use along the application route is insufficient to infer dedication of bridleway or restricted byway.

9.10 USE 'AS OF RIGHT' (WITHOUT FORCE, SECRECY, OR PERMISSION);

9.11 For a claim to give rise to an inference of dedication at common law, 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 routes without resort to force, secrecy and as if they had a right to do so – that is, without having been granted any license/ permission by the landowner. There is no evidence of use by force or secrecy.

9.12 There are various issues relating to use by permission considered within this report. The *first* is the 1924 license granting a private right to individuals living within the area of Newnham Urban District Council to use the land over which the application route crossed as a promenade. For those

individuals, this could constitute use by permission, or 'by right' and could prevent dedication. This application, however, is to add a public footpath for the benefit of the 'public at large'.

9.13 In *Fairey v Southampton County Council* 1956, Denning LJ said: *'In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate. In order for there to be 'sufficient evidence that 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 public who used the path, in this case the villagers – that he had no intention to dedicate'*.

9.14 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. The following 3 questions in the User Evidence Forms are included to identify any use by permission.

- Q.10 asks *"Have you ever seen any signs or notices suggesting whether or not the application route was a public right of way? (For example, "private" "Keep Out",..."Permissive Route only"?)* All individuals responded "No".
- Q.12 asks: *"Did the owner or occupier ever give you permission (or did you seek permission) to use the application route?"* All but one individual responded "No". One user, identified in the summary of UEF's as No.28, responded 'yes'. Mrs Ford wrote *"During 2020, two householders who live next to the route, Newnham House and the neighbour to the left (river behind you) said they have riparian rights, but they don't mind people walking"*.
- Q.13 asks: *"Has anyone ever told you that then route is not public (including by a landowner, tenant of the land or by anyone in their employment)?"* All but one individual responded "No". One use, identified in the summary of UEF's as No.28, responded 'yes', *"see previous answer"*.
- In response to Q.15 of the UEF *"Have you ever had a private right to use the application route (for example, an easement, private right of access, license?"* All individuals responded "No".

9.15 The accepted user evidence dates to 1990. The responses to the questions above suggest that the 1924 license was not in the public domain and that individuals, whether living within the boundary of Newnham Urban District Council, or not, were unaware of it. As a result, case law indicates that the license would be insufficiently overt to rebut the claim.

9.16 The **second** issue of permission is the express permission granted to Mrs Ford in 2020 by individuals claiming riparian ownership of sections of the claimed way as illustrated by her responses to questions 12 & 13 above. This would constitute use 'by right', not 'as of right'. However, in response to Q.17, 'Please give any further information which may help', she wrote. *"I have used this riverside route for decades. It was only recently that I found out that it is technically not a footpath. It is used by many locals and is a beautiful walk, so I hope it can officially become a right of way"*. Mrs Ford dated her Declaration; 25 November 2021. Use prior to this would therefore be 'as of right' and can be considered for this report. The years use between 2020-2021 however, would be use by permission or 'by right' and has been removed from the analysis.

9.17 The **third** issue of permission is the registration under section 6(2) of the Commons Registration Act 1965: Register of Town and Village Greens, on 10 June 1977, of the area of land between Hawkins Pill and Newnham Car Park as a village green, for the purpose of lawful sports and pastimes which would include organised or ad-hoc games, picnics, fetes, and similar activities. Any such use would operate as a conditional permission to use the land and as such prevent presumed

dedication under section 31 Highways Act 1980. However, use of the claimed routes for reasons other than for 'lawful sports and pastimes' could succeed. In case law; Billson 1998, Sullivan J accepted "if a track across a common is not used for the purpose of air and exercise but is being used by the public for some other purpose; as a route between points A and B for example, from the village across a common to a nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act". Applying this ruling, if the route subject to this application is deemed to have been used, not for the purpose of lawful sports and pastimes but to travel along a defined route between two highways, then this use could be considered capable of satisfying a claim.

9.18 Another requirement for a claim of dedication is that the route has definite start and end highway termination points or connects with a place of popular resort. Public user cannot give rise to an inference of dedication if it does not. 28 individuals submitted a plan without an accepted termination point along the claimed route. They are recorded in the summary as;

- No's 5, 13, 14, 45, (Journeys End),
- No's 6, 36, 37, (middle of route),
- No's 7, 10, 28, 47, 48, (White Inn car park),
- No's 12, 15, 25, 38, 39, 40, (White Hart Inn),
- No's 17, 18, 19, 22, 32, (foreshore),
- No's 23, 24, 27, 30, ('X' – 'X' marked in the river),
- No. 33 (marked a completely different route)

9.19 The various termination points could also constitute '*wandering at will*'. Wandering at will (roaming) over an area, just like the foreshore (Dyfed CC v SSW 1989), cannot establish a public right.

9.20 The termination point leads to the **fourth** issue of permission: the 6 individuals who marked their termination point as the White Hart Inn; if visiting the establishment for refreshment, would constitute use '*by invitation*', acting as a conditional permission to use the land and as such prevent inferred dedication.

9.21 The applicant was contacted regarding the northern termination point shortly after the application was received. There was some uncertainty regarding this issue, exacerbated by the resistance shown by the owners of the White Hart Inn. In response to an email seeking clarification of the route used, Mr Robinson, representing the applicant, responded on 28 April 2023, "*The Application Route follows the flood bank running north from Hawkins Pill and ending at the White Hart overspill car park. From here there are 3 easily accessible options for terminating the application route onto the footpath alongside the A48:*

- (i) Straight onto the A48 footpath without going into the overspill car park*
- (ii) Joining the A48 footpath at the overspill car park entrance/exit halfway along its length*
- (iii) Joining the A48 footpath at the entrance/exit to the main White Hart car park just North of the White Hart building".*

9.22 Further clarification was sought of the applicant. Mr Robinson responded by email of 13 June 2023 "*I have contacted the applicants group about this and there is general agreement that if it is not going to be practical to claim a footpath through the land owned by the White Hart, then the northern termination point of the footpath application would need to be where the application route meets the southern boundary of the White Hart overspill car park, with a short connection down to the existing path along the A48*". This amended route is shown on the plan **JH3**.

9.23 In light of the applicant's responses, an email was sent on 13 June 2023 to all individuals who had submitted accepted user evidence to clarify the claimed termination points as shown on the submitted plans. As a result, 33 of the 46 considered that the termination point should stop short

of the White Hart Inn at the A48 pavement, essentially agreeing to the amended application plan **JH3**. 1 confirmed his termination point to be the first car park exit within the White Hart Inn boundary from Newnham and 12 confirmed that their termination point as the A48 beyond the White Hart Inn.

- 9.24** The 12 individuals who walked beyond the White Hart Inn and terminated their use at the A48 highway adjacent to the northern car park (point C), illustrates the **fifth** issue of permission. We must consider whether the owner or the tenant were capable of distinguishing between visitors to the White Hart Inn who would have been there 'by permission or invitation', i.e., 'by right' as opposed to users of the application route 'as of right'? In *(Lewis) v Redcar and Cleveland Borough Council* (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 accepted the view of Lord Hoffman in *Sunningwell* (1999) 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. 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. In the Court of Appeal, Dyson LJ refers to *Hollins and Verney* (1884) and the words of Lindley LJ. "... *no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term ... the user is enough at any rate to carry to the mind of a reasonable person...the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended.*"
- 9.25** It is suggested that at this location, where there is a pavement alongside the A48 highway, abutting the frontage of the Inn, albeit narrow, it would be almost impossible for the landowner/ tenant to distinguish between permitted use of his facilities, i.e., 'by right', by 12 individuals crossing his property, as opposed to use of a route across his land in a manner of a highway; 'as of right'. Thus, it is considered that in terms of sufficiency, use by 12 individuals in this location, would not be enough to infer dedication across the boundary of the White Hart Inn.
- 9.26 USE WITHOUT INTERRUPTION;**
- 9.27** A further requirement for a claim of dedication is that use should 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 Urban DC* (1937)) as opposed to an act which 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. It is not sufficient if the interruption is for some other purpose such as tide movements which are outside any landowner's control.
- 9.28** Three individuals noted that their use of the section of application route between Severn Terrace and Newnham Car Park was interrupted on some days due to flooding. Further, Mr Puttuck, who claims riparian ownership of the section of application route adjacent to his property since 2008, states, "*the path as applied for has been impassable since 2018*". He also refers to the application route being fenced off in 2006 (2005 Google Map on next page (shows fencing more clearly)). However, he also stated "*I have never objected to Newnham residents traversing my land. Indeed, when using an 8-ton digger to build flood defenses I levelled an area to allow better passage for them*".... *Where they walk now cannot have had the required 20 years use. It was river or steep bank below the mean high-water mark. Such passage was with my tacit permission and within my control.*
- 9.29** Mr. Dickie, who similarly claims riparian ownership of the section of application route adjacent to his property since 1993, wrote "*At the moment the remaining path is well-trodden by frequent use and is easily passable in the summer months. However, in the winter the high tides reach such a high level that the river floods into our garden, leaving the proposed footpath impassable and very muddy as the tide recedes.*"



Google Earth 2005

9.30 Section 31(11) Highways Act 1980 includes land ‘covered with water’ (e.g., causeways/ fords), when detailing the process of statutory dedication. Only 3 individuals who submitted evidence of use noted that on some days the route was inaccessible. Although considering this application at common law for which there is no minimum period of time required for use, this did not stop 31 members of the public claiming use of this section of route for a period of over 30 years (back to 1990). There is also no evidence to suggest that the fencing referred to by Mr Puttock was installed to prevent public access and none of the individuals claiming use of the route mentioned it. As the photo above shows, there would be nothing to prevent someone walking around the fence. With regard to the statement that the route has been inaccessible since 2018, it was inspected by officers in 2021 and 2023 and was found to be overgrown but not inaccessible. The Wildlife and Countryside Act 1981 is concerned with ascertaining the existence of highway rights and does not allow factors such as the suitability of the way to be considered. As stated in paragraph 9.16, a landowner who does not wish to dedicate a way as a highway, must make it clear to members of the public using it, as was the case with Mrs Ford in 2020. Tacit (unspoken/ implied) permission is insufficient.

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.

10.3 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, both historic and user, is dated after the 1959 Highways Act when the procedure for adopting public highways maintainable at public expense, was introduced. No evidence has been found 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 The Definitive Map however, 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.

10.6 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 route to the Definitive Map, it recommended that it is not accepted as publicly maintainable because the inference 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** There is very little documentary evidence associated with this application. The combination of the 1973 OS map and the Crown Estate provides confirmation that the application route was considered to run wholly above the foreshore © 1990 and there is no evidence that the public were made aware of the 1924 license granting a private right of access to local people. The analysis of the 46 UEFs indicates that the application route was used 'as of right' and without interruption for over 30 years (back to 1990) on foot. Further no evidence over this period has been submitted to indicate a challenge to use by the landowner or a lack of intention dedicate it. Upon clarification of the northern termination point of the claimed route, most users accepted the amended application route suggested by the applicant which removed the section of claimed route across the White Hart Inn from the application. The remaining 12 users whose claimed route crossed the White Hart Inn to the A48 highway are considered, at this location, to be insufficient in quantity to enable the landowner/ tenant of the White Hart Inn to distinguish between members of the public visiting their establishment from those crossing their land in the manner of 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. It is however considered on the balance of probability that the amount of public user is insufficient to infer that the application route B-C subsists as a public footpath.
- 11.5** Thus, the recommendations are as follows:
- That no order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B-C as per the original application.
 - 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	1:25,000 scale Location Map
JH2	1:6000 scale Application Plan
JH3	1:6000 scale amended Application Plan
JH4A-O	Photos of claimed routes.
JH5	Ordnance Survey 25" first edition 1881
JH6	Ordnance Survey 25" fourth edition 1973
JH7	Summary of PPEFs