

**18 March 2016**

**TITLE OF REPORT:** **Claimed Public Right of Way: Sherburn Tower Farm, Rowlands Gill**

**REPORT OF:** **Strategic Director, Corporate Services and Governance**

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### **Summary**

This report to Committee sets out, summarises, and evaluates the evidence, alleging the dedication of a public footpath alongside Sherburn Tower Farm and into Sherburn Green Wood, Spen Burn.

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### **Purpose of the report**

- 1) To seek authority from the Rights of Way Committee for the making of a Definitive Map Modification Order in respect of a claimed footpath, at Sherburn Tower Farm, Rowlands Gill, Gateshead.

### **Background**

- 2) The route which is the subject of the claim is indicated on the plan at Appendix 2 from Point A to Point D. It is approximately 1290 metres in length and commences at Point A in Sherburn Green Wood, Spen Burn, on a steep track, where it proceeds to an unlocked gate and fence, which has a broken sign on it which did read: "Private Road No Entry", which is shown at Point P on the plan at Appendix 2. It then continues to a gate at the top of the Wood that is locked with a stile to the side of it, as indicated on the plan at Appendix 2. There is a sign on the gate that states: "Private Road – No access without permission". It then continues on an old stone track that runs past Sherburn Tower Farm and through an open double gate, with the fence to the side of that gate with a sign stating "Sherburn Tower Farm Private Road". It then continues round a bend, at Point B on the plan at Appendix 2 on a hard stone surface, where it proceeds to and crosses Footpath Blaydon 59 at Point C on the plan at Appendix 2. From this point it forms part of the Red Kite Trail to another locked gate which has a gap to the side of it at Point D on the plan at Appendix 2 where it joins Hollinhill Lane opposite Thornley Kennels.
- 3) An application to register the claimed right of way was made and registered on the 18 August 2015. After receiving the Schedule 9 Certificate on 21<sup>st</sup> August 2015 (service of notice of the claim on affected owners and occupiers of the land the claimed right of way runs across);

the Council was under a duty to investigate the claim. The applicant had submitted in March 2014, 11 user evidence forms but the application was not formally made until 18<sup>th</sup> August 2015. Those 11 user evidence forms are part of the application along with an additional user evidence form that was submitted in 2015 and all that evidence is set out in the table at Appendix 3. Members are advised that they are exercising a quasi-judicial function when determining this claim, and can only have regard to the statutory and evidential matters arising from section 31 of the Highways Act 1980 and section 53 and Schedule 14 of the Wildlife and Countryside Act 1981.

- 4) On investigating this claim the Council in its capacity as Surveying Authority, inspected the Tithe Maps online and the Ordnance Survey plans from 1856 to the present day. Copies of Ordnance Survey plans are at Appendix 4. An investigation was also undertaken at the Tyne and Wear Records Office but no information relating to the claimed public right of way was identified. Notices were displayed along the claimed right of way requesting any persons who use it to complete a user evidence form. One user evidence form was submitted, namely user evidence form 12. In addition user evidence forms were sent out to Thornley Kennels, but no response was received from them. 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. However no responses were received from them. A detailed assessment of the user evidence submitted is set out at paragraphs 10 to 26 below.
- 5) In addition to the above investigations, the landowners of the claimed right of way were also sent a landowner evidence form to determine whether they recognised the claimed right of way as a public right of way or whether they had done anything to rebut any presumption of dedication of the claimed right of way. The landowner evidence is assessed at paragraphs 27 to 38 below, and their evidence is set out in a table at Appendix 5.

**The statutory requirements to add a public footpath to the definitive map of public rights of way.**

- 6) The process of adding a public right of way to the Council's Definitive Map and Statement of Public Rights of Way is set out in the Highways Act 1980, and the Wildlife and Countryside Act 1981. The Highways Act deals with the type and character of the evidence put forward to 'claim' the right of way in question, whilst the Wildlife and Countryside Act sets out the way in which this evidence becomes part of, in turn, an 'application', and then – if the Committee so decides – an 'order'.
- 7) Section 31(1) of the Highways Act provides:

“Where a way over any land, other than a way of such a 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 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.”

In this case, the two important issues in this section are, i) the need for a period of 20 years public use without interruption, and, ii) absence of evidence that the landowner(s) had no intention to dedicate the right of way.

8) Section 31(2) provides:

“The period of 20 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 ...”

9) The Committee are therefore asked to determine:

- a. Was there an ‘event’ that brought the claimed right of way into question and, if there was, when was it?
- b. Is there a full 20 years of evidence of public use of the claimed right of way, ‘as of right’, stretching back from that date? And, if yes,
- c. Is there any evidence that the landowner(s) has given sufficient evidence of their intention not to dedicate the claimed right of way to the public?

### **According to User Evidence**

#### **A) The Date of a ‘Bringing Into Question’.**

10) In order to determine whether the claimed right of way has been dedicated in accordance with Section 31 of the Highways Act 1980, it first needs to be determined how the use was brought into question. An event which can bring a claimed right of way into question can consist of:

- Locked gates being put up on the claimed right of way;
- Notices being erected along the claimed right of way to deny it is a public right of way;
- Landowner’s stopping or challenging the use of the claimed right of way;
- Notices stating that the claimed right of way can only be used with the permission of the landowner, and
- The lodging of an application for a Definitive Map Modification Order.

11) All 11 user evidence forms that were submitted with the application, state that there were no notices erected along the claimed right of way to inform users that it is not a public right of way.

- 12) A further user evidence form was submitted in September 2015 (namely user evidence form 12), which states that only recently a notice stating “private road” had been erected along the claimed right of way. However the words “private road” on a sign can be construed as meaning no access to vehicles, but still providing access to people on foot. This is further supported by stiles being erected to the side of the locked gates to allow pedestrian access, which is discussed at paragraph 14 below.
- 13) All the user evidence forms confirm that none of the users have ever been turned away from using the claimed right of way by the landowner or tenant farmer acting on the authorisation of the landowner.
- 14) In addition, 11 out of the 12 user evidence forms confirm that there are locked gates with adjacent stiles along the claimed right of way. There is only 1 user evidence form, namely user evidence form 9, which states that there are no locked gates or stiles along the claimed right of way. Contrary to the evidence submitted in user evidence form 9, the remaining user evidence confirms that there are locked gates and stiles along the claimed right of way, at the locations shown on the plan at Appendix 2. The user evidence does not however confirm the dates when the locked gates and stiles were erected. Furthermore it is questionable whether a locked gate that has a stile erected beside it, is a clear indication by the landowners to the public that their right to use the claimed right of way is being stopped; this is because the stile (much like a footpath sign), would imply or indicate to the public that they could still use the claimed right of way on foot.
- 15) The final event that can bring the use of the claimed right of way into question is the lodging of an application for a definitive map modification order under the Wildlife and Countryside Act 1981. An application for a definitive map modification order was made on 18 August 2015. Due to the above events (namely the notices and locked gates) being insufficient to bring into question the use of the claimed right of way; the view of Officers is that the date that first brought into question the public’s use of the claimed right of way can only be 18 August 2015; when the application was made.

**B) Is there 20 years public use of the route during the relevant period of 1995 to 2015?**

- 16) All the evidence in the 12 user evidence forms have been formulated into a table, which is attached at Appendix 3. Every person who has submitted a user evidence form have confirmed that they have used the whole of the claimed right of way, except for one person (user evidence form 12), which has only used the southern section of the claimed right of way. Therefore, that user evidence form will need to be discounted, leaving 11 user evidence forms to consider. In addition, user evidence

form 6 has confirmed in writing that they have used the whole of the claimed right of way (from Thornley Kennels to Sherburn Green Wood), but the plan attached to their user evidence form shows that they only used the route from Point A to Point C on the plan at Appendix 2 and then continued onto the Red Kite Trail. This might have been marked incorrectly on the plan by user 6, but contact has not been able to be made with that person in order to clarify their evidence and therefore their user evidence has been discounted. This means that there are only 10 user evidence forms to take into consideration.

- 17) From those 10 user evidence forms, 6 people claim to have used the claimed right of way regularly for at least 20 years during the relevant period of 1995 to 2015. The frequency of use for each person varies from a few times a year, to monthly then weekly. This indicates that there is regular use of the claimed right of way during the relevant period.
- 18) Two people allege to have used the claimed right of way for part of the relevant 20 years period, with 1 person having used the claimed right of way for 19 years of the relevant period. This evidence can be taken into account and added to those persons with 20 years or more use during the relevant period. The frequency of use of the claimed right of way varies from monthly to weekly, which indicates that the claimed right of way is well used. There are 2 user evidence forms (namely user evidence forms 10 and 11), which are unclear as to the period of use they have used the claimed right of way. The Council has written to these 2 people to request clarification on the period of years they are alleging to have used the claimed right of way, but no response has been received from them. Therefore those 2 user evidence forms will be discounted, leaving a total of 8 user evidence forms to be taken into consideration.
- 19) In order to satisfy the statutory test of dedication, the use not only has to be use during the relevant period, but it also has to have been enjoyed by the 'public' and not just used by a class or section of the public. For example, employees of a particular business using the route to get to work. When assessing the user evidence, it appears that the use is by local residents using the claimed right of way for recreational purposes i.e. walking. All of the 8 user evidence forms confirm that people have used the claimed right of way on foot, sometimes with the accompaniment of their dog. Therefore the user evidence supports the fact that the claimed right of way is actually enjoyed by the public as a footpath.
- 20) Taking the above into account it is the view of Officers that there is sufficient user evidence from the public claiming to have walked the claimed right of way for at least 20 years and continuously throughout the relevant period from 1995 to 2015, to satisfy the requirements of section 31(1) of the Highways Act 1980.

**C) Is the claimed public use 'as of right' and uninterrupted?**

- 21) The term 'as of right' in this context means without force (for example, breaking a lock on a gate to gain access), without secrecy (for example, the landowner must have been in a position to object to the use of his land as a right of way, so the public's use must not be in secrecy); and finally the public's use must have been without the permission of the landowner. For example, where the landowner gives express consent by erecting a sign stating "Permissive Path". Furthermore, use of the claimed right of way cannot be across common or access land as that use would be with permission (by right and not as of right). Also any permission granted or access denied, must be by the landowner or by someone authorised by the landowner.
- 22) From the user evidence, all 8 people confirmed that they did not ask permission of any landowners before using the claimed right of way. Again when the user evidence form asked if anyone had been stopped from using the claimed right of way, all 8 people stated that they had not been stopped from using it. Therefore, the user evidence confirms that the use of the claimed right of way was not with the permission of the landowners and was not in secrecy.
- 23) The final element of the 'as of right' test is whether the use of the claimed right of way was by force. The user evidence confirms that there are gates, some locked and some open, along parts of the claimed right of way, but that there are stiles or gaps next to the gates. This means that no force has been used to access the claimed right of way on foot and therefore use of it by the public has been 'as of right'.
- 24) Use of the claimed right of way must be without interruption, which does not refer to the interruption in continuity of use, but the actual and physical stopping of the enjoyment of the public's use. For example, if a landowner erected a locked gate on their land to stop public access, but the public continued to use it by going round the side of the gate, then that would still constitute an interruption in public use.
- 25) However the user evidence all appears to confirm that despite there being gates along the claimed right of way, the gates are either locked with stiles or gaps to the side or are unlocked and open. According to the user evidence, there have always been stiles and gaps or gates left open to enable public access on foot. Therefore it is assumed that stiles and gaps were put in place to enable footpath users to continue to use the claimed right of way, whilst stopping vehicles and motorbikes. If that is the case, then there would be no interruption in use of the claimed right of way as a footpath, because the landowner intended that use to continue by the existence of stiles, gaps and unlocked gates.
- 26) It is the view of Officers for the reasons set out above, that the nature of the public's alleged use of the claimed right of way was 'as of right' and

uninterrupted for the purposes of section 31(1) of the Highways Act 1980.

### **Landowner Evidence**

**D) Is there any evidence of the landowners having an ‘intention not to dedicate’ the route during the statutory 20-year relevant period?**

- 27) A landowner is able to evidence his or her ‘intention not to dedicate’ a public right of way in a number of ways. The action that a landowner takes to do this must make it clear to users that they did not intend to dedicate a public right of way. The most effective way to achieve that is to have lodged with this Council (or a previous Council) a statutory declaration under the provisions of section 31(6) of the Highways Act 1980. The Council has not received any such declarations from the landowners.
- 28) Other ways in which a landowner can rebut a presumption of dedication could include erecting clear and unequivocal notices, erecting locked gates or challenging people using the claimed right of way. The user evidence detailed above, suggests that only recently there have been “private road” signs erected along the claimed right of way. All of the user evidence confirmed that no one had asked permission or been stopped from using the claimed right of way. However, this user evidence is in conflict with the evidence that has been provided by some of the landowners.
- 29) The ownership of the claimed right of way has two freehold landowners. One who occupies the land (which is unregistered land) from Point D to Point C on the plan at Appendix 2 as a farmer (referred to as Landowner 1 on the evidence table at Appendix 5); and the other landowner (referred to as Landowner 2 on the evidence table at Appendix 5), owns the remaining part of the claimed right of way. Landowner 2 has a tenant farmer occupying Sherburn Tower Farm from Point C to Point P on the plan at Appendix 2 (although no copy of the tenancy or lease has been provided). Landowner 2 has also granted a long lease to the Forestry Commission that manages the section of claimed right of way from Point A to Point P on the plan at Appendix 2, which is not registered as common land. Each of these owners and occupiers, have provided evidence in a landowner evidence form, which are detailed in the table at Appendix 5.
- 30) Landowner 1 has confirmed that they have owned the land since 1965 and that they have not obstructed the claimed right of way. Landowner 1 did not provide any further evidence.
- 31) The Forestry Commission provided initial evidence that the section of the claimed right of way that it manages is open access land under the Countryside and Rights of Way Act 2000. However the Forestry

Commission subsequently confirmed, in January 2016, that the area of land that forms part of the claimed right of way is not designated as open access land. (If the designated open access land had included that section of the claimed right of way, then the use of it by the public would not have been 'as of right' but 'by right', and no public right of way would be able to be dedicated on it).

- 32) The land agent acting for Landowner 2 and initially for the tenant farmer (who has recently appointed a legal representative), has confirmed that the tenant farmer has erected signs stating "Private Road No Entry" and "Private Road No Access without Permission". The sign stating "Private Road No Entry" has been broken off the new unlocked gate and fence at Point P as indicated on the plan at Appendix 2 and the sign stating "Private Road No Access without Permission" on the locked gate with stile to the side of it as indicated on the plan at Appendix 2; were both erected by the tenant farmer in 2015. The sign on the fence next to the open gate outside Sherburn Tower Farm, indicated with the "Private Road" sign on the plan at Appendix 2, has been in situ since 1990, where it was previously on the left hand side of the claimed right of way according to Landowner 2's agent.
- 33) The issue here is that if two of the signs were only erected in 2015 and one of those signs has been broken and not reinstated and no notice has been given to the local highway authority by the landowner to confirm that they do not intend to dedicate a public right of way on their land under sections 31(5) and (6) Highways Act 1980; then this would not be sufficient enough to rebut any presumption of dedication of a public right of way to the people who have used it at least 20 years prior to 2015. Furthermore, the two signs stating: "Private Road No Entry" and "Private Road No Access without Permission" are ambiguous and imply that there is no access to vehicles along the road without the permission of the landowner. In other words, it is not clear and unequivocal that the intention of Landowner 2 was to stop all public access along that section of the claimed right of way that they own. Also these notices were erected by the tenant farmer and these notices need to be erected by the landowner or by somebody on the instruction of the landowner to satisfy the test of rebuttal against dedication. It is not clear in this case if the signs were erected on the instruction of Landowner 2, as the evidence does not confirm this point. The agent for Landowner 2 has only confirmed that the tenant farmer was under a duty to prevent footpaths being established on the land. However it does not state how that duty arises.
- 34) The one sign that states: "Sherburn Tower Farm – Private Road" that is alleged to have been in situ since 1990 is still not sufficient to rebut a presumption of dedication to users for the reasons set out in paragraph 33 above. Also the user evidence suggests that there have been over 20 years use before 1990 of the claimed right of way by the public and as the sign is not located at the start or end of the claimed right of way, people would have to walk more than half way along the claimed right of

way before they saw it. Furthermore, it is arguable that only people walking from Point A at Sherburn Green Wood, up to Point D at Thornley Kennels, would see the sign as it is only facing in that direction. It would be questionable whether anybody walking in the opposite direction would actually see the sign. In addition, it appears the sign has had written on it at a later date the words: "Private Road" in the middle of the words "Sherburn Tower Farm", which could also be construed because of the position of the sign, as meaning the road up to the farm is a private road not the claimed right of way itself. Again those words could also indicate that it only applies to vehicles not pedestrians as it makes reference to the word "road". Therefore for those reasons, Officers would conclude that the sign that has been in situ since 1990 would not be sufficient to rebut any presumption of dedication of a public right of way.

- 35) The tenant farmer has confirmed that they have given verbal permission on an ad-hoc basis to people using the claimed right of way and has challenged some users, which has resulted in vandalism to the farm and putting the tenant farmer in a threatened position. This resulted in the tenant farmer not challenging the use by the public of the claimed right of way as much as they wanted too. This evidence coincides with the user evidence as it confirms that no challenges were made when walking the claimed right of way. However, other measures could have been taken to rebut any presumption of dedication as outlined above, which has not been done. In addition, it would need to be the landowner or someone authorised by them, for any challenges to be effective. It is unclear here if Landowner 2 has authorised the tenant farmer to challenge the public use of the claimed right of way on foot, although the agent for Landowner 2 has confirmed that the tenant farmer is under a duty to prevent new footpaths being established, although it does not state where this duty comes from.
- 36) The agent for Landowner 2 and the tenant farmer have confirmed that the two locked gates (one at Point D and the other between Points B and P as indicated on the plan at Appendix 2); were installed about 20 years ago and have been locked for the whole of that time to stop people from driving in and fly-tipping on the claimed right of way (although it does not confirm who erected the locked gates). This indicates that the gates were installed to stop vehicular traffic and not pedestrians, which may account for the stiles and gaps being erected next to the locked gates. Therefore there is no evidence of the landowners stopping the public from using the claimed right of way on foot.
- 37) The tenant farmer has also blocked the claimed right of way when moving stock around the farm, which has meant that some people have had to turn back or wait for permission from the tenant farmer before proceeding along the claimed right of way. However this act would not rebut a presumption of dedication because the interruption of public use must be with the intent of the landowner to stop the public using the claimed right of way. Whereas here it is an act of the tenant farmer to

move cattle from one field to another across the claimed right of way; it is not the intention of the landowner to stop the public using it as a footpath.

- 38) Therefore it is the view of Officers that there is no evidence of the landowners' intention not to dedicate the claimed right of way on foot during the relevant period of 1995 to 2015 for the purposes of section 31(2) of Highways Act 1980.

### **Map Evidence**

- 39) The Council has reviewed the Ordnance Survey Plans, copies of which are attached at Appendix 4. The Ordnance Survey Plans from 1856 to the present day show that the claimed right of way was in existence on the ground for the whole of that period. This means that the claimed right of way was in existence since 1856, but it does not prove or establish its legal status. However, it does support the user evidence in showing that it has been in existence for a very long period of time and has more than likely been used for the whole of that period in order to be marked on the Ordnance Survey Plans.
- 40) The Tithe Maps were also inspected online when considering this claim. Historically, tithe maps were produced where agreement could not be reached between tithe owners and tithe payers and detailed surveys were undertaken of the land to apportion the applicable rent-charge to each part of the land contained in an accompanying award. Although these maps do not prove legal status of a claimed right of way, they do show whether a claimed right of way was in existence at the time the detailed survey was undertaken in 1838. The Winlaton tithe map shows that the claimed right of way was in existence in 1838 and therefore it is more than likely that it will have been used by the public from the time of its existence.
- 41) The above map evidence shows that it is more probable than not, that the public have used the claimed right of way for the duration of its existence, which is shown as being in existence from 1838.

### **Conclusion**

- 42) In light of the user evidence, map evidence and submissions made by the landowners, Officers would recommend that there is sufficient evidence of use by the public as of right of the claimed right of way as a footpath, in order to make a definitive map modification order.

### **Recommendation**

- 43) The Rights of Way Committee approves:

(i) the making of a definitive map modification order to add the claimed footpath at Sherburn Tower Farm, as shown with a broken black line from Point A to Point D on the plan at Appendix 2 onto the Definitive Map and Statement of Public Rights of Way.

(ii) Grant delegated authority to the Strategic Director of Corporate Services and Governance, to undertake the following:

(a) To consult statutory consultees and make a definitive map modification order to add the footpath at Sherburn Tower Farm as shown from Point A to Point D with a broken black line on the plan at Appendix 2, and

(b) If no objections are received to confirm the order or if objections are received and not subsequently withdrawn, to send the order to the Secretary of State for determination as an opposed order.

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**1 FINANCIAL IMPLICATIONS**

The costs of making and advertising the order will be covered by existing budgets.

**2 RISK MANAGEMENT IMPLICATIONS**

None

**3 HUMAN RESOURCES IMPLICATIONS**

Staff from Legal, Democratic and Property in conjunction with the Public Rights of Way Officer, will carry out the processing of the order.

**4 EQUALITY AND DIVERSITY IMPLICATIONS**

None

**5 CRIME & DISORDER IMPLICATIONS**

None

**6 SUSTAINABILITY IMPLICATIONS**

None

**7 HUMAN RIGHTS IMPLICATIONS**

Under Article 8, everyone has the right to respect for his or her private and family life, home and correspondence.

**8 WARD IMPLICATIONS**

Chopwell and Rowlands Gill

**9 BACKGROUND INFORMATION**

None

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