

TRO Panel

Decision Maker: Director of Environment, Nasir Dad

Date of Decision: 28 September 2023

Subject: Definitive Map and Statement Modification Order

S53 – Wildlife and Countryside Act 1981. Claim to register a Public Footpath at Brookdale Golf Club, Failsworth

Report Author: Liam Kennedy PRow Officer

Ward: Failsworth East

Reason for the decision: To determine an Application submitted under Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act), requesting that a Modification Order be made in respect of a route running across land at Brookdale Golf Club, Failsworth (the application route), which is shown on the attached location plan 764/A4/239/1.

Summary: The Council has a duty to investigate and determine applications for Modification Orders submitted under the 1981 Act.

The Application has been received in respect of the application route which is claimed as a Footpath through use of the route by the public for more than 20 years.

Applications based on use by the public for more than 20 years must meet the legal tests for use 'as of right', which means use without secrecy, without force and without the permission of the landowner.

The Application is supported by User Evidence Forms, completed by 17 individuals who claim to have used the application route for periods ranging between 5 and 79 years until the bridge closure in 2018 without challenge, although some

user evidence forms claim continued use until 2021.

The application route is not recorded on the Definitive Map and Statement for the area.

The evidence in support of and against the Application must be considered and the Application determined in line with legal requirements as described in the report.

Background

The application was submitted by John Walton of The Ramblers Association on 21 July 2021. The application is supported by 17 user evidence forms and maps.

The evidence in support of the application consists of user evidence which needs to be considered against the statutory provisions in section 31 of the Highways Act 1980 (“the 1980 Act”) concerning dedication of a highway through 20 years’ usage.

Under section 31 of the 1980 Act, a way is deemed to have been dedicated as a highway after 20 years use by the public unless there is sufficient evidence that there was no intention during that period to dedicate it. In order to establish a presumed dedication under this section, each element in the wording of section 31(1) and (2) needs to be proved on the balance of probabilities.

“(1) Where a way over any land, other than a way of such a character that use if 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 the 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 was as aforesaid passes:-

(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after the 1st 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 the way as a highway.”

To make a Modification Order to add the Claimed Footpath to the Definitive Map the Council needs to decide whether an event under section 53 of the 1981 Act has occurred. If so, a Modification Order should be made. The “events” which are relevant to this application are those in s53(3)(b) and s53(3)(c)(i) of the 1981 Act. These provisions can overlap. “The discovery of evidence which shows that a right subsists or is reasonably alleged to subsist” under s53(3)(c)(i) can include the discovery that the period of user required to raise a presumption of dedication has expired. Thus, where an application is made for the addition of a path on the grounds of user for a requisite period, the application can be for an Order either under s53(3)(b) and/or under s53(3)(c)(i). An important difference between s53(3)(b) and s53(3)(c)(i) should be noted. The former does not contain words “reasonably alleged”. Unless the period has without doubt expired, the subsection does not apply. Under the latter, it is sufficient if it is no more than reasonably alleged that the way exists as a public right of way.

Proposal

The claimed route is shown on the attached plan (764/A4/239/1).

The route branches west from existing Footpath 50 Failsworth after crossing Ash Bridge at Point A (GR SD90986 00078) for approximately 44m to Point B (GR SD90959 00047) and skirts the green in a south easterly direction for a distance of approximately 97m to Point C (GR SJ91027 99994) continuing east for approximately 32m to Point D (GR SJ91058 99999). Points C & D are the locations of BR500 Andrew’s Footbridges A &

B which are not currently OMBC assets. From Point D the route proceeds southeast for a distance of approximately 44m to Point E (GR SJ91094 99981) continuing southeast for a distance of approximately 18m to Point F (GR SJ91107 99969). At Points E & F are located flights of steps approximately 26 risers in total. From Point F the route re-joins the existing alignment of Footpath 50 Failsworth approximately 5m on at Point G (GR SJ91111 99967).

What are the alternative option(s) to be considered? Please give the reason(s) for recommendation(s):

Option 1: To approve the application and add the claimed route to the Definitive Map and Statement as a footpath.
 Option 2: Not to approve the application.

Consultation: including any conflict of interest declared by relevant Cabinet Member consulted

Ward Councillors have been consulted and Councillor L Rea - Having looked through the report and the map detailing the proposed additional public footpath, I am happy that should the result be the proposal is passed, that this would be a suitable decision for all involved. The golf course is being avoided and any walkers will have a clear route.

Recommendation:

It is recommended that:

1. The application for a Modification Order in respect of a route on land at Brookdale Golf Club, Failsworth to be recorded in the Definitive Map and Statement as a footpath as detailed in Schedule 1 be approved.
- 2.. The Applicant be notified of the Council's decision and of his right of appeal under Schedule 14 of the 1981 Act.

The preferred option is Option 1 as the claim meets the required legal test of 20 years use of the whole of the claimed route 'as of right'.

Implications:

What are the financial implications?

The cost of introducing the order is shown below:

	£
Advertisement of Order	1,400

The advertising expenditure of £1,400 will be funded from the 2023/24 Highways TRO budget.
 (John Edisbury)

What are the **legal** implications?

Under section 53 of the 1981 Act, the Council is required to make a Modification Order amending the definitive map and statement where it appears requisite in consequence of the discovery by the Council 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 definitive map and statement subsists or is reasonably alleged to subsist over land in the area to which the definitive map relates, being a right of way such that the land over which the right subsists is a public path (ie a footpath or bridleway) or a restricted byway.

The burden of proof on establishing that the application route is a footpath lies with the claimant. The evidence submitted by the claimant is sufficient evidence of 20 years usage of the claimed route by the public. (A Evans)

What are the **procurement** implications?

None

What are the **Human Resources** implications?

None

Equality and Diversity Impact Assessment attached or not required because (please give reason)

Not applicable

What are the **property** implications

None

Risks:

None

Co-operative agenda

It is recommended to modify the land at Brookdale Golf Club and introduce a new footpath in the area. The proposal aligns with the Council Co-operative agenda as this will be a response to the application submitted under S14 of the Wildlife and Countryside Act 1981 which has received support from 17 other individuals. This will represent the Service as working in the best interest of residents who use the area and a new footpath will keep residents safe and healthy (Mahmuda Khanom, Policy Support Officer)

Has the relevant Legal Officer confirmed that the recommendations within this report are lawful and comply with the Council's Constitution? Yes

Has the relevant Finance Officer confirmed that any expenditure referred to within this report is consistent with the Council's budget? Yes

Are any of the recommendations within this report contrary to the Policy Framework of the Council? No

Analysis of Claim

The evidence submitted in support of the Application consists of User Evidence Forms completed by various individuals. In total 17 completed Right of Way Evidence Forms have been received in support of the Application.

It can be seen from the summary of User Evidence at Table A below that: -

A number of people claim to have used the application route; all are local people.

None of the persons who completed a User Evidence form have indicated that they ever sought or were granted permission to use the application route. No User Evidence forms indicate users having being stopped or turned back from using the claimed route.

The periods of use range from 5 to 79 years, with the earliest use being 1939. For those persons who have used the application route, the frequency of their use is moderate.

The Council has to decide what it considers are the correct facts, and on the basis of those facts, whether an event under section 53(3)(c)(i) has occurred.

Use of the way is not in itself enough – it is the nature of such use that has to be established. All the provisions of section 31 of the 1980 Act, together with the common law rules need to be carefully considered.

a) "use by the public"

Whilst the user evidence submitted comes mainly from residents who live in the area that does not mean that the use cannot be regarded as "use by the public"

In the case of R v Inhabitants of Southampton 1887 it was held that use by the public “must not be taken in its widest senses; it cannot mean that it is a use by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road”

Use by those persons who completed User Evidence forms should be regarded as “use by the public”.

(b) “use as of right”

None of those persons who completed User Evidence Forms have indicated being challenged themselves. The use of the route by those who completed User Evidence Forms appears to have been open and without force or permission and can therefore be considered to be use as of right.

(c) “period of 20 years to be calculated retrospectively from the date when the right of the public to use the way is brought in question, whether by a notice such as is mentioned in subsection (3) below or otherwise”

It is considered that the date when the public’s right was first called into question was when Ash footbridge was closed in 2018, severing the route’s connection to the northern part of Footpath 50 Failsworth. The period of consideration (for the purposes of presumed dedication under section 31 of the 1980 Act) has, therefore, been taken from 1998 to 2018.

The use described in the User Evidence Forms extends throughout that period.

(d) “without interruption”

An interruption has been defined as the actual and physical stopping of the use of a way by the landowner or their Agent. Moreover, such interruption must be with the intention to prevent public use. It is not sufficient if the interruption is for some other purpose.

(e) “unless there is sufficient evidence that there was no intention during that period to dedicate it”
There have in recent years been numerous legal rulings on what constitutes “sufficient evidence” that there was no intention to dedicate a highway. The leading case is Godmanchester, which was considered by the House of Lords in 2007. In that case the House of Lords ruled that the words “unless there is sufficient evidence that there was

no intention during that period to dedicate” in s31(1) of the 1980 Act requires landowners to have communicated to users their lack of intention to dedicate and that must have been communicated at some point(s) during the 20 year period of use by the public.

There has been no evidence provided of any intention of the landowner not to dedicate the route as a footpath.

Table A
Summary of User Evidence

User	Usage From-To	Years	Frequency p/a	Purpose	Permission
1	1978-2018	40	1	Recreation	No
2	1989-2018	29	Once every 4 yrs	Recreation	No
3	1998-2018	20	1	Recreation	No
4	1998-2018	20	Regularly	Recreation	No
5	1998-2018	20	2	Recreation	No
6	1993-2018	25	10	Recreation	No
7	1939-2018	79	200	Recreation	No
8	1943-2021	78	30-40	Recreation	No
9	1970-2018	48	6	Recreation	No1
10	1998-2018	20	2	Recreation	No
11	1990-2018	28	1-2	Recreation	No
12	1993-2018	25	5-20	Recreation	No
13	2015-2021	6	12	Recreation	No
14	1998-2018	20	6	Recreation	No
15	2012-2021	9	24	Recreation	No
16	2013-2018	5	2-3	Recreation	No
17	2014-2021	7	12	Recreation	No

Schedule 1 – Modification of Definitive Statement

See table below.

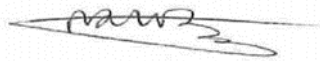
District and path number	Page Number	Status	Length (m)	Description	Comments
FAILSWORTH 50A	10&15	F.P	240	The route branches west off existing Footpath 50 Failsworth after crossing	2 footbridges 5 flights steps approx. 26 risers

				<p>Ash Bridge at (GR SD90986 00078) for approx. 44m to (GR SD90959 00047) and skirts the green in a south easterly direction for a distance of approx. 97m crossing footbridge at (GR SJ91027 99994) continuing east for approx. 32m to cross another footbridge at (GR SJ91058 99999). The route proceeds southeast for a distance of approx. 44m to steps at (GR SJ91094 99981) continuing southeast for a distance of approx. 23m to re-join Footpath 50 at (GR SJ91111 99967)</p>	
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There are no background papers for this report

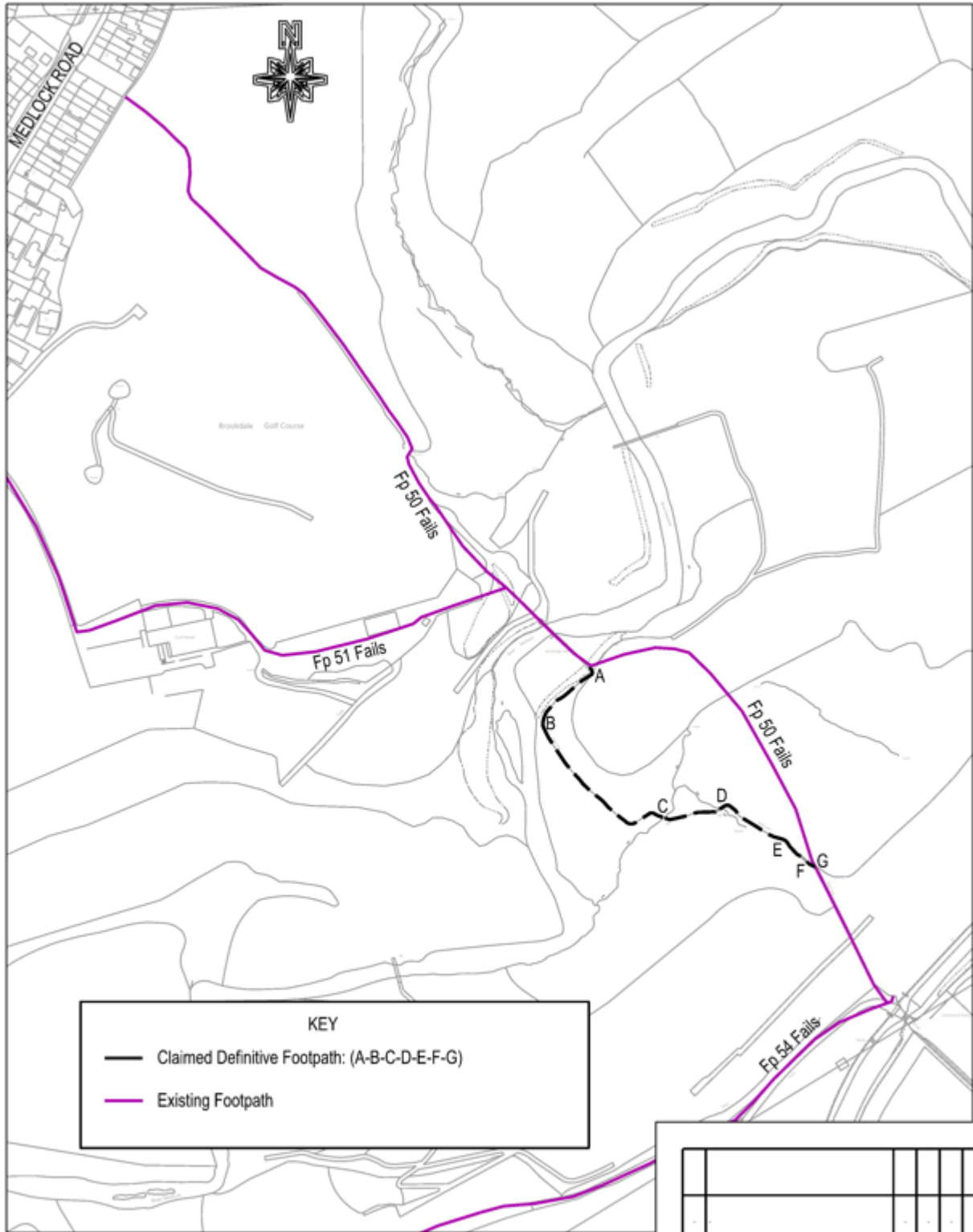
Report Author Sign-off:	
Liam Kennedy	
Date: 11 September 2023	

In consultation with Director of Environment



Signed :

Date: 15.09.2023



KEY	
	Claimed Definitive Footpath: (A-B-C-D-E-F-G)
	Existing Footpath

Rev	Revision details	By	Chk	App	Date



Oldham Council

**Place and Economic Growth
HIGHWAYS & ENGINEERING**
Henshaw House, Cheapside, Oldham OL1 1NY

Client Oldham MBC		
Project Brookdale Golf Club, Failsworth		
Drawn by RW	Date 03/23	Purpose of issue information
Checked by LK	Date 03/23	Scale at A4 size 1:3000
Approved by	Date	

Title Wildlife and Countryside Act 1981 S53 Claim to Register a Public Footpath	
Drawing No. 764/A4/239/1	Rev.

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