

REGULATORY COMMITTEE  
15<sup>th</sup> APRIL 2005

---

**MERE: FOOTPATH 78 - OBJECTIONS TO MODIFICATION ORDER**

**Purpose of Report**

1. To consider and comment on objections received to the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981. The Order provides for a footpath to be added to the Definitive Map and Statement from the C59 road at Edge Bridge leading down and into Shreen Water, an approximate length of 1.5 metres with a width of 1.34 metres, as indicated A-B on the plan attached at **Appendix 1**.

**Background**

2. On 23<sup>rd</sup> September 1999 Mere Parish Council made an application for a bridleway to be added to the Definitive Map and Statement from Edge Bridge to dipping stones a few feet from the river's edge in Shreen Water, as shown A-B on **Appendix 1**.
3. The application was supported by 10 witness statements testifying to use since 1916. The statements are summarised in the attached **Appendix 2**.
4. No actual direct evidence of use by horses has been submitted and it is consequently not possible to establish whether use was as of right or with the permission of the landowner.
5. The owners of the land affected by the claim are Mr. and Mrs. Hollick, who purchased 2 Edgebridge in 1987 as a weekend retreat, moving permanently into the house in 1993. Mrs. Hollick informed an officer of the County Council that when the property was first acquired the whole area in the vicinity of the claimed path was overgrown. At that time there was a gate on the path which was broken and covered with ivy. In 1991 Mr. and Mrs. Hollick cleared the area to open up the view to the river. It was shortly after they had cleared the way that a group of teenagers walked down into the river, through the gateway and sat on their river bank drinking beer. In the mid 1990s they erected a new gate and locked it.
6. From 1982 to 1987 the property was owned by Mr. R. Potter who informed an officer there was a thorn and bramble hedge in the location through which there was no access. Although Mr. Potter let the property, he claims never to have seen anyone using an access way to the river.
7. The owners of the property prior to Mr. Potter were Mr. and Mrs. Sheppard who have subsequently died.

8. Objections to the Order are as follows:-

▪ **Mrs. S.L. Hollick, 2 Edgebridge, Mere**

- (i) Can see no reason for the access way
- (ii) In 1991 after the brambles were cleared, over the following years they have been regularly visited by badly behaved and abusive youths. The gate was erected to prevent this trespass.
- (iii) The footpath could be detrimental to wildlife.
- (iv) Concern regarding their liability should someone slip.

▪ **Mr. S.F. Lander, Lordsmead House, Mere**

- (i) The path would affect the privacy and security of the occupants of Lordsmead House.
- (ii) There is no need for a watering hole for horses, nor useful need or purpose of access to the river at this point.
- (iii) Has experienced anti-social behaviour from youths in the past and considers it is dangerous for people to "horse about" by the bridge because of traffic.
- (iv) The wildlife would be disturbed.
- (v) Poor use of money.

▪ **Mr. and Mrs. Burnip, Lordsmead Cottage, Edgebridge, Mere**

- (i) Since moving to their house in 1999 they have been subjected to aggressive and abusive behaviour by youths in the river and their garden. This stopped when the access was restricted.
- (ii) Health and safety grounds.
- (iii) Questionable justification. 21<sup>st</sup> century Mere does not require a watering facility at Edgebridge.
- (iv) Security, privacy and the effect on riparian rights.
- (v) Old maps do not show an access way but an informal watering place for animals is accepted.
- (vi) Mere is wet and there are dozens of places where dogs and children can paddle and play in safety.

▪ **Mr. A. Morgan Rees, Shreen Water Cottage, Clements Lane, Mere**

- (i) May have an adverse effect on his riparian rights and there could be trespass on his land.

- (ii) Health and safety grounds.
- (iii) Environmental damage has already been caused by trespassers. The locked gate deters them.

### **Comments on the Objections**

9. The Definitive Map is a legal recognition of existing public rights to walk, ride and use vehicles. As such, any proposal to modify the Map by means of a definitive map modification order to add a right of way has to be judged by the legal test - "*Do the rights set out in the order already exist or can be reasonably alleged to exist?*" If the rights do exist then the Map must be modified regardless of any effect they may have on property interests or the nuisance they are alleged to cause or are likely to cause.

### **Main Considerations for the Council**

10. Members are asked to consider the objections received and decide whether or not the Order should be confirmed. The legal considerations to be taken into account, and these are the only considerations Members can take into account, are set out in the following paragraphs 11-23. If Members resolve that the objections are duly made and should be accepted, the Order must be submitted to the Secretary of State for determination in accordance with statutory procedure. The objections to the Order were made in the statutory period for objection and do not appear to overturn the evidence of highway status.

### **Legal Considerations to be taken into account**

11. Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement up to date. Section 53(3)(c)(i) requires the authority to issue an order where:-

*"by 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 in the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the Map relates, being a right of way to which the Part applies."*

12. The County Council must, in accordance with *R v Secretary of State for the Environment ex parte Emery* (1998) and *R v Secretary of State for the Environment ex parte Bagshaw* (1994), consider whether a reasonable person, having considered all the evidence available, could reasonably allege a right of way to subsist. This does not require the County Council to find a right of way actually exists.
13. In the case of *R v Secretary of State for Wales ex parte Emery* (1998), under Section 53(3)(c)(i) of the 1981 Act, the Court had to consider whether there is evidence that:-
- a right of way subsists or
  - a right of way is reasonably alleged to subsist

The latter test is inevitably less onerous than the former.

14. The physical nature of the Order route is unusual but there are ancient authorities showing that certain culs-de-sac may be highways. In *Moser v Ambeside UDC* (1925), Justice Atkin said:-

*"One of the first questions that one always has to enquire into in such a case as this is from whence does the highway come and whither does it lead? It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me to be too large a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway."*

15. Highways come into existence through dedication of a right of way to the public by a landowner and acceptance by the public of that dedication. Dedication of a way as highway may be presumed after public use over 20 years. This is given statutory effect under Section 31 of the Highways Act 1980 as follows:-

- "1. Where a way over any 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 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
2. The period of 20 years referred to in subsection 1 above is to be calculated retrospectively from the date when the right of public to use the way is brought into question, whether by a notice such as is mentioned in subsection 3 below or otherwise.
3. Where the owner of the land over which any such way as aforesaid passes:
- (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway; and
- (b) has maintained the notice after the 1<sup>st</sup> 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 as a highway....*

4. In the case of land in the possession of a tenant for a term of years or from year to year, any person for the time being entitled in reversion to the land shall notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.
5. Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

6. *An owner of land may at any time deposit with the appropriate council:*
- (a) *a map of the land on a scale of not less than 6 inches to 1 mile and*
  - (b) *a statement indicating what ways ( if any) over the land he admits to having been dedicated as highways; and, in any case, in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time:-*
    - (i) *within six years from the date of deposit; or*
    - (ii) *within six years from the date on which any previous declaration was last lodged under this section.*

*To the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case maybe, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way was a highway.”*

16. It was established in *R v Secretary of State for the Environment ex parte Blake* (1984) that the word “enjoyment” means having the amenity or advantage of using.
17. Proof of 20 years enjoyment calls for evidence of use by members of the public generally. Lord Parke observed in *Poole v Huskinson* (1843) that:-
- (i) there cannot be a dedication to a limited part of the public.
  - (ii) the trial judge should not have told the jury that, as such a partial dedication in favour (only) of the residents of a particular parish and their visitors would nevertheless operate, against the intention of the owner of the soil, in favour of the public.
18. The term “as of right” means that the use of the way must not rely on permission to use the path given by the owner of the land it crosses. The meaning of ‘as of right’ was considered by the House of Lords in *R v Oxfordshire County Council and Oxford Diocesan Board of Finance ex parte Sunningwell Parish Council*. As a result of this case it is now clearly laid down that the test is, rather, whether the observed use by others would have appeared to the landowner to be used by people who were regarding the way as public highway or whether it was, for example, only used by employees of the landowner who were free to take whatever routes they choose over the land. The Council, therefore, has to assess the use and length of use of the claimed route by the public and evidence of such use without permission. Lord Hoffman also considered whether tolerance on the part of the landowner was incompatible with user as of right, he concluded that tolerance was compatible.
19. The use of the way must be without interruption. Once the 20 year uninterrupted use as of right has been proved, the burden then moves to the landowner to show that there is sufficient evidence that there was no intention to dedicate.

20. Before the 20 year period can be determined, the act of bringing into question of the public right to use the routes must be determined.
21. In the case of R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset County Council, Justice Dyson concluded that overt and contemporaneous evidence of an intention not to dedicate would usually be required. There was no rule that only activities directed at users of the way could constitute sufficient evidence.
22. Two of the witnesses have mentioned that at a public meeting the owner of the land crossed by the claimed path stated that he did not acknowledge the existence of a public path on the order route. In May 1998 the erection of a gate, its locking and the word "Private" upon it were a clear indication of a lack of intention to dedicate the order route as a public path.
23. Evidence of use has been provided dating back to 1916. It is clear from the witness statements that the order route does have a purpose for recreation and animals.

#### **Environmental Impact of the Recommendation**

24. Environmental concerns have been expressed by the objectors but this is in relation to trespassing on land and in the river which does not form part of the order route. The order route is an access from the C59 road to the dipping stones and does not extend to a right to wade along the river bed on private property. In exercising the right to pass and repass along the order route, officers would not expect any environmental impact to arise. Members will, however, be aware that in ascertaining what public rights exist, alleged environmental factors may not be taken into account. These can be considered in the future management of a right of way.

#### **Risk Assessment**

25. None.

#### **Financial Implications**

26. There will be financial implications regarding future maintenance of the footpath should the Order be confirmed but these will be minimal.

#### **Options Considered**

27. There are statutory procedures to be followed associated with Section 53 Orders which must be adhered to.

#### **Reason for Recommendation**

28. To comply with statutory requirements. Despite the objections received, the public have used the route as of right and the previous landowners have apparently acquiesced to that use.

### **Recommendation**

29. That the Order providing for a footpath to be added to the Definitive Map and Statement from road C59 at Edge Bridge leading down and into Shreen Water be submitted to the Secretary of State for the Environment, Food and Rural Affairs with the County Council's recommendation that it should be confirmed.

### **GEORGE BATTEN**

Director of Environmental Services

Report Author

**BARBARA BURKE**

Senior Rights of Way Officer

---

**The following unpublished documents have been relied on in the preparation of this Report:**

Correspondence with the District and Town Councils and other interested parties