

# **Application to add two Public Footpaths at Grasmere Pastures, Whitstable to the Definitive Map of Public Rights of Way**

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A report by the Director of Environment and Waste to Kent County Council's Regulation Committee Member Panel on Wednesday 12<sup>th</sup> November 2008.

**Recommendation:** I recommend that the County Council makes a Definitive Map Modification Order to modify the Definitive Map of Public Rights of Way (and accompanying Statement) by adding two Public Footpaths over land known as Grasmere Pastures at Whitstable, as shown at Appendix A to this report.

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Local Members: Mr. M. Harrison and Mr. M. Dance

Unrestricted item

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## **Introduction**

1. The County Council has received an application from local resident Mrs. E. Watkins ("the applicant") for a Definitive Map Modification Order to modify the legal record of Public Rights of Way, known as the Definitive Map and Statement, by adding two Public Footpaths ("the claimed routes") over land known as Grasmere Pastures at Whitstable, as shown at **Appendix A** to this report.

## **Procedure**

2. The County Council is the 'surveying authority' for the purposes of public rights of way and is responsible for holding and keeping up to date a map showing all the recorded public rights of way in the county. This map is a legal document and is known as the Definitive Map of Public Rights of Way. Under section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), the County Council has a legal duty to keep the map under continuous review and to make such modifications to it as appear requisite in consequence of certain events.
3. Under section 53(5) of the 1981 Act, anyone may make an application to the County Council for a modification to be made to the Definitive Map and/or Statement. Such an application must be made in the form specified in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 and might consist of a request to record a new Public Right of Way, to delete an existing Public Right of Way, to upgrade or downgrade the status of a route already shown on the map, or to amend any particulars contained within the statement accompanying the Definitive Map.
4. As a standard procedure set out in the Schedule 14 of the 1981 Act, the County Council has a duty to investigate the matters stated in the application, to consult with every local authority whose area includes the land to which the application relates and, as soon as practicable after determining the application, to give notice of the decision by serving a copy of it on the applicant and any known owners or occupiers of the land in question.
5. The Countryside Access Objectives and Policy document (dated July 2005) sets out the County Council's own priorities for keeping the Definitive Map and Statement up to date. The main priorities are:

- A. The investigation and determination of outstanding applications to modify the Definitive Map;
- B. The resolution of anomalies and mapping errors where essential for the effective management of the PROW network; and
- C. The 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.

### **Applicant's submission**

6. The application has been made on the grounds that the paths concerned have been used 'as of right' over a period in excess of 20 years. In support of the application, the applicant submitted 61 user evidence forms demonstrating use of the claimed routes.

### **Description of claimed routes**

7. The claimed routes run across a field known locally as Grasmere Pastures which is situated in Whitstable and lies immediately adjacent to the Chestfield parish boundary. The field is bounded to the south by the rear of properties in Grasmere Road and to the west by the rear of properties in Richmond Road. To the east, the field is bounded by other fields (separated by vegetation) and the rear of properties in Laxton Way. To the north of Grasmere Pastures is a route known as 'Ridgeway' which is recorded on the County Council's Definitive Map of Public Rights of Way as Bridleway CW40. Beyond 'Ridgeway' lies the John Wilson Business Park and a large supermarket.
8. In this case, there are two claimed footpaths; the first, which shall be referred to as 'claimed path A' runs from Grasmere Road in a generally northerly direction for approximately 465 metres to a junction with Ridgeway, whilst the second, which shall be referred to as 'claimed path B' runs from Richmond Road in a generally easterly direction for approximately 335 metres to a junction with claimed path A. The claimed routes are shown on the plan at Appendix A.

### **Background information**

9. Members should be aware, for information only, that the land over which the claimed routes run, Grasmere Pastures, was the subject of a separate application made under the Commons Registration Act 1965 to register the land as a new Village Green on the basis of the recreational usage of the land by the local inhabitants for a period of over 20 years 'as of right'. The matter was considered by a Regulation Committee Member Panel meeting held on 30<sup>th</sup> April 2007 at which it was resolved to reject the application on the basis that those using the land for recreational purposes had 'deferred' to the landowner's agricultural activities on the land.

## Summary of mapping evidence

10. When dealing with applications to modify the Definitive Map, the County Council has a duty to investigate the matters stated in the application<sup>1</sup>. As a standard procedure which forms part of the investigative process, Officers will therefore research whether there is any evidence of the claimed route(s) having been identified on historic mapping (i.e. those maps that precede the publication of the first Definitive Map in 1952). For example, the depiction of a route on the First Edition Ordnance Survey maps (c1840) as a 'public road' can provide good supporting evidence of its status as a public right of way. Indeed, in some cases the mapping evidence is so strong that it is possible to conclude that a public right of way is reasonably alleged to subsist on mapping evidence alone; this is because there is a well established legal maxim which states '*once a highway, always a highway*'<sup>2</sup>.
11. In this case, there is no mapping evidence in support of the application and the historic maps consulted do not show any evidence of the existence of the claimed routes.

## Summary of documentary evidence

12. The Wildlife and Countryside Act 1981 requires that when investigating such applications, the County Council must consider 'all other relevant evidence available'. In this respect, I have considered the evidence which was put forward in the recent application to register the land at Grasmere Pastures as a new Village Green. Although this was an application concerning another area of legislation (the Commons Registration Act 1965), relevant evidence was provided during the course of the determination process in respect of the claimed footpath.
13. An objection to the Village Green application was lodged on behalf of the same objectors in the present case. Included within the objection bundle were witness statements from relevant parties and appropriate extracts are reproduced below:
- Mr. M. Lewer, director of O.W. Presland Ltd, states at paragraph 24 of his witness statement: '*Similarly, with walking, the site grew hay for part of the year, but like all farming land, it lay un-cultivated for part of the year. I knew that some local people used to walk on the path on the periphery of the site, with or without dog, and others used a track across the site [shown on an attached plan, roughly corresponding with claimed path A], as a shortcut. Walkers usually kept to the tracks on the periphery of the site and the track across the site...*'
  - Mr. P. Watkins, Strategic Land and Planning Manager of Kitewood Estates Ltd, states at paragraphs 2 and 3 of his statement: '*I visited the site in the 1990 – 1996 period on a number of occasions, at these visits I only saw people walking along paths on the periphery of the site, some with dogs... I visited the site on a number of occasions in the period 2000 – 2004 and only saw people walking the tracks on the periphery of the site and on [other tracks, including one roughly corresponding with claimed path A]*'.
  - Mr. K. Goldsmith, tenant of the site between 1984 and 2004, states at paragraphs 2 and 3 of his statement: '*during the time that I rented the site, the hay crop extended over all of the site and there were tracks on the perimeter of the site and one track which crossed the site [roughly corresponding with claimed path A]... in the autumn*

<sup>1</sup> Wildlife and Countryside Act 1981 – Schedule 14, paragraph 3(1)(a)

<sup>2</sup> From *Dawes v Hawkins* [1860] 8 CB (NS) 848, but note that an established highway may cease to be a highway if closed by statutory process (e.g. a Public Path Extinguishment Order)

*of 1989, I ploughed the field in its entirety, including the perimeter track. The only track that I left when I ploughed the field was [claimed path B]... After this process was complete, I reinstated the perimeter edging'. He adds, at paragraph 5 of his statement, 'during the period that the hay was growing, people who came onto the site kept to the tracks and did not disturb the hay.'*

14. I have also consulted the County Council's records for available aerial photographs of the site taken during the last 20 years. There are two aerial images available:
- The first, taken in **1999** (attached at **Appendix B**), clearly shows the existence of defined tracks, across and around the perimeter of the field. The claimed paths (A and B) are both clearly identifiable.
  - The next image, taken in **2003** (attached at **Appendix C**), is of particular interest as it actually shows the harvesting of the hay taking place with farming machinery and hay bales clearly visible. Despite the fact that the harvesting is in progress, it is still possible to see the tracks over the field which indicates that they were of a well-defined, well-used and near-permanent nature.

### **User evidence**

15. Included with the application were 61 user evidence forms. These forms demonstrate use of the claimed routes on foot over a long period, with the earliest use dating back to 1959. Of those 61 witnesses, over half (36) have used the claimed route(s) for over 20 years (as at the date of application) for purposes such as dog walking, recreational walking or access to shops and other facilities in Chestfield. Many of the witnesses have used the claimed route(s) on a daily basis and nearly all of the witnesses state that they had used the claimed route(s) freely and unchallenged until 2004 when fencing was erected across the path thereby preventing access. Some witnesses also recall two notices being erected at the same time as the fencing appeared, containing wording to the effect of 'private property - no trespassing', along 'Ridgeway' to the north of the site (although it is unclear as to the exact location of these notices and whether they were placed at the entrance of claimed path A onto Grasmere Pastures).
16. In addition to the user evidence forms submitted with the application, the applicant also identified a number of other people with evidence of use during the course of the investigation process. In total, 21 witnesses were interviewed (including the applicant) in order to gain a more detailed understanding of the history of the claimed routes and to ensure that there had been actual use of the claimed routes as public rights of way rather than general wandering at will over the wider area of Grasmere Pastures. In addition to the evidence provided in the user evidence forms, those interviewed confirmed that the route had always been clearly visible on the ground (having become well worn and defined through heavy usage) and that the route was in regular usage by other walkers.
17. The conclusion to be drawn from the user evidence (a summary of which is attached at **Appendix D**) is that there is a substantial body of user evidence from a large number of people which confirms use of the claimed routes over a period well in excess of 20 years.

## Consultations

18. Consultations have been carried out with local Councils (as required by the 1981 Act) and, in addition, local Councillors and the Ramblers' Association have been contacted for their views. Chestfield Parish Council has written in support of the application. No other responses have been received.

## Landowner

19. The land over which the claimed routes run is owned by O.W. Presland Ltd. In addition, Mr. N. Sands is a tenant of the land and Kitewood Estates have an option to purchase the land. Collectively, these three parties have lodged an objection to the application ("the objectors"). The objection contains a statement setting out the grounds of objection (attached at **Appendix E**) and is supported by witness statements from Mr. Michael Lewer CBE QC (director of O. W. Presland Ltd.) and Mr. Norman Sands (a tenant of the land since 2004).

20. The main substance of the objection is that *'the applicant has failed to identify the necessary period of 20 years by reference to any commencement or termination date, and has failed to demonstrate the use of the paths by the public as a right without any interruption'*. This is based on the following grounds:

- That a fence was erected around Grasmere Pastures by the tenant on 5<sup>th</sup> October 2004 and on 6<sup>th</sup> October 2005 a bund and trench were created around the boundary of the site. The fence, bund and trench have been breached and torn down in places and therefore the use of the paths was by force and not 'as of right'.
- That any use of the claimed paths would have been interrupted on an annual frequency since 1984 due to the taking of a hay crop and as such the applicant has not shown that the land has been used for a full period of 20 years.

## Legal tests

21. Section 56 of the Wildlife and Countryside Act 1981 provides that a Definitive Map and Statement shall be conclusive evidence of the routes shown and section 53 of the same Act also places a general duty on the County Council to keep the Definitive Map and Statement under continuous review and to make such modifications as appear requisite in consequence of certain 'events'. One such event, contained in section 53(3)(c)(i) refers to *'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 statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates...'*

22. In considering an application to add routes to the Definitive Map, it is also necessary to take into account section 31(1) of the Highways Act 1980 which 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.

23. 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* (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.

## Analysis

24. As there is no substantive mapping or documentary evidence in support of the claim the case relies entirely upon the user evidence presented and the statutory principles set out in section 31(1) of the Highways Act 1980.

### *Date of Challenge*

25. The first step 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 in a recent House of Lords case known as *Godmanchester*<sup>3</sup>, Lord Hoffman quoted with approval the words of Lord Denning (in a previous case) who said this: ‘... I think that, in order that the right of the public should have been ‘brought into question’, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity to meeting it... whatever the public do, whether they oppose the landowner’s action or not, their right is ‘brought into question’ as soon as the landowner puts up a notice or in some way makes it clear to the public that he is challenging their right to use the way.’

26. In his statement, Mr. M. Lewer (the landowner) explains that, in 2000, his company (O. W. Presland Ltd) entered into an option agreement with Kitewood Estates Ltd (a developer) who were concerned to stop trespass onto the site and this led to the erection of fencing and notices together with the creation of trenches and a bund. However, this is at odds with the evidence of his tenant, Mr. N. Sands, who completed a grazing agreement for the land in 2004. He states: ‘my intention is to use the land for grazing... clearly, in order to use the site for grazing, it had to be secured. Consequently, on 8<sup>th</sup> October 2004, I erected fencing on the site... [and] I also dug a ditch’.

27. Despite this obvious conflict as to the purpose of the fencing (i.e. whether it was put there to keep the public out or to prevent the egress of grazing animals), it is clear from the evidence of the applicant that the effect of the fencing was to challenge the public’s right to use the land. It was also the evidence of Mr. Sands, that he had verbally challenged those entering Grasmere Pastures and placed ‘no trespassing’ signs on the newly erected fencing<sup>4</sup>.

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<sup>3</sup> *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28

<sup>4</sup> The witness statement of Mr. Sands reads: ‘whilst the fence was being erected, I stopped everyone I saw attempting to come on to the site and told them that they were trespassing. I also asked for their names and

28. Although it appears that the effect of the fencing and trench was short lived (insofar as some parts of the fencing were quickly broken down and makeshift bridges over the trenches were created) and that use of the land resumed without considerable delay, it is clear that the erection of the fencing was more than a mere temporary interruption to use, and constituted an overt action on behalf of the landowner intended to exclude the public from using the land that clearly brought the right of the public to use the claimed paths into question; indeed, it was the fencing which appears to have triggered the application to record the claimed routes.

29. I have therefore taken 2004 as the date of challenge and have considered very carefully the period 1984 to 2004 (the 'material period') in my investigation. Despite the objectors' assertion to the contrary, it should be noted that there is no requirement for the applicant to specify the date of challenge or material period upon which s/he relies; the County Council can consider evidence of use over *any* 20 year period<sup>5</sup>.

#### *Evidence of use 'as of right'*

30. In order to satisfy the provisions of section 31(1) of the Highways Act 1980, it is necessary to demonstrate that use of the claimed routes has been 'as of right', or without force, secrecy or permission<sup>6</sup>. Following interviews with a number of local people, it is clear that there has been regular use of the claimed routes on foot for a full period of 20 years between 1984 and 2004; this is illustrated in the user evidence table and interview summaries provided at Appendix D.

31. There is no evidence from any of the users that their use was by force, that it was secretive or that they had obtained permission to use the claimed routes. There is, however, evidence that the claimed routes were in regular usage and the existence of the claimed routes was common local knowledge. There are several instances where users were first told about the routes by the vendors of their properties when they first moved to the area and all of those interviewed stated that they had regularly witnessed use by others. This is evidenced by the defined tracks shown on the aerial photographs in 1999 and 2003.

32. The onus is on those denying the existence of the right of way to prove compulsion, secrecy of license<sup>7</sup>. Although fencing (and possibly notices) were erected in 2004, the objectors have not been able to produce evidence indicating that they attempted to exclude the public and/or had no intention to dedicate a public right of way prior to that time, despite the fact that O.W. Presland Ltd appears to have owned the land since 1959. It does not appear that there have been any challenges to use during the material period and indeed none of the witnesses recall any notices or obstructions to prevent their use of the path during the material period.

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*addresses, but none would supply those details. Every person that I requested to leave the site did so. At the same time as I had the fence erected, I erected 'no trespassing' signs'.*

<sup>5</sup> This is a subtly different situation to that of Village Green applications where the twenty-year period is normally (subject to certain limited exceptions) the twenty years immediately preceding the date of application.

<sup>6</sup> *R v Oxfordshire County Council and another, ex parte Sunningwell Parish Council* [1999] 2 All ER 385

<sup>7</sup> *Jones v Bates* [1938] 2 All ER 237

### *Recreational use of the land*

33. There is another issue, related to 'as of right', which concerns the type of use of the claimed routes. As mentioned above, the land over which the claimed routes run was subject to a previous (unsuccessful) application to register the whole of the field as a Village Green on the basis of recreational usage. A public right of way is a right to pass and re-pass along a particular route from A to B and there is therefore a need to distinguish between this type of direct linear usage and any use of the route that was incidental to other activities which may have taken place on the land (i.e. kite flying, blackberry picking etc.).
34. A similar situation arose in a case known as *Dyfed*<sup>8</sup> in which an application to record a circular route around a lake as a Public Footpath was considered. In that case it was held that '*if... there had been use by the public of a footpath for pure walking (i.e. not merely ancillary to the recreational activities such as sunbathing, fishing and swimming), in my judgement such evidence was capable of founding a case of deemed dedication of the footpath whether or not such walking was itself purely recreational as opposed to walking for business purposes. There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way*'.
35. At Grasmere Pastures, it is clear that some of the use of the claimed routes would have been ancillary to other recreational activities which took place on the land but that is not to say that if a person were walking their dog along a defined route, their use was not characteristic of someone exercising a public right of way along a defined route as opposed to a general right of recreation.
36. There is also strong evidence that a significant proportion of the use that did take place was not attributable to other those other recreational activities. Several of the witnesses refer to use of the route as access to shops (there is a Sainsburys and B&Q located on the nearby John Wilson Business Park) or to other facilities in the village of Chestfield, such as the Medical Centre or as a shortcut to visit friends. These are all legitimate uses that it would normally be expected to find a public right of way being used for.
37. As confirmed in recent case law, '*it is also well established that a highway should have a defined route...subject to such a clearly established usage, the route of a highway can and should be defined with some precision*'<sup>9</sup>. In this case, the evidence of the users and, in particular, the aerial photographs (which taken several years apart) clearly confirm that defined routes were walked over the field.

### *Interruptions to use*

38. It is the case of the objectors that use of the claimed paths did not continue 'without interruption' during the material period due to the use of the land for agricultural purposes. In his witness statement, Mr. Lewer (company director) provides a detailed account of the history of the land and its various uses. He explains that from 1984, the land has been farmed by tenants who would take a hay crop on an annual basis and, in 1989, the land was ploughed, harrowed and re-seeded.

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<sup>8</sup> *Dyfed County Council v Secretary of State for Wales* (1990) 59 P&CR 275

<sup>9</sup> *R. (on the application of Gloucestershire County Council) v Secretary of State for the Environment, Transport and the Regions and the Ramblers' Association* [2000]

39. Clearly, the agricultural use of the land would have led to temporary and relatively minor interruptions (in the context of 20 years) to use whilst such activities took place. Hence, the question to be considered is whether the agricultural use of the land sufficiently interrupted use of the claimed routes to the extent that the users of the claimed routes would have been aware that their use was being challenged.
40. In the *Fernlee Estates*<sup>10</sup> case, the issue of temporary interruptions caused by the intermittent dumping of building materials on a claimed bridleway was considered. The judge in that case held that interruptions of a temporary nature that were not placed with the intention of preventing use of the way did not constitute an interruption to use for the purposes of s31(1) of the Highways Act 1980; he concluded that an interruption '*must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on*' and added '*a mere absence of continuity in the de facto user will not stop time running [as] there must be interference with the enjoyment of a right of passage*'. In support of this, he further stated '*the circumstances of and the intention with which the barring of the way takes place are relevant. For example, the blocking of a road by a broken down vehicle would not amount to a relevant interruption*'.
41. In the present case, the agricultural use of the land was a use which co-existed with the use of the claimed routes but it does not appear to have interfered with the walkers' use of the route, save for relatively short periods on a seasonal basis whilst agricultural operations and machinery occupied the land over which the claimed paths run. Any interruptions to use that did take place were as a result of the tenant's agricultural operations and not as a result of direct actions by the landowner to challenge public use of the land.

#### *Lack of intention to dedicate*

42. Mr. Lewer, in his statement, asserts that '*when this [the ploughing, harrowing and seeding of the land] took place, there could have been no doubt in the mind of anyone who tried to use the field in that period that the owner of the site, through his farmer, had no intention to dedicate any part of the site permanently to them as a footpath or otherwise.*'. It is the objector's case, therefore, that the agricultural use of the land was, in itself, sufficient to bring to the attention of the users that the landowner had no intention to dedicate the claimed routes as Public Footpaths.
43. The owner's lack of intention to dedicate was considered in some detail in the *Godmanchester* case. On this point, Lord Hoffman made the following comments: '*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... 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*'. Lord Scott, in the same case, agreed and provided some practical examples: '*Acts blocking passage along the path by, for example, the padlocking of gates would be likely to be sufficient. Regular challenges to users of the path might suffice. But expressions of intention never disclosed or circulated privately would not, in my opinion, be 'sufficient'. The reason they would not is that they would do nothing to curb the public*

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<sup>10</sup> *Fernlee Estates Ltd v City and County of Swansea and another* [2001] All ER 237

*user of the path, or to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not care or give a thought to whether or not they had a right to use the path that they were trespassers’.*

44. The essence of *Godmanchester* was therefore to make it clear that overt and contemporaneous acts are required in order to show a lack of intention to dedicate and, in addition, that such acts must be communicated to users of the claimed routes so that they may reasonably understand the landowner’s intention. It is clear from the submission of the objectors in relation to the Village Green application that the landowner and his tenant were aware of the use of the tracks over the field; indeed, the tenant himself admits that he went so far as to leave claimed path B and reinstate the perimeter track when he ploughed the field in its entirety in 1989.
45. No evidence has been presented (either by the applicant or the objectors) to suggest that any acts were undertaken during the material period (until, of course, the erection of the fencing in 2004) to demonstrate a lack of intention to dedicate the claimed routes, either by wholly preventing or, at the very minimum, by challenging the use of the routes by walkers.

## **Conclusion**

46. In *Norton and Bagshaw*<sup>11</sup>, it was held that there is a distinct difference between the wording of section 53(3)(c)(i) and that in deciding whether a Public Right of Way exists, two tests must be applied; whether a right of way subsists (known as 'test A') and whether a right of way is reasonably alleged to subsist ('test B'). It was also held that for test B to be met, it is necessary to show whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a public right of way to exist. In *Emery*<sup>12</sup>, the Court of Appeal held that it was possible to make an Order provided that the lower test (test B) had been met, and that in cases where there was credible evidence of public use over a twenty-year period, it would be appropriate to make the Order.
47. Therefore, having carefully considered the evidence and for the reasons cited above, I consider that there is a credible body of user evidence to show that the claimed routes has been used for a period of twenty years and little evidence to show that the landowner had, prior to 2004, directly challenged this use or demonstrated a lack of intention to dedicate the claimed routes. I have thus concluded from my investigations that, on a balance of probabilities, a public right of way on foot is at least reasonably alleged to subsist along the routes claimed.

## **Recommendation**

48. I recommend that the County Council makes a Definitive Map Modification Order to modify the Definitive Map of Public Rights of Way (and accompanying Statement) by adding two Public Footpaths over land known as Grasmere Pastures at Whitstable, as shown at Appendix A to this report.

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<sup>11</sup> *R v. Secretary of State for the Environment ex parte Norton and Bagshaw* (1994) 68 P&CR 402

<sup>12</sup> *R v. Secretary of State for Wales ex parte Emery* [1998] 4 All ER 367

### ***Further details on procedure for information only***

49. The effect of the refusal of this application would simply be that the County Council would take no action to recording the claimed routes as Public Footpaths on the Definitive Map. However, the applicant would have a right of appeal against the County Council's decision to the Secretary of State and this may result in the County Council being directed to make a Definitive Map Modification Order.
50. The effect of accepting the recommendation would be for a Definitive Map Modification Order to be made to add the claimed routes to the Definitive Map of Public Rights of Way. This Order would then be subject to a formal public consultation and, if no objections are received to the Order, the County Council itself has the power to confirm the Order and modify the Definitive Map accordingly. However, in the event of objections being received would be sent to the Planning Inspectorate for determination, most likely by way of a local Public Inquiry.

Accountable Officer:

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Case Officer:

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The main file is available for viewing on request at the Environment and Waste Division, Environment and Regeneration Directorate, Invicta House, County Hall, Maidstone. Please contact the case officer for further details.

### **Background documents**

APPENDIX A – Plan showing claimed routes at Grasmere Pastures

APPENDIX B – Aerial photograph dated 1999

APPENDIX C – Aerial photograph dated 2003

APPENDIX D – Summary of user evidence

APPENDIX E – Objectors' statement