

15 July 2024

TITLE OF REPORT: **Application for a Definitive Map Modification Order to claim a Byway Open to All Traffic from Earls Drive to Glenbrooke Terrace, Low Fell**

REPORT OF: **Strategic Director of Corporate Services and Governance and Strategic Director of Housing, Environment and Healthy Communities**

Summary

This report to Committee sets out, summarises and evaluates the evidence gathered and submitted to the Council regarding an application made under section 53 of the Wildlife and Countryside Act 1981 for modification of the Definitive Map and Statement by adding to it a Byway Open to All Traffic from Earls Drive to Glenbrooke Terrace, Low Fell.

Purpose of the report

- 1) To investigate an application and evidence for a definitive map modification order to add an alleged Byway Open to All Traffic from Earls Drive to Glenbrooke Terrace onto the Definitive Map and Statement of public rights of way.

Background

- 2) The Council received an application dated 18 July 2023 to add a Byway Open to All Traffic onto the Definitive Map and Statement of public rights of way. A plan showing the route of the alleged Byway Open to All Traffic is at Appendix 2 of the report.
- 3) The application is made under section 53 of the Wildlife and Countryside Act 1981 which provides for modification of the Definitive Map and Statement to be made where it is shown that a right of way subsists or is reasonably alleged to subsist. Rights of way can be acquired where they have been exercised by the public at large without permission or restriction for a period of at least 20 years.
- 4) All the relevant statutory provisions and competing rights and interests have been considered in drafting this report. The recommendation is in accordance with the law and proportionate having regard to individuals' rights and the public interest.

The Application

- 5) The application is for a Byway Open to All Traffic to be added to the Definitive Map and Statement. The statutory definition of a Byway Open to All Traffic is set out at section 66(1) of the Wildlife and Countryside Act 1981, namely:

“A highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”.

- 6) In the High Court decision of *Masters*, (*Masters-v-the Secretary of State for the Environment, Transport and the Regions [2000] 2 All ER 788*) the Court, in deciding the meaning of section 66(1) looked into what Parliament’s intention was, which was to record “full ways or cartways” for the benefit of ramblers and horseriders. That intention would not be served if, for example, a new Byway Open to All Traffic could not be put on the map without current pedestrian or vehicular use.
- 7) The effect of the Judgment is that it is not a necessary precondition for a carriageway to be a Byway Open to All Traffic for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test for a carriageway to be recorded on the Definitive Map and Statement as a Byway Open to All Traffic relates to its character or type.
- 8) The applicant submitted historical map evidence, photos and 12 user evidence forms to support the claim. The user evidence is assessed at paragraphs 19 to 32 below, and the evidence is set out in a table at Appendix 3 to the report.
- 9) During the Council’s investigation into the claim, notices were displayed along the claimed right of way inviting anyone who use it to complete a user evidence form. The Council also wrote to the local user groups to determine if any of their members used the claimed right of way and wanted to submit user evidence.
- 10) Only one response was received from a local consultee representing local user groups the Byways and Bridleways Trust, Bridleways and Riders Action Group and Cycling UK. The consultee submitted comments that in their opinion “the route does not fulfil the character of way necessary to facilitate recording as a Byway Open to All Traffic”.
- 11) Following the Council’s informal consultation, no user evidence forms were received.
- 12) In addition to the above, the Landowner of the claimed right of way was invited to submit landowner evidence 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 33 to 39 below.

The Legislation

13) 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 1980 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 1981 sets out the way in which this evidence becomes part of, in turn, an 'application', and then – if the Committee so decides – an 'order'.

14) Section 53(2)(a) requires the Council to keep its Definitive Map and Statement under continuous review and to make modifications as soon as reasonably practicable after the occurrence of any of the events specified in section 53(3). The event relevant to this application is set out at section 53(3)(c)(i), namely,

“The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over the land to which the map relates, being a public path, restricted byway or a byway open to all traffic”.

15) Section 31(1) of the Highways Act 1980 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.”

16) 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.

17) 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 ...”

18) 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 has given sufficient evidence of their intention not to dedicate the claimed right of way to the public?

The Facts According to the User Evidence

(a) The date of 'bringing into question'.

19) 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. The period of 20 years is counted back from the date on which the public's right was first brought into question.

20) An event which can bring a claimed right of way into question can consist of:

- Locked gates being put up on the right of way;
- Notices being erected along the claimed right of way to deny it is a public right of way;
- Landowners 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.

21) If the public's use has not been brought into question, the date of an application for a definitive map modification order can be taken as the end-date for the 20-year period.

22) In light of the above, the relevant period can be considered as being 20 years back from the date of the definitive map modification order application, that being from July 2003 until July 2023.

(b) Is there 20 years public use of the route during the relevant period of 2003-2023?

23) The evidence in the 12 user evidence forms have been formulated into a table, which is attached at Appendix 3.

24) From those user evidence forms, nine people confirm they have used the claimed right of way regularly for at least 20 years during the relevant period of 2003-2023; one person had used the route for four years during the relevant period; one person had used the route for 17 years and one person had used the route since 2023. The frequency of use for each person varies from daily to weekly and monthly.

25) 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.

- 26) When assessing the user evidence, it appears that principal use is by local residents using the claimed right of way to access either their garden or garage. Two of the user evidence forms state the route is used for dog walking; one person uses the claimed right of way as a shortcut; one person uses the route for leisure and to access school and work and one person uses the claimed right of way to access shops, public transport or work.
- 27) All of the 12 user evidence forms confirm that people have used the claimed right of way on foot; one user evidence form confirms use of the claimed right of way on cycle and six of the user evidence forms confirms use of the claimed right of way by vehicle.
- 28) The user evidence forms submitted include statements from residents of Glenbrooke Terrace who use the route to access their garage. This may indicate that the residents have private vehicular rights, however for the purposes of the definitive map modification order application, the evidence should come from members of the public who have used the route on foot, cycle, horse or in a motorised vehicle. There is no evidence to suggest that the public at large have used the route in motorised vehicles, on foot, horseback or cycle.

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

- 29) 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.
- 30) From the user evidence, all 12 people confirmed that they did not ask permission of the Landowner before using the claimed right of way; however two of those users also state that they have a private access right across the claimed right of way. When the user evidence form asked if anyone had been stopped from using the claimed right of way, all 12 people stated that they had not been stopped from using it.
- 31) 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 no

obstructions. This means that no force has been used to access the claimed right of way therefore use of it by the public has been 'as of right'.

- 32) 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.

Landowner Evidence

(c) Is there any evidence of the Landowner having an 'intention not to dedicate' the route during the statutory 20-year relevant period?

- 33) 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 declaration from the Landowner.

- 34) 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. All of the user evidence confirms that no one had asked permission or been stopped from using the claimed right of way, although as mentioned above at paragraph 30, two of the users state they have a private right of access along the route. The user evidence forms state there are no signs erected along the claimed right of way. However, the user evidence submitted is in conflict with the evidence that has been provided by the Landowner.

- 35) There is a painted sign stating "Private lane, no tipping, no parking" on one of the walls of the end garage which fronts onto the rear part of the land in question. The sign has been in situ for many years and having queried it with ancestors, the Landowner was unable to confirm the exact date the sign was installed. Further signs stating "private land, no public access or right of way" were installed when the Landowner was made aware of the application for a definitive map modification order and as such, were installed outside of the relevant period.

- 36) In terms of granting permission to use the route, the Landowner states that the route is used by individuals accessing their garden or garage and the Landowner has never had to turn back or stop anyone from using the route.

- 37) The Landowner states that the garages have been in constant use since being built and regarding the question as to whether gates have ever been erected on the route, the Landowner has commented that the route is not

suitable for gates as there are seven different garages, each originally constructed for use by seven individuals and as there are gardens on the other side of the land, it would not be appropriate to erect gates along the route. Further, it is stated that the occupiers of 1-7 Glenbrooke Terrace have existing rights to pass over the land in question to access their rear gardens.

- 38) The Landowner has also submitted documentary evidence including a Notice from Mayor Alderman and Burgess of the Borough of Gateshead to the Landowner's ancestor dated 6th April 1927, asking each occupant along Glenbrooke Terrace to "pay contributions for penning and paving charges" and provides that the land in question was originally designated as "garden land".
- 39) From the above assessment of the evidence in relation to each of the tests required by section 31 of the Highways Act 1980, it would appear that the tests have not been satisfied in order to prove on a balance of probabilities that the alleged Byway Open to All Traffic is reasonably alleged to subsist and that the Landowner had no intention to dedicate the land as a Byway Open to All Traffic. Further, the claimed right of way has not been "used by the public mainly for the purpose for which footpaths and bridleways are so used" as set out in the statutory definition of a Byway Open to All Traffic.

Conclusion

- 40) The Council must make a definitive map modification order if Members consider that evidence submitted with the application which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist on land in the area to which the Definitive Map relates.
- 41) The Committee may determine that the evidence submitted in support of the application is sufficient to support that rights of way subsist or are reasonably alleged to subsist and to authorise the Council to make the necessary order to modify the Definitive Map and Statement or, the Committee may determine that the evidence is insufficient to support that rights of way subsist or are reasonably alleged to subsist.
- 42) The Officer's recommended option is for Members to determine that the evidence is insufficient to support that a right of way subsists or is reasonably alleged to subsist and to refuse the application.

Recommendation

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

- 1) To refuse the application dated 18 July 2023 to add a Byway Open to All Traffic from Earls Drive to Glenbrooke Terrace, Low Fell.

2) Reasons for refusal: The reason for the refusal of the application is that there is insufficient evidence to support a reasonable allegation of a Byway Open to All Traffic subsisting over the claimed route.

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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

Low Fell

9 BACKGROUND INFORMATION

Appendix 2 – Plan of claimed route

Appendix 3 – User evidence table

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