

## CLAIMED PUBLIC FOOTPATH FROM VALEBROOK CLOSE TO PUBLIC FOOTPATH HF43, FOLKESTONE

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A report by the Head of Countryside Access Service to the Kent County Council Regulation Committee Panel Meeting on **12th July 2011**.

**Recommendation:** I recommend the County Council declines to make an Order under the Wildlife and Countryside Act 1981, Section 53(2), to record a Public Footpath on the Definitive Map and Statement of Public Rights of Way between Valebrook Close and Public Footpath HF43 at Cheriton, Folkestone.

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Local Member: Mr T Prater

Unrestricted item

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**Summary:** To seek authority to decline an application to modify the Definitive Map and Statement by adding a Public Footpath running between Valebrook Close and Public Footpath HF43 at Cheriton, Folkestone

### FOR DECISION

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#### Introduction

1. The County Council is the Surveying Authority for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 1<sup>st</sup> April 1987. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review.

#### Procedure

2. The Countryside Access Objectives and Policy document (dated July 2005) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date. The main priorities are:
  - A. Investigation and determination of outstanding applications to modify the Definitive Map
  - B. Resolution of anomalies and mapping errors where essential for the effective management of the PROW network
  - C. Publication of Definitive Maps and Statements for those areas excluded from the original Definitive Map

Definitive Map modification cases will normally be investigated in order of receipt, except in any of the following circumstances, where a case may be investigated sooner:

- Where it satisfies one of the key principles set out in paragraph 11.1 of the Countryside Access Policy,
- Where the physical existence of the route on the ground is threatened by development, or

- Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.
3. The investigation of this particular issue has been carried out in accordance with the report to the Sub-Committee in February 1990, which outlined the procedures to be used for sources of evidence and the legal tests to be applied.

### Legal Tests

4. (a) Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates, it shall, by Order, make such modifications to the Map and Statement as appear requisite.

(b) Section 31 of the Highways Act 1980 states that "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 twenty 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". The period of twenty years referred to is to be calculated retrospectively from the date when the right to use the way is brought into question.

(c) Alternatively, a public right of way may be established over a shorter period of time under Common Law. In *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route "for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of them belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was", i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

### The Case

5. The County Council has received an application from Mr Tim Prater ("the applicant"). Mr Prater is the County Member for Folkestone West and a Town and District Councillor for Cheriton. The applicant has applied for an Order under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area by adding at Public Footpath status a route running between Valebrook Close and the northern end of Public Footpath HF43 at Folkestone ("the claimed route").
6. In support of the application, the applicant has provided 14 user evidence forms.

### Description of route

7. The claimed route (shown on the plan at **Appendix A**) commences on Valebrook Close adjacent to No. 65 and runs parallel to the boundary for approximately 150 metres in a generally south through south easterly direction, the path then turns to run in a generally north easterly direction for approximately 7 metres crossing the boundary to connect with the northern end of Public Footpath HF43 at Cheriton, Folkestone.

## **DOCUMENTARY EVIDENCE**

The Wildlife and Countryside Act 1981 requires that, when investigating such applications, the County Council must consider 'all other relevant evidence available'. I have therefore interrogated the following documentary evidence:-

### **Tithe Map (circa 1840)**

8. Tithe Maps were produced by the Tithe Commissioners, under the 1836 Tithe Commutation Act, to record all parcels of land that generated titheable produce. The Tithe Maps were concerned solely with identifying titheable land but nonetheless can sometimes provide useful supporting evidence about public rights of way.
9. In this case, the Tithe Map was of no assistance as it did not show the claimed route. Instead the claimed route is incorporated within apportionment numbers 7, 8 and 18, which are listed as No.7 – Parsonage House and Gardens, No.8 – Great Meadow, pasture and No.18 as The Moors, pasture.

### **First Edition Ordnance Survey 1:2500 Map and Book of Reference (circa 1860)**

10. The First Edition 25" Ordnance Survey Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights, but do provide useful information as to the existence of the routes on the ground at that time.
11. The First Edition OS Map for Cheriton (dated May 1874) does not record the claimed route. The claimed route is incorporated within apportionment numbers 101 and 120. The Book of Reference records number 101 as pasture, barn etc with an area of 10.911 acres and number 120 as pasture etc with an area of 6.036 acres. There is a double pecked line shown to the south on a similar alignment to Public Footpath HF43 which leads to the grounds of the Rectory.

### **Finance Act 1910 and Valuer's Field Book**

12. The Finance Act 1910 Maps and Valuer's Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer's Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for public rights of way admitted to exist at the time by the landowner.
13. In this case, the Finance Act map does not show the claimed route, which is incorporated within numbers 725, 756 and 759. The Valuer's Field Book records hereditament number 725 as Cheriton Rectory, houses and grounds and no deductions are made for public rights of way or user. Hereditament number 756 is recorded as Horn Street land and a deduction of £25 is made for public rights of way or user. However this land parcel encompasses several routes which are recorded on the Definitive Map of Public Rights of Way. Hereditament number 759 is recorded as Cheriton Court, land and no deductions

are made for public rights of way or user. Again HF43 appears to be shown running adjacent to the boundary and leading to the grounds of the Rectory.

### **Borough Maps and Draft Maps**

14. In consequence of the National Parks and Access to the Countryside Act 1949, County Councils were required to undertake a survey of '*all lands in their area over which a right of way... [was] alleged to subsist*' and then to prepare a draft map showing on it those footpaths, bridleways and roads used as public paths which the County Council as Surveying Authority considered to be public rights of way. In practice, the initial surveys were undertaken by the Parish Councils who were required to call a Parish Meeting to consider the information to be provided and who then submitted maps and statements showing the alleged rights of way within their parish. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Borough Map.
15. The Borough Map of Hythe does not record a public right of way over the claimed route, nor does the Draft Map (relevant date 1<sup>st</sup> December 1952). Neither the Borough nor Draft map record Public Footpath HF43.
16. The Borough Map of Folkestone also does not record a public right of way over the claimed route, nor does the Draft Map (relevant date 1<sup>st</sup> December 1952). Public Footpath HF43 is recorded on both the Borough and Draft map, although the length recorded is much less than that currently shown on the Definitive Map of Public Rights of Way. HF43 is recorded on the Borough Map as "FP26 which branches off of FP25 as this path commences to go through trees. NW course to Hythe Borough". It further states that "the footpath has a width of 18/24 inches where worn and only a short length is in the borough". The Draft Map records HF43 as "FP26, footpath, Shorncliffe Camp to Horn Street. Commences at Junction with FP25, 330 yards SSW of Officers Mess and leads NW for 30 yards to Hythe Borough Boundary". It further states that "the route has an approximate length of 0.02 miles and an approximate width of 1<sup>1/2</sup> -2 feet".

### **Provisional Map**

17. The Provisional Maps for Hythe and Folkestone with relevant dates of 1 December 1952 do not show a public right of way over the claimed route. There was opportunity for landowners; lessees and tenants to object to this map and no objections were received regarding the claimed route. Public Footpath HF43 is recorded on the Folkestone Map as FP43 and this extends further north than the previous maps, however it still terminates at the borough boundary with no connection recorded on the Hythe Map.

### **Definitive Map (Relevant date 1<sup>st</sup> December 1952)**

18. The National Parks and Access to the Countryside Act (1949) required County Councils to survey all land over which a public right of way was alleged to subsist and prepare a map showing these routes. The first Definitive Map and Statement of Public Rights of Way for the County of Kent was published with a relevant date of 1<sup>st</sup> December 1952.
19. The claimed route does not appear on the original Definitive Map for the County of Kent and Public Footpath HF43 is shown in the same manner as the Provisional Map.

## **Review of survey (1970)**

20. Following the publication of the Definitive Map in 1952, the County Council, again under the National Parks and Access to the Countryside Act 1949, had a duty to produce a revision of the original map. Consequently, and following broad consultation, the County Council published a Draft Revised Map with a relevant date of 1<sup>st</sup> October 1970. The map was subject to a formal objection or representation process.
21. The Draft Revised Map of 1970 again does not show the claimed route and records HF43 in the same manner as the Provisional Map. No objection or representation to the omission of this route was received by the County Council.

## **Definitive Map (Relevant date 1<sup>st</sup> April 1987)**

22. The current Definitive Map of Public Rights of Way does not show the claimed route and records HF43 in the same manner as the Provisional Map.

## **Ordnance Survey Maps**

23. Other relevant Ordnance Survey Maps dated 1897 – 1900, 1907 – 1923 and 1929 – 1952 have been interrogated and these do not show the claimed route. In addition to those routes recorded as public rights of way today, these three maps also show a double pecked route leading from Public Footpaths HB4/5 and running in a generally east north easterly direction to the grounds of the Rectory. Although this can be considered proof of the physical existence of a route on the ground at that time, it does not provide any assistance in ascertaining whether or not it has public or private rights over it.

## **Aerial Photographs**

24. **1946** – There is no clear evidence of the claimed route, the drains are clearly shown and Valebrook Close had not been developed at this time
25. **1961** – There is no clear evidence of the claimed route and as above, Valebrook Close had not been developed.
26. **1967** – There is no clear evidence of the claimed route. Valebrook close has been developed. The drains are clearly visible and there is also evidence of a worn route on the alignment of Public Footpath HB4.
27. **1972** – This photograph is at such a small scale that it is difficult to say with any certainty what it shows.
28. **1985** – There is no clear evidence of the claimed route. There is evidence of worn routes on the alignments of Public Footpaths HB4 and HB5.
29. **1990** – There is no clear evidence of the claimed route. There is as above evidence of worn routes on the alignments of Public Footpaths HB4 and HB5
30. **1995** – Again, this photograph is at such a small scale that it is difficult to say with any certainty what it shows.

31. **1999** – There is no clear evidence of the claimed route. There is evidence of clearly worn routes on the alignments of Public Footpaths HB4 and HB5

## **CONSULTATIONS**

Consultations have been carried out as required by the Act.

### **Shepway District Council**

32. Shepway District Council was consulted and no response was received.

### **Folkestone Town Council**

33. Folkestone Town Council was consulted and no response was received.

### **County Councillors and District Councillors**

34. The County Member and one of the District Councillors is Mr Tim Prater, the applicant. The remaining District Councillors, Carroll and Gane were consulted and no responses were received.

### **User Groups**

- 35 The Ramblers' Association, the Open Spaces Society and the British Horse Society were consulted. No responses were received from the Ramblers' Association or the British Horse Society. The Open Spaces Society representative, Mr G Wanstall was consulted and stated that "from local knowledge (having walked the area for over 20 years) we strongly support this claim which forms an important link used for many years by locals and others".

### **Kent Highway Services**

36. Kent Highways Services responded stating that they have no adverse observations regarding the proposal.

## **USER EVIDENCE**

37. In support of the application, 14 user evidence forms were submitted out of which 9 of these witnesses were interviewed by the County Council and one witness submitted an additional letter and plan. In addition, throughout the course of the investigation several other potential users of the route were supplied to the County Council, 4 of which were interviewed. The user evidence forms are summarised at **Appendix B**.

38. The earliest evidence of use dates back to 1951 and continued up until approximately 2008 when the land was fenced off. The reason for use tended to be recreational with many commenting that they used the route to gain access to woods (situated to the rear of Valebrook Close) and the recorded footpaths which in turn connect with Horn Street and Pond Hill Road. Some witnesses also recall using the route to gain access to the Britannia Public House situated on Horn Street and as a route to and from work. A plan showing these locations is attached at **Appendix C**.

39. Frequency of use varied greatly with 2 witnesses reporting daily use for certain periods, 6 witnesses recall periods of weekly use, three, monthly, with the remaining witnesses using the route occasionally.
40. Most of the witnesses state that the current landowners cleared the land in approximately 2006 and installed several new drainage ditches. Also at this time building rubble was deposited on the land which made the land difficult to use. Although one witness stated that after this it was not possible to use the entire length of the route, the majority of users continued their use until a barbed wire fence was erected around the perimeter of the land in 2008.
41. Several witnesses also refer to natural obstructions affecting their use of the route. Such obstructions referred to were, vegetation overgrowth and the boggy nature of the land.
42. Mention is also made of the presence of stiles, gates and bridges situated along the claimed route and at various locations on the area of land. Nearly all witnesses referred to the Public Footpath sign which is situated at its junction with Valebrook Close. One witness stated that he believed the fingerpost was erected by Shepway District Council, approximately 20 – 25 years ago. At that time responsibility for the maintenance of public rights of way rested with the District Council.
43. Some of the witnesses provided the County Council with copies of plans showing an 8 ft right of way located adjacent to No. 65 Valebrook Close. This route is referred to in more detail below at paragraphs 54 – 58. One witness also supplied the County Council with a series of photographs which purport to show various members of the public trying to access the land once it had been obstructed by the fencing.

## **LANDOWNERSHIP**

44. There are several landowners, all of which were contacted. The County Council met with one of the landowners, Mr T D Boxell who has spoken on behalf of all of the registered landowners. The majority of the land over which the claimed path runs is registered; however the first section of the claimed route adjacent to No. 65 Valebrook Close is unregistered. Mr Boxell checked with his solicitor prior to fencing the land to see whether or not there were any rights recorded and was advised that none existed and to fence the land in order to claim adverse possession over the unregistered section. Mr Boxell has joint ownership of the land adjacent to the first section of path from Valebrook Close and has owned this land since approximately January 2006. Mr Boxell stated that since 2006 he has never seen anyone using the route and he is not aware of any documents which show that it is a right of way.
45. Mr Boxell confirmed that the site was cleared in approximately 2006 and fencing was erected along the perimeter of the land in 2008 in order to prevent fly tipping. Mr Boxall further stated that until the site was cleared in 2006, it was physically impossible to walk the route. There were large trees along the route with large branches across the path. Mr Boxell's son and daughter own the land to the south and through this area there are drainage dyke's which prior to Mr Boxell putting railway sleepers across them would have been difficult to negotiate.
46. Mr Boxell confirmed that neither he nor the other landowners have ever erected any notices, instructed anyone to deter public use or given anyone permission to use the claimed route.

47. Mr Boxell provided the County Council with an aerial photograph taken in approximately 2006 which Mr Boxell stated shows trees in place along the route. He also supplied the County Council with an EDF Map (05/07/2010) and a Land Registry Plan (Jan 2006). These plans do not record a right of way along the claimed route but do show the recorded footpaths.
48. Lastly, Mr Boxell stated that approximately 10 – 15 years ago he would go clay-pigeon shooting on the land now owned by his son and daughter. At this time he only ever recalls seeing the recorded footpaths.
49. The County Council also consulted with adjacent landowners, the Ministry of Defence and the owners of 65 Valebrook Close. The owners of 65 Valebrook Close, Mr & Mrs Wilson moved to the property in 1966 and at this time there was an 8 ft wide track running adjacent to their property, which the Ministry of Defence and the farmer used for access. The track was fenced on either side and there was a stile located at the end of the short section immediately adjacent to No.65.
50. Mr & Mrs Wilson stated that initially you could walk up and down the section adjacent to their house, but beyond that it was very difficult to use due to the land being too boggy. Mr Wilson cannot recall many people using the route even when they first moved to the area. Approximately 5 – 10 years after moving to the property, the track was narrowed to 3 ft and again was fenced on either side. The stile also remained in situ.
51. They commented that the length of route adjacent to their property has been overgrown with brambles, nettles and a few trees for the majority of the time they have lived there. The current landowners cleared the land in approximately 2006 and for a short while following the clearance it was possible to access the claimed path. Since this time the trees have really sprouted and the route is overgrown once again.
52. Mr Wilson last tried to use the claimed route approximately 20 years ago; however he commented that it was very difficult to use. Mrs Wilson can only recall using the route on one occasion during a hot summer when the land was very dry.
53. Mr & Mrs Wilson stated that they have never seen any notices other than the current Footpath sign which has in their view been in place for approximately 10 years. The only obstructions along the route prior to the current fence were natural.
54. The Ministry of Defence (MoD) own land to the south of No.65 Valebrook Close and to the east of the claimed route. They confirmed that according to their records the land upon which Valebrook Close has been built has never been within the ownership of the MoD. The land referred to above was acquired by the MoD in the 1940's and the land to the west of the claimed footpath was sold in 1977.
55. The MoD further confirmed that the first part of the claimed route beside No.65 is subject to a Deed of Grant between G.H.S (Contractors) Limited ("the company") and Her Majesty's Principal Secretary of State for the War Department ("Secretary of State") - dated the 3<sup>rd</sup> February 1964 - in respect of a private right of way on foot and with vehicles for agricultural purposes. They are not aware that this private right has ever been extinguished. Relevant paragraphs from the Deed are as follows:-
56. "...the company as beneficial owner HEREBY GRANTS unto the Secretary of State FULL right and liberty for the Secretary of State and his successors in title owners and occupiers for the time being of the land edged green on the said Plan "B" at all times



hereafter by day or night to pass and re-pass on foot and with vehicles along and over the piece of land eight feet wide coloured green on the said Plan "A" and over the roadway coloured brown on the said Plan "A" for all purposes connected with the use and enjoyment of the land edged green on said Plan "B" as agricultural land..."

57. "That the company will at its own expense provide and lay a suitable hard core base to the strip of land coloured green on the said Plan "A" and provide and fix at the point "D" on the said Plan "A" a suitable field gate to the reasonable satisfaction of the Secretary of State"

58. This Deed was amended by a Varying Agreement dated 1 December 1966 which revised the alignment of the roadway and the strip of land coloured green.

### **COMMON LAW**

59. A public right of way may be established over a shorter period of time under Common Law. The first part of the route appears to have been created when Valebrook Close was constructed. According to the Deed of Grant supplied by the MoD, the first section of the route adjacent to No.65 was intended to be a private means of access on foot and with a vehicle for the MoD and any occupiers for agricultural purposes. None of the witnesses refer to a sign stating that it was a private means of access and indeed in the early days it would appear that the route was set out in such a manner that it was no doubt evident to the public. In addition, many of the residents were aware of the 8 ft track, as it appeared within their property deeds. However, beyond this first section, the route was undefined and crossed an area of open land and would not therefore have necessarily been evident to the public.

60. It may be viewed by some that the fingerpost situated at Valebrook Close was in effect the landowner dedicating the way to the public. However, the fingerpost was not erected by the landowner but instead it would appear was erected in the past by Shepway District Council or someone acting on their behalf. In my view this fingerpost was erected in error as the route has never been recorded on the Definitive Map of Public Rights of Way. Therefore the erection of the fingerpost cannot be seen for the purposes of common law as a dedication of the way by the landowner.

### **STATUTE AND LEGAL TESTS**

61. Section 53 of the Wildlife and Countryside Act 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates, it shall, by Order, make such modifications to the Map and Statement as appear requisite.

62. Section 31 of the Highways Act 1980 states that '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 twenty 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'. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

63. Alternatively, a public right of way may be established over a shorter period of time under Common Law. In the case of **Mann v. Brodie**<sup>1</sup>, Lord Blackburn considered that where the public had used a route *'for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of their belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was'*, i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

## **CONCLUSION**

64. As there is little historical mapping or documentary evidence in support of the application, the application rests solely on user evidence. Hence, in determining whether a right of way is reasonably alleged to subsist, it is necessary to have regard to the provisions contained within section 31 of the Highways Act 1980 (outlined above).

### **The 'date of challenge'**

65. The first step is to identify the date upon which the right of the public to use the route was first brought into question ('the date of challenge'). There is no precise definition of what constitutes 'bringing into question' the public's right to use a particular route, but generally speaking the public's right is brought into question when there is some sort of overt and identifiable challenge to such use, for example, by way of the erection of a notice telling the public to 'keep out' or the locking of a gate to physically prevent access.

66. In this case, the landowners cleared the land in approximately 2006 and installed new drainage ditches. There is also mention of the fact that around this time builder's rubble was deposited on the land, with one witness stating that it was necessary to walk around the rubble. Another witness commented that after the extra drainage ditches were installed it was impossible to use the route beyond No. 65 Valebrook Close. Although, another witness commented that prior to the fencing, new drainage ditches were dug and builder's rubble was deposited on the land, however this did not stop use. The majority of witnesses stated that it was the fencing, which was erected across the entrance at Valebrook Close in 2008 which challenged their use and meant that they could no longer use the route. I have therefore taken 2008 as the date of challenge and have considered very carefully the twenty-year period between 1988 and 2008 ('the material period') in my investigation.

### **'as of right' use for a full period of 20 years**

67. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission<sup>2</sup>. There is no suggestion from the user evidence in this case that use has ever been with force (i.e. by breaking down barriers to gain access) or that those using the path have done so in a subversive manner. None of the witnesses refer to any such permission being sought or obtained. Therefore, it is possible to conclude that use has been 'as of right'.

68. In relation to the length and frequency of use, it is clear that there is evidence of use for a period well in excess of the material period from 1988 to 2008. However on closer

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<sup>1</sup> (1885) 10 App Cas 378

<sup>2</sup> *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council* [1999] 3 WLR 160

inspection of the evidence it would appear that users were using a variety of routes with many saying that beyond No. 65 Valebrook Close it was an area of open land and the footpath was undefined. The route taken would depend on the destination with many cutting across the land to reach Horn Street and others using the route to gain access to the wooded area situated to the eastern side of the claimed route.

69. The County Council must restrict its investigation to the route shown on the application plan – which runs from Valebrook Close adjacent to No. 65, following the western side of the boundary before crossing the boundary to meet with the northern end of Public Footpath HF43. Having analysed the evidence, only two of the witnesses have used the route as claimed and the frequency of their use was stated as occasionally and rarely. Most of the witnesses referred to a number of different routes that they would take across what many described as an open piece of land, with one witness stating that it was “lovely to roam around”. The route used appears to have depended on the surface conditions, vegetation growth and the destination. It can be seen from the user evidence forms – and in particular the plans showing the ways used and the description of the route on page 2 of the forms – that the route taken by individual witnesses varied greatly. Even where a witness has marked upon the plan a route, they would often say that the actual route taken depended on the factors referred to above. Several witnesses made statements such as “the land was open and there were no fences, would have headed towards Valestone Close but would not necessarily have walked adjacent to No. 65 – would take the easiest route across open land”; “unsure of the exact route taken to meet with the footpath”; “would use a variety of routes”; “would use a variety of routes across open land”. These comments and the descriptions given within the user evidence forms demonstrate that there was not a defined route. To satisfy section 31 of the Highways Act 1981 the user must have been of a single defined route as confirmed by Lord Oliver in the *Brotherton*<sup>3</sup> case: “*a public right on land depends upon proof of public user over an exactly demonstrated course*”. This is further confirmed by Ross Crail<sup>4</sup> a Barrister writing in the *Rights of Way Law Review* “*if people have crossed land in the same general direction but by varying routes, their user cannot be aggregated and attributed to a single route*”.

70. Furthermore, when investigating the user evidence forms supplied with the application, it was noted that the plans attached only showed the first section of the claimed route running adjacent to No. 65 Valebrook Close. The law requires that a right of way must have a fixed terminus; however it is possible for a right of way to have a terminus other than on another public right of way or highway. However a cul-de-sac path must lead to a place of public resort i.e. a public park or beach. In this case the section of path adjacent to No. 65 does not lead to a place of public resort and therefore it is not possible to make an Order to record only this section of path. In light of the difference between the route shown on the application plan and the route shown on the plans attached to the user evidence forms, it was necessary to obtain more detail from witnesses as to where they were going. It soon became apparent when obtaining more detail that the section adjacent to No. 65 was just one small part of a multitude of different routes taken by the public.

### **Whether a right of way is ‘reasonably alleged to subsist’**

71. The tests contained in section 31 of the Highways Act 1980 (set out above) are to be considered in conjunction with the requirement in section 53 of the Wildlife and

<sup>3</sup> *Attorney-General ex rel. Yorkshire Derwent Trust Ltd v Brotherton* (1992) 1AC 425 at page 434

<sup>4</sup> Ross Crail, *Barrister Rights of Way Law Review* February 2006, section 9.2 page 2

Countryside Act 1981 that a right of way must be shown to 'subsist' or is 'reasonably alleged to subsist'. This issue was considered in the case of **Norton and Bagshaw**<sup>5</sup>, in which the judge distinguished between the two tests to be applied and stated that in deciding whether or not to make a Definitive Map Modification Order the question to be asked is thus: '*does the evidence produced by the claimant together with all the other evidence available show that either (a) a right of way subsists? [known as 'test A'], or (b) is it reasonable to allege that a right of way subsists? [known as 'test B']*'. The test to be applied is not therefore whether it is reasonable for the claimant to allege that a right exists, but rather whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

72. This approach was subsequently affirmed in the **Emery**<sup>6</sup> case, in which the judge said this: '*where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years...then the allegation that the right of way subsists is reasonable*'.

### Evidence of non-intention to dedicate

73. Even if all the legal tests relating to quality and quantity of use have been met, a public right of way cannot come into being where there is evidence that the landowner demonstrated a lack of intention to dedicate the claimed route. This lack of intention must be communicated to the users of the claimed route, as confirmed by Lord Hoffman in the recent **Godmanchester**<sup>7</sup> case: '*I think that upon the true construction of s 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending... to 'disabuse [him]' of the notion that the way was a public highway*'.

74. In this case, none of the users recall any prohibitive notices or other restrictions to use during the material period. The evidence suggests that it is only the current landowners who have challenged usage by the erection of the fence in 2008. I therefore conclude that during the relevant period there is no evidence to show that the landowner demonstrated a lack of intention to dedicate the claimed route. The only obstructions people refer to prior to the current landowners purchasing the land were natural obstructions i.e. vegetation overgrowth, or the boggy nature of the land.

75. Most of the witnesses refer to the presence of an official fingerpost at Valebrook Close with many stating that due to the presence of the sign, they assumed it was a footpath. It is unclear as to exactly who installed this fingerpost and when this happened, although one witness stated that he believed it was installed approximately 20 – 25 years ago by Shepway District Council. Unfortunately the County Council has been unable to find any records in relation to this. However, the fingerpost has been in situ for a long period of time, long enough that if the landowner wished to challenge the existence of the sign they could have done. The problem with the fingerpost is that whilst it indicates the point at which the claimed path leaves Valebrook Close there is no clear defined path after that point and no supplementary way marking to show the public exactly where the path goes. The evidence shows that the public have therefore taken the opportunity to

<sup>5</sup> *R v Secretary of State for the Environment, ex parte Norton and Bagshaw* (1994) 68 P&CR 404 at page 408

<sup>6</sup> *R v Secretary of State for Wales, ex parte Emery* [1998] 2 All ER 367 at page 379

<sup>7</sup> *R (Godmanchester) v Secretary of State for the Environment* [2007] 4 All ER 273 at page 284

wander across and over the land beyond with the intention of reaching a variety of differing locations by way of a variety of different directions, influenced by ground vegetation conditions at the time. Further, there has never been any period in the past where this route has been formally recorded on a Definitive Map or within maps produced during the processes leading up to a Definitive Map. I can therefore only conclude that this signpost was erected in error and that much of the use by the public has been as a result of this erroneous act.

76. As stated above, section 31 of the Highways Act 1980 states that "a way may be deemed to have been dedicated as a highway unless it is a way of such character that use of it by the public could not give rise at common law to any presumption of dedication". A way refers to a path, track or definite route. Many witnesses have given evidence of using a variety of routes between Valebrook Close and the recorded Public Footpaths and therefore no definite route could be determined. The County Council must give emphasis to the claimed route and with only two of the witnesses giving evidence of using the route as claimed; it is not possible to satisfy the requirements of Section 31 as there is insufficient evidence to substantiate the application.

### **RECOMMENDATION**

77. I therefore recommend that the County Council informs the applicant that it is not prepared to modify the Definitive Map and Statement by adding a Public Footpath running between Valebrook Close and Public Footpath HF43, as shown on the attached plan marked **Appendix A**.

Accountable Officer: Mike Overbeke – Head of Countryside Access Service – 01622 221513
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### **Background Documents:**

APPENDIX A – Plan showing the claimed route  
APPENDIX B – Summary of user evidence in support of the application  
APPENDIX C – Location plan

### **Case Officer:**

Laura Wilkins (01622 221517)

### **Case Reference:**

PROW/SH/C320

