

# ROBIN CARR ASSOCIATES

Public Rights of Way Management & Consultancy Services

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## Wildlife & Countryside Act 1981

### Application for Definitive Map Modification Order

### Alleged Public Footpaths at Droppingwell (Watson's Tip) Rotherham

### Client: Rotherham Metropolitan Borough Council

## PART ONE: INTRODUCTION

### 1.0 Purpose of Report

1.1 This report seeks to assist Rotherham Metropolitan Borough Council (the Authority) in the determination of an application (the Application) for a Definitive Map Modification Order to add a number of alleged footpaths to the Definitive Map for the Rotherham area. These routes are shown on the attached Plan 1 [**APP 1 pg. 1**] by broken blue lines:

- A-B,
- C-D
- D-E,
- F-E-G-H-J-L,
- G-I-K-L,
- I-J,
- K-J,
- D-L
- L-M-N

### 2.0 Format of Report

2.1 Whilst there is no statutory requirement to do so, as a matter of good practice, this report has been prepared in line with the principles of the Civil Procedure Rules so far as they relate to the production of expert reports.

2.2 The report is divided into five parts, namely:

- Part One: Introduction
- Path Two: Background
- Part Three: Summary of Evidence
- Part Four: Consideration of Evidence
- Part Five: Conclusion & Decision

- 2.3 The report is accompanied by a document bundle containing all documents referred to in the report. Where a document is referred to within the report, it will be referenced by Appendices and Page Number thus **[APP XX pg. xx]**.

### **3.0 Consultant's Expertise**

- 3.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), and a Registered Expert Witness.
- 3.2 My experience is based, most generally, on an expertise that has been developed over a thirty-year period as a Public Rights of Way & Highways practitioner.
- 3.3 I hold a post-graduate level certificate in Leisure Management from the Institute of Leisure and Amenity Management which was a dissertation-based management qualification which focussed on the "*Best Value*" in service delivery. I am also a former Treasurer and founding Director of the Institute of Public Rights of Way and Access Management (IPROW).
- 3.4 I have had papers published, on the subjects of: a) highway record management and b) rail crossing closures under the Transport and Works Act 1992, in the journal of the Institute of Public Rights of Way and Access Management. I also have a published Practice Guidance Note on Rights of Way Improvement Plans on the "LexisNexis" legal resource website.
- 3.5 Between 1987 and 2003 I was employed by a number of local authorities as a rights of way and highways practitioner, including six years at principal officer (management) level, during which time I was responsible for the management of the authority's statutory public rights of way functions as well as the maintenance of the authority's highway records.
- 3.6 Since 2003 I have worked as an independent consultant specialising in public rights of way and highway matters, and more specifically on matters relating to the existence, status and extent of public highways. In doing so I have prepared reports for various local authorities and private individuals, as well as giving evidence at local public inquiries, the Magistrates Court,

County Court and High Court. I have also represented Clients at local public inquiries, hearings and similar fora.

- 3.7 Since the mid-1990's I have been actively involved in the delivery of specialist training on public rights of way and highway issues. I have delivered training and CPD sessions to local authority staff and elected members, volunteers, government bodies (i.e. Natural England), further education establishments (i.e. UCL Birkbeck) and the local government ombudsman. I was also invited to contribute towards the drafting and development of the Sheffield Hallam University MSc in public rights of way management.

#### **4.0 Statement of Truth**

- 4.1 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

## **PART TWO: BACKGROUND**

### **5.0 Background**

- 5.1 It is understood that in 2018 the owners of the land crossed by the claimed footpaths undertook a range of work to secure the boundaries of their property. This involved the repair and replacement of fencing etc. As a result of these works being undertaken the Authority received a number of complaints that public rights of way had been blocked. However, upon checking the Definitive Map for the area **[APP 2 pg. 2]**, it was discovered that none of the routes in question were recorded as being public rights of way.
- 5.2 On 5<sup>th</sup> February 2019 Mr Stephen McKenna submitted to the Authority an Application (the 2019 Application) **[APP 3 pg. 3]** for a Definitive Map Modification Order and requested that various routes be added to the Definitive Map as footpaths. The Application was accompanied by thirty-eight User Evidence Forms **[APPs 5 – 8]** claiming use of the routes shown on **Plan 1 [APP 1 pg. 1]** over a period of up to 69 years (1949 – 2018). The user evidence forms are summarised in **Appendix 9 [APP 9 pg. 222]**
- 5.3 The Authority subsequently appointed Robin Carr Associates (the Consultant) to investigate the matters raised within the Application and to produce an advisory report (this report) to assist them in determining the Application. Upon receiving and assessing the case file, the Consultant noted some discrepancies in the 2019 Application **[APP 3 pg. 3]** and, in order to ensure that the Applicants rights (to appeal etc) were fully protected, he recommended that a further application be submitted. Mr McKenna therefore submitted a new Application (the 2020 Application) on 14<sup>th</sup> August 2020 **[APP 4 pg. 8]**. The user evidence **[APPs 5 – 8]** submitted with the 2019 Application was transferred over for consideration as part of this new Application.
- 5.4 The owners of part of the land crossed by the routes under investigation have also submitted evidence comprising of five witness statements and accompanying documents **[APP 10 – 14]**

5.5 Whilst there have been various delays and restrictions arising from the Covid-19 Pandemic the Consultant is satisfied that all necessary investigations have been undertaken to such an extent as required to enable the 2020 Application **[APP 4 pg. 8]** to be determined.

## **6.0 Consultations**

6.1 Consultations have been undertaken with a ranger of user and local interest groups, local councillors and utility companies, as well as the landowners. Any evidence arising from the consultation exercise has been incorporated into the body of the report.

## **7.0 Site Visit**

7.1 I conducted a site visit on 3<sup>rd</sup> November 2020, during which appropriate Covid-19 social distancing protocols were observed. Due to the nature of the site, I was accompanied by representatives of the landowner. I was able to view all of the alleged paths during my visit.

## **8.0 Legislative Context**

8.1 Rotherham Metropolitan Borough Council are the Surveying Authority for the purposes of the review and maintenance of the Definitive Map and Statement for their area. Section 53 of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the Definitive Map and Statement under continuous review and to make such changes (a Definitive Map Modification Order), upon the discovery of evidence that appear necessary.

8.2 More particularly in reference to this case: Section 53(3)(c)(i) provides that an Order should be made upon the discovery of evidence which (when considered with all other relevant evidence) shows that a right of way which is not shown in the map and statement subsists or is reasonable alleged to subsist.

8.3 The test for making an Order under Section 53(3)(c)(i) differs from that for confirmation. Whilst the duty to make the Order is triggered upon the discovery of evidence that rights are “reasonably alleged to subsist”, such an Order can only be confirmed if those rights are shown, “on balance of probabilities to subsist”. The test for confirmation is therefore greater than that for the initial making of the Order.

Dedication and Acceptance

- 8.4 With few exceptions, before any highway can come into being there must be an act of dedication on the part of the landowner, followed by an acceptance of the said dedication by the public. The act of dedication need not be express, it may be presumed or implied as a result of the actions (or inaction) of the landowner. Public acceptance is generally demonstrated through public use of the way. Such use must be of a nature that can be defined as being “as of right”

Section 31 of the Highways Act 1980

- 8.5 Section 31 of the Highways Act 1980 states:

*“(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty 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.”*

*“The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.”*

*“Where the owner of the land, which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”*

- 8.6 Section 31(1) has two ‘limbs’ the first provides that proof of twenty years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats

the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

### Common Law

- 8.7 The establishment of highway rights under the common law is not bound by the “20-year rule” discussed above, with the courts having ruled<sup>1</sup> that rights can be established in a very short period of time.
- 8.8 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938*, both quoted with approval by Laws J in *Jaques v SSE 1994*, who described the former’s summary as *a full and convenient description of the common law*. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956*, *Mann v Brodie 1885* and *Poole v Huskinson 1843*. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J’s judgment in *Nicholson v Secretary of State for the Environment 1996* comments further on aspects of these differences.
- 8.9 Halsbury<sup>2</sup> 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. And - 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; and 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”.

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<sup>1</sup> North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18-month period

<sup>2</sup> Halsbury’s Laws of England (Volume 55 ‘Highways’)

8.10 The inference of dedication may arise in three ways:

- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*<sup>3</sup> the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public taxi-cab rank had been established on part of the bridge. The Justices' conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages sometime after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that "As to the erection of the barriers by the appellants, that was done too late to do away with the dedication".
- ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred<sup>4</sup>.
- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact<sup>5</sup>.

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<sup>3</sup> (1872) 27 L.T. 672

<sup>4</sup> See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA)

<sup>5</sup> See e.g. *Parker J in Webb v Baldwin and others* (1911) 75 JP 564 at p565



- 8.11 In reaching a conclusion (under both the common law or Section 31 of the 1980 Act) the decision-maker must take into account Section 32 of the Highways Act 1980, which states:

*“A court or other tribunal, before 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 weight thereto as the court or tribunal considers justified by 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 complied, and the custody in which it has been kept and from which it is produced.”*

Standard of Proof

- 8.12 The standard of proof that applies to cases of this nature is the civil test of the balance of probabilities.

## **PART THREE: SUMMARY OF EVIDENCE**

### **9.0 Documentary Evidence**

- 9.1 A range of documentary sources have been consulted and archive catalogue index searches undertaken to identify possible documentary sources which may assist in the determination of the application.
- 9.2 The Application Routes do not appear on any of the historical documentary evidence sources consulted.

### **10.0 Aerial/ Satellite Images**

- 10.1 A range of images from "Google Earth" dating from 1999 through to 2018 **[APP 15]** show what appear to be a number of paths or tracks across the land which correspond with the Application Routes. These images also suggest that the gate and stone/concrete blocks at **Point D (on Plan 1 [APP 1 pg. 1])** were not in place, nor was the earth bund and Harris fencing across the Application Route in the vicinity of **Point L (on Plan 1 [APP 1 pg. 1])**.

### **11.0 User Evidence**

- 11.1 Thirty-eight User Evidence Forms **[APPs 5 – 8]** claiming use of the routes shown on **Plan 1 [APP 1 pg. 1]** over a period of up to 69 years (1949 – 2018) were submitted in support of the application. The user evidence forms are summarised in **Appendix 9 [APP 9 pg. 222]**.
- 11.2 Each witness has completed a single form in respect of their use of multiple routes, but they have each marked the route(s) they have used on an accompanying plan. It is therefore possible to analyse the user evidence forms and identify which users have used which paths, and for what period of time.
- 11.3 The user witnesses provide evidence of use which may be considered to be of a nature which can be defined as being "as of right" (without force, without secrecy and without permission) and without interruption. They also identify the fencing of the land in 2018 as the event which prevented or challenged their use of the Applications Routes.

11.4 A number of the user witnesses refer to the farmer putting signs up when the land was cropped asking walking to keep to the paths.

11.5 The number of users and the period of use in respect of each path are summarised in the table below:

Path Link	No of Users	Period of Use	No of Years
A-B	7	1958 - 2018	60
C-D	24	1958 - 2018	60
D-E	15	1949 - 2018	69
F-E-G-H-J-L	30	1949 - 2018	69
G-I-K-L	15	1949 - 2018	69
I-J	3	1980 - 2018	38
K-J	2	1983 - 2018	35
D-L	23	1949 - 2018	69
L-M-N	20	1958 - 2018	60

## 12.00 Landowner Evidence

12.1 The landowners have submitted statements from five witnesses:

- a) Glen Dransfield – Agricultural Contractor **[APP 10 pg. 241]**
- b) Peter Anthony Westley – Operations Manager at MHH Contracting Limited **[APP 11 pg. 254]**
- c) Robert Burden – Agricultural Contractor **[APP 12 pg. 265]**
- d) John Woodhouse – Farmer **[APP 13 pg. 270]**
- e) Martin Hartley Hague – Managing Director at MHH Contracting Limited **[APP 14 pg. 289]**

12.2 The witness statements **[APP 10-14]** contain a lot of information regarding the use of the land crossed by the Application Routes, and the statements cross reference each other for consistency. The following key factors arise out of the witness statements:

- i. Planning permission for tipping originally granted in December 1950 with a further permission in 1958, which included provision for the restoration of the entire site to agriculture;
- ii. A waste disposal license dated 11<sup>th</sup> January 1978 included the clause that lockable gate must be provided and that the existing gates and fencing were to be maintained along with all reasonable precautions being taken to prevent unauthorised access to the site;
- iii. A further license dated 11<sup>th</sup> October 1990 required the provision of a 2m high chain link fencing with three strands of barbed wire and lockable steel gates. The gates were to be kept locked when the site was unmanned;
- iv. The site was surrounded by a 2m high chain link fence with three stands of barbed wire & lockable steel gates in 1994
- v. If anyone had been seen trying to walk across any part of the site whilst tipping operations were ongoing they would have been challenged
- vi. The site was operational (phase 1) from circa 1994 – 1998;
- vii. Phase 1 completed around 1998 at which point the site was secure and the fencing intact;
- viii. Between 1994 and 1998 the field to the east of the tip was farmed and planted with arable crops;
- ix. Since 1998 both security and stock proof fencing has been vandalised
- x. MHH Ltd Purchased land 21<sup>st</sup> March 2000;
- xi. Agricultural contractors circa 2012-15 did not see anyone using the Application Routes nor any signs of such use;
- xii. Circa 2015 the steel access gates were still in place and a key was needed for access. Whilst some of the fencing was damaged, the steel access gates were still intact;
- xiii. The large blue steel gates and barrier at **Point D on Plan 1 [APP 1 pg. 1]** were installed circa 2018;
- xiv. Signs stating that the land was private and trespassers should keep out were erected circa 2018;
- xv. The route **F-E on Plan 1 [APP 1 pg. 1]** follows the line of a land drain; and,
- xvi. Nobody has been given permission to use the Application Routes.

## PART FOUR: CONSIDERATION OF EVIDENCE

### 13.0 General Considerations

- 13.1 Definitive Map Modification Orders do not extinguish or create any public rights of way, they simply seek to update the legal records to reflect the true and existing situation. As a result, issues such as desirability, suitability, need, property values and even public safety are not matters that can lawfully be considered as part of the decision-making process.
- 13.2 The consideration of the evidence may be considered analogous to piecing together a jigsaw, where each document (or piece of evidence) is an individual piece of the jigsaw. It is only when all of the pieces are put together that the true picture can be seen, albeit it does not necessarily require every piece to be in place.
- 13.3 The approach to considering the evidence was also considered in *R v Exall and Others* (1866) 4 F & F 922: *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any one link broke the chain would fall. It is more like the case of a rope composed of several cords. One strand of a cord might be insufficient to sustain the weight, but three stranded together maybe of quite sufficient strength."* Whilst "*Exall*" was a criminal case, requiring a higher standard of proof (beyond reasonable doubt) there is no reason why the same principles cannot be applied to the consideration of evidence in a civil matter with the lower (balance of probability) test being applied. The analogy points to the consideration of the totality of the evidence and that a sustainable conclusion can still be drawn if some evidence is contradictory.
- 13.4 At the end of the day, the civil test of the balance of probability is to be applied when considering the evidence, however at this stage of the process Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an Order should be made upon the discovery of evidence which (when considered with all other relevant evidence) shows that a right of way which is not shown in the map and statement subsists or is reasonable alleged to subsist.

13.5 The lower (reasonable allegation) test is all that needs to be applied at this time. In *R (Roxlena Ltd) v Cumbria County Council [2019]* the Court of Appeal said that the consideration of evidence at this stage of the Modification Order process was “*necessarily less intense*” than at confirmation stage. The evidence might or might not be satisfactorily sustained when the Order comes to be confirmed, but that does not mean an Order cannot be lawfully made at this juncture.

13.5 Furthermore in *R v Secretary of State for Wales ex parte Emery [1998]* it was held that where there is a conflict of apparently credible evidence, and a public right of way is reasonably alleged to subsist, an Order should be made to allow that evidence to be tested through the Order making process.

#### **14.0 Documentary Evidence**

14.1 The fact that the Application Routes do not appear on any of the historic documentary sources consulted suggests that if, public rights of way have been established, it is likely to have occurred in more recent years. The determination of the Application will therefore rely primarily on the user evidence and the evidence submitted by the landowners.

#### **15.0 Aerial/ Satellite Images**

15.1 The interpretation of aerial photography and satellite imagery is a specialist field in its own right. As such, any interpretation placed upon such documents, other than by a suitably qualified expert, should be treated with caution. In expressing an opinion on the interpretation of these documents the Consultant does not claim to be such an expert, albeit he does have some experience on the matter.

15.2 Records of this nature can provide excellent evidence of the existence of physical features as they existed on the ground on the day that the photographic image was taken. They are a snapshot in time. They will not, in their own right, provide any evidence of the existence of a public right of way. At most they can provide evidence which may be interpreted as being supportive of the physical existence of a route on the ground which coincides with a route that is claimed to have been used (i.e. they may assist in substantiating claimed use).

15.3 In this particular case these records **[APP 15]** show a number of paths and tracks across the land that are consistent with the routes that the user witnesses claim to have used. This may be considered to further substantiate their evidence.

15.4 The photographic images also confirm that there were no gates or barriers in the vicinity of **Point D** on **Plan 1 [APP 1 pg. 1]**. There certainly appears to a direct conflict between this evidence and the witness statements submitted on behalf of the landowners.

## **16.0 User Evidence**

16.1 The evidence of witnesses, whether for or against an application of this nature, must be treated with some degree of caution because it is bound to be subject to a natural bias in favour of the case for which it has been compiled. This is only natural, and does not necessarily detract from its value. This was clarified in the comment made in *Norfolk CC v Mason* (2003)<sup>6</sup> when the judge stated:

*"It is commonplace in this sort of case for a good deal of material to emerge by way of user forms. Mrs Palmer and her brother in law, Mr Gathercole, played a prominent and energetic part in getting people to fill them in. Such a process is always a difficult one because the person distributing the forms often has a degree of personal enthusiasm for their cause, and Mrs Palmer strongly supports this road as being public. Ideally a serious degree of intellectual rigour needs to be adopted, to get the most fair and accurate results. Inevitably she was cross-examined, and commented on, by Mr Fetherstonhaugh, along these sort of lines. But it seems to me that she did nothing she ought not to have done and, within the necessary bounds that these sorts of forms are never completely satisfactory' if collected by the sort of people (non lawyers) who are actually likely to be collecting them, especially as regards matters of precision. I ought not to regard them as in any way suspect, though simply because of what they are I should be cautious how far to go with them."*

16.2 In this case, the user evidence provides a broadly consistent picture of the use of a number of paths over a period of time spanning, in parts, up to nearly seventy years. It is provided by a wide range and not-insignificant number of people, which may be considered to be

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<sup>6</sup> NR250111 High Court Chancery Division, Norwich District Registry

representative of the general public. This evidence is set out against the tests and considerations for both Section 31 of the Highways Act 1980, and dedication arising out of the Common Law, below.

## **17.0 Landowner Evidence**

- 17.1 The witness evidence collected by, and submitted on behalf of, the landowners should be treated with a similar degree of caution to the user evidence discussed above. It is inevitable that there will be contradictory information within such evidence as each individual will have different recollections. As with the user evidence, this evidence is set out against the tests and considerations for both Section 31 of the Highways Act 1980, and dedication arising out of the Common Law, below.

## **18.0 Consideration under Highways Act 1980, Section 31**

### *Date of Bringing into Question and the Requisite 20 Year Period*

- 18.1 For an event to constitute a “bringing into question” for the purposes of Section 31 of the Highways Act 1981 it must comprise an act which brings it home to the public that their right to use a way is being challenged, thus allowing them the opportunity to respond. In the absence of such an event, the submission of a Definitive Map Modification Order may be used instead. In either case the required twenty-year period is calculated back from this event/date.
- 18.2 It would appear to be common ground that in 2018 works were undertaken to secure the land, including the installation/repair of fencing and gates, and the erection of signage. It was these actions, along with plans to implement a further phase of tipping works that resulted in the local public outcry and the submission of the application for the Definitive Map Modification Order [APP 3 pg. 3]. If it is accepted that rights were brought into question in 2018, the requisite period, for the purposes of Section 31 of the Highways Act 1980 will be 1998 – 2018.

### *Use by the Public & Sufficiency of Use*

- 18.3 For user evidence to qualify for consideration it must be evidence of use by the general public, and not a closed section of the community. The user evidence submitted in support of the Application may reasonably be considered to meet this requirement.



- 18.4 Whilst there is no requirement for a set minimum number of users of a route, use must be sufficient so that any landowner might reasonably be expected to be aware that the use was taking place. In this case, with the exception of **I-J** (3 users) and **K-J** (2 users) all of the Application Routes shown on **Plan 1 [APP 1 pg. 3]** are considered to have been subject to sufficient use to meet the requirements of the legislation.

*Use that is "As of Right" and "Without Interruption"*

- 18.5 For use to be considered to be "as of right" it must be of a nature that is "without force, without secrecy and without permission". Such use may therefore be defined as trespassory in its nature.
- 18.6 The witnesses on behalf of the landowners have confirmed, within their witness statements, that no permissions have been granted to any person to use the Applications Routes during their ownership of the land (2000 – present). This appears to be confirmed by the user witnesses who confirm that they did not seek or have permission to use the routes.
- 18.7 Given the relatively open nature of the land, it is unlikely that anyone wishing to use the Application Routes would do so in a stealth-like manner. No tipping or reclamation works were being undertaken during the relevant twenty-year period (1998-2018) so it is unlikely that the land was subject to 24 hour scrutiny by the landowners or their representatives. This may explain why the alleged use was not observed.
- 18.8 It is quite understandable that people might not use the Application Routes on the limited number of days each year that agricultural operations were being undertaken, not to avoid being caught, but because of the safety issues referred to by the landowner's witnesses (e.g. potential conflict between path users and large agricultural machinery).
- 18.9 The breaking down, or climbing over, of fences or locked gates may be considered to be forceable acts, which would render any use to be no longer "as of right". It may also be argued that anyone subsequently passing through a broken-down fence may also be considered to be using the way in the exercise of a forceable act.

- 18.10 There is a potential conflict in the evidence on this particular point inasmuch that user witnesses say they used the Application Routes without any hinderances, yet the landowner's witnesses claim that there were locked gates and fencing which would have prevented, unless forced. However, the Google Earth images (1999 – 2018) **[APP 15 pg. 434]** suggest that any barriers towards Dropping Well Road had pedestrian bypasses and a lack of any barriers or gates across the majority of the Application Routes.
- 18.11 Notwithstanding any possible conflict in the evidence, it may be reasonable to conclude that, on balance of probability, public use of the Application Route was of a nature which may be defined as being "as of right". Even if the "balance of probability" test is not considered to be met, the "reasonably alleged" test most certainly is.
- 18.12 For the purposes of Section 31 of the Highways Act 1980 "interruption" means the actual and physical stopping of the enjoyment of the public's use of the way. The "interruption" must also be with the intention of preventing use of the way. There would not appear to be any events which would constitute an interruption to use throughout the requisite twenty-year period.

*Interim Conclusion*

- 18.13 In conclusion, the evidence suggests that the existence of public rights over the Application Routes was brought into question in 2018, when works were undertaken to secure the site, with a view to recommencing tipping operations. The requisite twenty-year period would therefore be 1998-2018.
- 18.14 With the exception of Application Routes I-J and K-J on **Plan 1 [APP 1 pg. 1]**, there is a sufficient body of user evidence which suggests that the public have used the Application Routes in a manner which may reasonably be defined as being "as of right" and "without interruption". As a result, a "Presumption of Dedication" of public footpath rights may be considered to have arisen over all of the Application Routes, except Application Routes I-J and K-J on **Plan 1 [APP 1 pg. 1]**.

*Evidence of Lack of Intention to Dedicate*

- 18.15 The above-mentioned “Presumption of Dedication” may be overturned if there is sufficient evidence of overt acts carried out by, or on behalf of, the landowner, which are directed at actual users of the ways, and which communicate the landowner’s lack of intention to dedicate public rights. This may include (but not be restricted to) the closure or fencing of the routes, the erection of appropriately worded signs, and actual challenges to use.
- 18.16 The landowner’s witnesses have provided clear evidence to the effect that during the period of the “Phase 1” tipping operations on the land (1994-1998), the area was securely fenced and gated, but this is outside of the relevant twenty-year period (1998-2018). There is less evidence to suggest that such fencing and gates were maintained after 1998. Furthermore, the Google Earth images (1999 – 2018) **[APP 15 pg. 434]** suggest that the Application Routes were open and show clear lines which are consistent with the use claimed by the user witnesses.
- 18.17 Whilst the landowner’s witnesses state that they would have challenged anyone they saw on the land, they also state that they never saw anybody. It must therefore follow that no such challenges were made.
- 18.18 When the evidence is considered in the whole, whilst there is some contradiction between the evidence of the users, and that of the landowner, there is no clear evidence of any sufficiently overt acts on the part of the landowner, which demonstrate a lack of intention to dedicate, during the relevant twenty-year period (1998-2018). It would therefore appear that the “Presumption of Dedication” discussed above has not been overturned. If this is the case, and with the exception of Application Routes I-J and K-J on **Plan 1 [APP 1 pg. 1]**, the case in favour of the establishment of the alleged public footpath has been proved.

## **19.0 Consideration under Common Law**

- 19.1 Whilst it would appear that the case in favour of a presumption of dedication of public footpath rights has been made pursuant to Section 31 of the Highways Act 1980, it would still be expedient to consider the matter under the Common Law.
- 19.2 For dedication to arise at Common Law the onus rests on those alleging the public right to prove an intention to dedicate on the part of the landowner. Such an act of dedication may be express, or presumed/implied as a result of the actions or lack of action of the landowner.
- 19.3 Unlike Section 31 of the Highways Act 1980, dedication under the Common Law can arise over a period of less than twenty years. In this case the twenty-year period under Section 31 is tightly defined by the end of the "Phase 1" tipping in 1998 and the works to secure the site in 2018. If evidence can be produced which results in a shift in either of these dates it is possible that period of uninterrupted use will be reduced to less than the required twenty years. This would result in a case under Section 31 of the Highways Act 1980 failing. It would not however preclude a conclusion that public rights have been established over a shorter period under the Common Law.
- 19.4 No evidence has been produced of any express acts on the part of the landowner from which dedication may be implied. It is however possible to conclude that a landowner may be presumed to have dedicated public rights from evidence of public use. Such use would have to be sufficient in quality and quantity to show that a reasonable landowner must have known that the use was taking place, but took no actions to prevent it.
- 19.5 The nature of the use by the public, and it being "as of right" has already been discussed in Section 18 of this report, and the conclusions in that respect remain the same for the purposes of considering the matter under the Common Law.
- 19.6 In the event of evidence being produced to suggest that the period of public use being reduced to slightly less than twenty years, with the exception of Application Routes **I-J** and **K-J** on **Plan 1 [APP 1 pg. 1]**, it would still be possible to conclude that public footpath rights had been established over the Application Routes under Common Law.

## **PART FIVE: CONCLUSION & DECISION**

### **20.0 General**

20.1 The decision whether or not to make a Definitive Map Modification Order is “quasi-judicial” in nature. This means that whilst all interested parties must be given the opportunity to have their say, the decision must be made taking into account all of the available and relevant evidence. The decision-maker must make the decision based upon their own objective assessment of the relevant evidence, and not simply follow the recommendation of a third party.

20.2 In terms of what is considered relevant evidence, the decision maker must remember that Definitive Map Modification Orders do not extinguish or create any public rights of way, they simply seek to update the legal records to reflect the true and existing situation. As a result, issues such as desirability, suitability, need, property values and even public safety, whilst undoubtedly genuine concerns, they are not matters that can lawfully be taken into account as part of the decision making process.

### **21.0 The Decision Required**

21.1 If the Authority is satisfied that the alleged public rights of way discussed within this report are reasonably alleged to subsist, they should resolve to:

- a) Make a Definitive Map Modification Order to add the specified routes to the Definitive Map and Statement for the area;
- b) In the event of no objections being received, or if such objections are received, if they are subsequently withdrawn, the Order be confirmed;
- c) In the even of objections being received, and not subsequently withdrawn, the Order be referred to the Secretary of State for determination.

21.2 If the Authority is not satisfied that the alleged public rights of way discussed within this report are reasonably alleged to subsist and therefore a Definitive Map Modification Order should not be made, they should resolve to refuse the Application and advise the Applicant of his rights to appeal to the Secretary of State.

## **22.0 Consultant's Conclusions**

- 22.1 Having considered all of the available and relevant evidence, the Consultant is of the view that, with the exception of Application Routes **I-J** and **K-J** on **Plan 1 [APP 1 pg. 1]**, there is sufficient evidence to give rise to a reasonable allegation in favour of the establishment of the Application Routes shown on **Plan 1 [APP 1 pg. 1]**.
- 22.3 Whilst this report concludes that there is a reasonable allegation in favour of the alleged public footpath rights, nothing within this report, or said conclusions, preclude a further or later conclusion that said rights do, on balance of probability, subsist.

## **23.0 Consultant's Recommendation**

- 23.1 Whilst it is the Consultant's view that a Definitive Map Modification Order should be made to add the routes shown **A-B, C-D, D-E, F-E-G-H-J-L, G-I-K-L, D-L** and **L-M-N** on **Plan 1 [APP 1 pg. 1]** to the Definitive Map and Statement for the Rotherham Metropolitan Council area, it is for the Council to reach its own conclusions based upon the evidence before it.

Robin Carr FIPROW  
Principal Consultant

27<sup>th</sup> January 2021

### **Robin Carr Associates**

Public Rights of Way Management & Consultancy Services  
Meadow Barn, Main Street, Kneesall, Newark, Nottinghamshire NG22 0AD  
Tel: 01623 835 798 Mobile: 07976 624 029  
Email: consultancy@prow.biz or robin.carr1@btinternet.com  
Web: www.prow.biz

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