

23 March 2020**TITLE OF REPORT: Application for a Definitive Map Modification Order to delete part of public footpath RY/47****REPORT OF: Strategic Director, Corporate Services and Governance**

Summary

This report to committee sets out, summarises and evaluates the evidence gathered and submitted to determine whether there is sufficient evidence to make a definitive map modification order to delete part of public the section of footpath RY/47/1 and the whole section of RY/47/2 from the Definitive Map and Statement.

1. Purpose of the report

To investigate an application and evidence for a definitive map modification order as to whether there is an error on the Council's Definitive Map and Statement and part of the section of footpath RY/47/1 and the whole of section RY/47/2 should be deleted as shown by a broken black line on the plan at Appendix 2 to the report.

2. Background

2.1 By virtue of Section 53(2)(b) of the Wildlife and Countryside Act 1981, the Council is required to keep the Definitive Map and Statement under continuous review and make modification orders upon the discovery of evidence which shows that the map and statement need to be modified in consequence of events described in Section 53(3).

2.2 The relevant statutory provision that applies where an existing public right of way requires modification is Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981. This requires the Council, as surveying authority, to modify the definitive map and statement following:

“(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:-

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

- 2.3 The evidence can consist of documentary/historical evidence or user evidence or a mixture of both. All the evidence must be evaluated and weighed before a conclusion is reached. Any other issues, such as safety, security, suitability, desirability, cost or the effects on property or the environment are not relevant to the decision.
- 2.4 The legal test for deleting a public right of way is somewhat different than for claiming a public right of way or for applications to change the status or alignment of a route. In particular, there are specific case law tests and government guidance notes to be considered when examining deletion cases.
- 2.5 All the relevant statutory provisions and competing rights and interests have been considered in making this report. The recommendation is in accordance with the law and proportionate having regard to individuals' rights and the public interest.

The Application

- 2.6 The Council received an application dated 29th November 2018 which was registered on 3rd January 2019 to amend the definitive map and statement of public rights of way by deleting part of a footpath. The applicant submitted historical map evidence to support the claim. The historical map evidence is set out at Appendix 3 to the report.
- 2.7 Following receipt of the application, the Council displayed notices along the current footpath route requesting any persons who use it to complete a user evidence form. The local user groups were also contacted to determine if any of their members used the claimed right of way and wanted to submit evidence. Following this, 2 user evidence forms were received. A detailed assessment of the user evidence is set out at paragraph 4 below. The user evidence is set out in a table at Appendix 4.
- 2.8 On investigating the claim, the Council in its capacity as Surveying Authority, inspected documentary evidence and this is set out at paragraph 4 below.
- 2.9 In addition to the above investigations, the landowners of the claimed right of way were also sent landowner evidence forms to determine whether they recognised the claimed right of way as a footpath. The landowner evidence is assessed at paragraph 5 below and their evidence is set out in a table at Appendix 4.
- 2.10 This report was due to be presented at the Rights of Way Committee on 18th November 2019, however, it was withdrawn from the agenda at the request of the applicant. The applicant has now indicated through their

solicitors on 15th January 2020 that the item could now proceed to Rights of Way Committee.

3 Site Investigation

- 3.1 The footpath which is subject to the claim is indicated on the plan at Appendix 2 from point A to point B. The part of the footpath that is Ryton 47/1 runs from the northerly corner of the field has a muddy surface. From grid reference NZ11846246 head in a northerly direction through a metal farmgate then continues in an easterly direction through the farmyard where the surface becomes hardstanding along to another metal farmgate. The route continues through the farmyard to another metal farmgate where Ryton 47/1 ends. Once through the metal farmgate the path becomes Ryton 47/2 grid reference NZ11926251. The route continues along the hardstanding surface, through a wooden gate until it reaches the road which is at grid reference NZ11956253.
- 3.2 On site visits by the officer, the public footpath was obstructed by locked gates, this has now been resolved with the landowner, but there was also metal fencing within the farmyard which was present on three site visits. On each site visit the officer was unable to continue through the farmyard section of the public footpath.

4 Consideration of the Application

- 4.1 In determining the application, the committee must decide the following:
 - (a) if the evidence in support of the claim demonstrates significant and robust evidence to overturn the presumption that the definitive map and statement are correct.

The burden to prove this falls on the applicant to establish on the balance of probabilities that the footpath has been wrongly recorded.

DEFRA Rights of Way Circular 1/09

- 4.2 This circular is advice and guidance on public rights of way and is not legislation, but seeks to give an overview within a policy context.
- 4.3 The circular states at para 4.33 that;

“The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:

- the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
- the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
- the evidence must be cogent.”

Trevelyan v Secretary of State for the Environment, Transport and Regions [2001]

- 4.4 In this case the Court of Appeal held that where an application was made to delete a path from the definitive map and it fell to the Secretary of State or an inspector to decide whether the right of way did exist, he had to start with an initial presumption that it did. Some evidence of substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included. There had to be some evidence that was ‘beyond the realms of credibility that a right of way existed’.

Planning Inspectorate Rights of Way Section Advice No 9: general guidance to inspectors on public rights of way matters, 11th Revision April 2019

- 4.5 The advice sets out that the purpose of definitive map modification orders and reclassification orders is to ascertain what rights exist. Further, that once a highway has come into being, by whatever means it continues indefinitely no matter whether it is used or not.

Documentary Evidence

- 4.6 The application was submitted with the following documentary evidence:

a) OS Map NZ16SW 1967

This shows the public footpath and is labelled path, when it meets the farmyard the way joins a road that continues to the road on the other side of the farm.

b) OS Newcastle upon Tyne 1947

No footpath is depicted.

c) OS Hexham 1947

No footpath is depicted.

d) OS Blaydon NZ16 1952

This shows a footpath, it runs parallel with the hedge as it continues northward, which is a different alignment to the present day public footpath. The footpath joins the road in the farmyard and continues through the farm to the road on the other side of the farm.

- e) OS NZ16SW 1951
This shows the public footpath in its present alignment, it continues to the entrance of the farmyard which is open. A road continues after the buildings and joins the road on the other side of the farm.
- f) OS Northumberland XCVI.SW 1899
This shows a footpath labelled on a similar alignment to the 1952 OS Blaydon map above. Officers note that there is a well depicted where the footpath runs alongside a road. The road continues through the farmyard where it meets the road at the other side.
- g) OS Newcastle upon Tyne 1898
No footpath is depicted.
- h) Gateshead 1965 Definitive Map
This shows the public footpath in its present alignment.
- i) Gateshead 2018 Definitive Map
This shows the public footpath in its present alignment.
- j) Google distance measurement.
This shows measurements of the footpath using the present day alignment.

Further evidence was submitted on 24th October 2019

- k) Durham V 1921 map
This shows a footpath, it runs parallel with the hedge as it goes northward, which is a different alignment to the present day public footpath. The footpath meets the road in the farmyard.
- l) OS map 1951
This shows a footpath, it runs parallel with the hedge as it goes northward, which is a different alignment to the present day public footpath. The footpath meets the road in the farmyard and the road continues through and meets a road at the other side.
- m) Google distance measurement
This shows measurements of the footpath, however, the officers note it is measuring a different alignment to the present day public footpath.
- n) “Information map”
This shows the path with measurements, however, using a different alignment to the present day public footpath but also states ‘we propose providing a much better and linking route that would also be suitable for people with disabilities’. No other route is highlighted on the information map.
The council adopted highway and private drive are also highlighted.
The location of the gate that has been locked for over 60 years is also marked on the map.

o) Letter from Neighbour

This is a letter from a neighbour who lives at West Wing, Kyo Close, which is at the end of footpath Ryton 47/2, has known that gate has been locked for the past 14 years. This is while she has lived there but also during the period her aunt lived there between 1956-2014. This neighbour has a key to the gate.

p) Fingerpost evidence

This shows a photograph of a fingerpost on Kyo Bog Lane which states that Westwood is 500 metres from that point along with measurements on google maps. However, the alignment measured is a different alignment to the present day public footpath.

4.7 In addition to studying the documentary evidence submitted in support by the Applicant, the Council also carried out its own research.

a) OS Northumberland XCVI.10 1897

This shows a footpath, it runs parallel with the hedge as it goes northward, which is a different alignment to the present day public footpath. The footpath meets the road in the farmyard where it also shows a well.

b) OS Administrative Area Series of Great Britain 45/16-A 1947 and key

This shows the footpath, however on a slightly different alignment as it runs parallel with the hedge as it goes northwards. It then meets the road as it goes through the farmyard. The road carries on through to the road at the other side of the farmyard. Looking at the key, it is labelled as F.P. and the road that runs through the farmyard is 'other road (not classified by Ministry of Transport).

c) OS Hexham 7th Series Sheet 77 1956

This shows the footpath on a slightly different alignment to the current public footpath. This depicts the footpath terminating in front of a building. According to the key it is a "footpath and track".

d) Gateshead Definitive Statement 1965

This is the first recorded evidence of the footpath that is subject to this application from points A to B. The description of the footpath says 'Leave Kyo Bog Lane by stone stile at Hag Hill, leading N. across grass field to wood stile into Westwood Farmyard and lane leading to main road'. It is also note that 'farmyard' is also mentioned under the details of features entry at number 4. Further, Line 11 says 'unrestricted use for 20 years'. This entry sets out how the route came to be entered onto the definitive map and statement. This would mean that it is not based on documentary evidence but has achieved its status through long usage.

e) Gateshead Definitive statement 2018

The description of the route says 'From Hag Hill, Kyo Bog Lane, proceeds north across field to stile, turns east along south side of hedge to stile into West Wood farmyard to eastern corner'. Line 10 states the length of path is 600 metres.

f) CAMs 2019

This is the Council's computer system which shows the public footpath in its present alignment.

g) Photo Fingerpost 2013

This shows a damaged fingerpost at the Kyo Close end of footpath Ryton 47/2.

h) CAMs Furniture Report 2019

This shows that on the footpath between A and B there are two metal gates as well as a fingerpost. Grid references are also noted.

i) Google street view 2009

This shows a damaged fingerpost where you can make out the words 'Kyo Bog Lane' at the Kyo Close end of footpath Ryton 47/2.

Conclusion of documentary evidence

4.8 After assessing the documentary evidence above, it is noted that some of the maps show the footpath in its current alignment and some show a different alignment. Where the footpath meets the road, people would not turn around and go back, walkers and indeed the footpath would continue along the side of the road. It is the road that would be depicted as this has a higher highway status than a footpath. OS maps are good evidence of the physical existence of routes, but not necessarily of status. The Council were not able to find any other maps e.g. tithe map, finance act map or other evidence. Further an internal search of council records no files or contemporaneous notes were found.

4.9 As mentioned above, a different alignment is shown on many of the maps. The reason why the current footpath is on a different alignment is because the reason the route became a footpath is based on 'unrestricted use for 20 years'. This means that it was based on user evidence of the alignment of the footpath as shown now and not based on the historical map evidence.

Landowner Evidence

4.10 Landowner 1 owns West Wood Farm Cottage, this has footpath Ryton 47/2 at the front of the property. They state that they have always known this to be a public right of way as their partner had used it for many years when he lived and worked on West Wood Farm. They then purchased West Wood Farm Cottage in 1994 again stating that they have always known the public right of way was there. They state that they have seen members of the public using the footpath but when landowner 1 has

used it she has been shouted at and landowner 1 also states there are locked gates along footpath Ryton 47/2. Landowner 1 submitted a letter supporting the footpath.

- 4.11 Landowner 2 owns West Wing, Kyo Close. This is at the end of footpath Ryton 47/2. They state that this route is not a public right of way but it has been used as a public right of way for at least 80 years and they have seen members of the public using it for the last 15 years. It is also stated that there are locked gates.
- 4.12 Landowner 3 owns the land that footpath Ryton 47/1 passes on. On the completed form from Landowner 3 it only includes from Kyo Bog Lane to West Wood Farm, so this does not include the route marked on the application A-B. They state that this route is known as a public right of way, but the length of time is unknown. It is also stated that there are gates on this route that were not locked.
- 4.13 Landowners 4 and 5, who are the applicants, state that in their opinion the route marked in the application from A-B is not a public right of way and they have informed members of the public on two occasions of this but allowed them to continue. They also state they have erected signs saying 'Footpath No 47 correct finishing point here' earlier this year. It is also stated that there are locked gates within the route marked A-B in the application.

Conclusion of Landowner evidence

- 4.14 There is mixed evidence in relation to the footpath between A-B and its existence. It is clear that users of the footpath are being deterred from using the public footpath, which is not appropriate where a footpath is on the Definitive Map and Statement. As a result of this, usage has declined over the years. In such applications, current use of the footpath is not integral to the determination of the application.

User Evidence

- 4.15 There were 2 completed user evidence forms submitted, which are attached at Appendix 4. Of the user evidence, 1 has used the footpath regularly for at least 6 years on a less than monthly basis stating that he had occasionally encountered a locked gate but also stating that one gate was always locked which he would climb. This user also confirmed that he has been told that the route is not a public right of way, but he did proceed. The other completed user evidence form indicated that they had only used the route once, which was last year, and stating that he had come across a locked gate which he climbed.
- 4.16 Evidence was also received from Councillor Kelly:

- (a) a detailed plan of walking footpath Ryton 47 on 15th May 2019 is broken up into stages.

- (b) Right of Way post removed-It was to the right of this tree as we look eastwards. My walk started from the bypass and up the lane to the farm and outlying buildings. I spoke to the person who lives in the first building on the right. She said the right of way signpost had been removed by the person disputing the right of way.
- (c) The next stage was to negotiate the farm yard as the path passes through the middle of it. A chain and padlock meant climbing over the gate.
- (d) At the other end of the farm yard were these metal fences that I had to be climbed over. The path route is toward the open field ahead.
- (e) As I was walking my way across the field a man by the wooden cabin to the left of this picture shouted at me that I had trespassed by walking across the farm yard and it was all a mistake by Gateshead council that would soon be confirmed.
- (f) Here at the corner of the field are more metal fences to be climbed over. After getting through the route is bare sharp left heading southwards....no signs!
- (g) The path across the field heads towards this gate near Kyo Bog Lane turns sharply. The view looks northwards back along the path.

Conclusion of User Evidence

- 4.14 Deletion applications are fairly rare and therefore detailed analysis of user evidence forms, which are most useful when a claim is made for a public right of way, are of little evidence value. Further, the fact that a footpath is not being used, is not part of the test or a denial that the footpath exists.

5 Conclusion

- 5.1 The historical evidence examined does not in this case show that a clear mistake has occurred and so is not sufficient to meet the high legal test as outlined above. The test is high because in order for a public right of way to appear on the Definitive Map and Statement it has already gone through a lengthy process with opportunities for objections/corrections. Consequently some very clear evidence of substance has to be provided or found to overturn the legal presumption, which has not been the case here.
- 5.2 The applicant sets out in their application that there is a 'line overrun on the map' and this is not the correct termination point of the footpath. The Council concludes, that whilst there are several opinions made by the applicant that there may have been an error in recording the footpath subject to this application, it is concluded that there is not sufficient evidence that an error did occur in recording the route. The route subject to this application was entered onto the definitive map and statement based on 'unrestricted use' this means that it was not based on historical map evidence but instead based on long usage of the way. Further, the description of the way includes details of the

farmyard, which you would not expect to see if it was simply a 'line overrun'.

- 5.3 As a separated point, there are various other statutory methods available to the applicant to explore if they are looking to develop their property or would like to see the footpath stopped up or diverted.

6 Recommendation

Approval is sought from the Public Rights of Way Committee for the following:

- 6.1 That an order not be made under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 to delete a footpath from the Definitive Map and Statement as shown between points A and B on the Plan at Appendix 2.
- 6.2 The reason for refusal of the application is on the ground that there is not robust evidence to overturn the legal presumption that the Definitive Map and Statement are correct.

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1 FINANCIAL IMPLICATIONS

None

2 EQUAL OPPORTUNITIES IMPLICATIONS

None

3 STAFFING IMPLICATIONS

None

4 ACCOMMODATION IMPLICATIONS

None

5 CRIME & DISORDER IMPLICATIONS

None

6 ENVIRONMENTAL IMPLICATIONS

None

7 HUMAN RIGHTS IMPLICATIONS

The applicable rights to be considered are the right to protection of property, right to a fair trial and right to respect for private life. However the Wildlife and Countryside Act 1981 and the Highways Act 1980 provides a legal basis for interference with these rights and the risk of these rights being infringed is addressed via the fact that any orders made are subject to an objection period and the statutory legal process.

8 WARD IMPLICATIONS

Crawcrook and Greenside

9 BACKGROUND INFORMATION

None

Appendix 2 – Plan of the claimed route

Appendix 3 – Map evidence

Appendix 4 – User evidence

Appendix 5 – Landowner evidence