

Name of meeting: Planning sub-committee (Heavy Woollen area)

Date: 1 September 2016

Title of report: Application for a definitive map modification order to delete public footpath Batley 49 (part) from the definitive map and statement, and to add a public footpath at Hey Beck Lane, Woodkirk, Dewsbury.

Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	No
Is it in the <a href="#">Council's Forward Plan</a> ?	No
Is it eligible for "call in" by <a href="#">Scrutiny</a> ?	Yes
Date signed off by <u>Director</u> & name	26 August 2016: Joanne Bartholomew on behalf of Jacqui Gedman
Is it signed off by the Director of Resources?	No. See 3.4 No financial implications
Is it signed off by the Assistant Director - Legal & Governance?	Yes
Cabinet member <a href="#">portfolio</a>	Investment & Housing

Electoral [wards](#) affected: Batley East

Ward councillors consulted: Yes

Public or private: Public

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## 1. Purpose of report

- 1.1 Members are asked to consider an application for a definitive map modification order (DMMO) to delete part of public footpath Batley 49 at Hey Beck Lane from the definitive map & statement as shown by the bold dashed line marked C-D on plan 1, attached to this report, and to add a public footpath over a different route, as shown on plan 1 as a bold dashed line between A-B.
- 1.2 The decision required is whether or not the council should make an order. The council should make whatever order is requisite following consideration of the evidence, i.e. the order applied for, a different order or no order at all.

## 2. Key points

- 2.1 The council has a duty to keep the definitive map and statement of public rights of way under continuous review.

- 2.2 The public rights of way (PROW) unit receives applications from members of the public to add, delete, upgrade, downgrade or vary the details of ways recorded on the legal record of public rights of way.
- 2.3 Appendix 1 to this report: “Amendments (modifications) to the definitive map, guidance notes for members”, outlines the factors members need to consider when determining applications to amend the definitive map and statement.
- 2.4 Members must consider the evidence and decide whether it has been shown that the application routes should be deleted from and added to the definitive map. It is not a material factor whether the existence and recording of the public footpath is convenient or inconvenient, desirable or undesirable to any party.
- 2.5 The application is made under the Wildlife & Countryside Act 1981.

Section 53 (2) and section 53 (3) c (iii) require the council to make an order to modify the definitive map when evidence is discovered which (when considered with all other relevant evidence available to it) shows that “there is no public right of way over land shown in the map and statement as a highway of any description...”

- 2.6 Section 53 (3) a (i) would apply where a path has been subject to an authorised diversion or extinguishment, such as a formal public path order. Such a change to the formal record would usually be by way of a legal event modification order, (“LEMO”) which is an administrative task without the need for public consultation, rather than by way of a definitive map modification order. However, it would also be requisite to have demonstrable evidence of the alleged legal event, such as a confirmed, brought into force diversion order, to make a LEMO.
- 2.7 Additionally, section 53 (3) c (i) requires the council to make an order to modify the definitive map when evidence is discovered which shows “a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;”.
- 2.8 Unrecorded public rights of way may come into being in a number of different ways, such as a result of a legal event such as a creation or diversion. Further, Section 53(3)(b) of the 1981 Act requires the Council to modify the Definitive Map and Statement on expiration of any period of public use if it can be shown that the public have used the path for a sufficient length of time to raise a presumption that the path has been dedicated as a public path. This presumption, detailed in the Highways Act 1980 section 31, states “*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 actually been enjoyed by the public as of right and without interruption for a full period of 20 years the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it*”. In identifying a relevant 20 year period for the purpose of section 31, we have to work retrospectively from this date of challenge.
- 2.9 Dedication of a public path at Common Law should also be considered. The main principles of establishing a highway under common law are:
- 2.9.1 Use by the public should be as of right; without force, secrecy or permission.

- 2.9.2 The landowner should know of the use but do nothing to prevent it. No minimum period of use is required (unlike the statutory process where a minimum of 20 years is required).
  - 2.9.3 The more intensive and open the use and the greater the evidence of owners knowledge and acquiescence the shorter the period required to raise a presumption that the way has been dedicated.
  - 2.9.4 Each case is judged on the facts available.
  - 2.9.5 The onus of proof lies with the person making the claim to show that there was use and that the owner knew of it and did nothing to stop it.
- 2.10 In considering the addition of unrecorded footpaths, there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw*, and clarified in the case of *R v Secretary of State for Wales ex parte Emery*.
- 2.10.1 Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.
  - 2.10.2 Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.
- 2.11 If the council were to make a decision to make an order adding a footpath only on the basis of Test B, members may note that the public rights of way provisions of the Deregulation Act 2015, which are yet to come into force, will remove Test B, so any such authorised order could only be made prior to commencement of any such relevant provisions.
- 2.12 The definitive map and statement is conclusive evidence as to the existence of a public right of way, unless and until it is modified by an order under the provisions of section 53 of the 1981 Act, in this case to show that the path had been included in error, there having been no public right of way over the path when it was added to the definitive map and statement or should subsequently be removed as a consequence of a legal event, such as formal diversion..
- 2.13 Public footpath Batley 49 is a recorded public highway currently shown in the definitive map and statement. An enlarged copy extract of the 1985 modified definitive map is appended with plan 1, the 1985 definitive statement copy extract is appended.
- 2.14 Section 32 of the Highways Act 1980 states “*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.*” Whether determination is by the Inspectors appointed by the Secretary of state, the highest courts or the council as surveying authority for public rights of way, it is appropriate and correct for those deciding such matters to consider documents that form part of the available evidence, and to decide the weight of that evidence in reaching a decision.

- 2.15 Government guidance to local authorities is contained in DEFRA'S Rights of Way Circular 1/09, version 2

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69304/pb13553-rowcircular1-09-091103.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69304/pb13553-rowcircular1-09-091103.pdf)

- 2.16 Paragraphs 4.30 to 4.35 of this circular deal with deletions of public rights of way from the definitive map and statement. These paragraphs are attached to this report in full as Appendix A.

- 2.17 This guidance provides that "The evidence needed to remove what is shown as a public right of way from such an authoritative record as the definitive map and statement....will need to fulfil certain stringent requirements. These are that:

2.17.1 The evidence must be new –an order to remove a right of way cannot be founded simply on a re-examination of evidence known at the time the definitive map was surveyed and made.

2.17.2 The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.

2.17.3 The evidence must be cogent."

- 2.18 Members are advised that if a definitive map modification order is made, which then attracts objections which are not withdrawn, then the council would have to forward it to the Secretary of State at DEFRA for determination. The DMMO consistency guidelines, are issued to the Secretary of State's inspectors in the planning inspectorate

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/51749/5/Full\\_version\\_February\\_2016\\_consistency\\_guides\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/51749/5/Full_version_February_2016_consistency_guides_2_.pdf)

- 2.19 They deal specifically with deletions in the guide's paragraphs 4.18 to 4.23. These paragraphs are attached as Appendix B.

- 2.20 Paragraph 4.18. of the guidelines indicates "When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all."

- 2.21 Paragraph 4.19 of the guidelines refers to the judgment in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* (2001) ("*Trevelyan*") and in particular the following statement by Lord Phillips M.R., "Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required

to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists.”

2.22 In light of the above guidance, the starting point for a deletion is that footpath Batley 49 exists. The evidence that is available to the council for consideration must demonstrate that, on the balance of probability, no way existed over the application route when it was added to the definitive map and statement. A path may be deleted by way of a LEMO if a legal event has already extinguished or diverted it (see paragraph 2.6 above).

2.23 When considering both deletion and addition, on a basis that one route would be a corrected representation of the other route, then the case *R v Leicestershire 2003 EWHC 171* informs us that the council should decide which is the appropriate line for the recording of the path.

2.24 At paragraphs 27 & 28 of the *Leicestershire* decision Mr Justice Collins notes,

2.24.1 “27 As I have indicated, it is perhaps unusual for section 53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing on the map of, in effect, a new right of way.”

2.24.2 “28 As I have already indicated, section 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, i.e. when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, section 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative Test B under section 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible -- it is dangerous to rule out any possibility -- but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.”

2.25 This report will cover the effect of these situations on the various potential grounds for the making of an order.

- 2.26 The application is further complicated by a change in position of the applicants, with differences between the arguments supporting their case presented before January 2016 and those contained in their legal representatives' letter of 28 January 2016 from Ramsdens Whitfield Hallam ("Ramsdens"). (Appendix G).
- 2.27 At the time of DMMO application, the applicants claimed that the originally recorded Batley public footpath 49 was no longer in existence over their landholdings as it had allegedly been formally diverted previously by the Batley Borough council. Their representatives had also argued that the route had been "*abandoned*" and that lack of use and the passage of time meant that the council could no longer take enforcement action. However, in January 2016, after engaging an additional consultant, it was submitted to the council on behalf of the applicants that the formal records of public rights of way show no public footpath across their land. This meant, in their view, that the Bragg DMMO application is "*wholly unnecessary and based on erroneous information (largely from your Rights of way Officer)*". This position was a significant change from the applicant's original claims, statements and arguments. The council has a duty to make decisions further to DMMO applications and has been directed by the Secretary of State at DEFRA to determine this one.
- 2.28 The situation that arises from the application and the January 2016 Ramsdens letter may appear somewhat contradictory, so is worth clarifying. The applicants have denied that there is any representation of a footpath shown on the definitive map and statement within their land, whilst retaining their DMMO application asking the council to make an order to delete from the DMS that same representation of a path within their land.
- 2.29 In summary, the applicants originally put forward the case that the footpath had been legally moved off their property onto Mr Lilley's property, whereas they later put forward a case that the public right of way on foot, Batley 49, has never been recorded over their property.
- 2.30 They claim, in conclusion, that, as a consequence, if the council wishes to record a footpath over the Bragg's property ("*upon the route [you] think it should run*"), then a DMMO would have to be made to record it by adding it for the first time. i.e. the Braggs claim there is no recorded path on their property so the council would have to add the same footpath - that they have make a formal application to delete - if the council's wishes any footpath to be recorded over the Braggs' land.
- 2.31 At the same time, they suggest in January 2016, that a footpath diversion application made by their neighbour Mr Lilley in the 1990s has precedence, and that the diversion order showed and moved the footpath, and that its confirmation is now unchallengeable

To best inform members and to offer reasonable and *verbatim* representation of the points raised, the January 2016 Ramsdens/Bragg letter states as following, with enclosures being representations of documents appended at L, M & N, also at Appendix G with the letter:

We refer to previous correspondence concerning the above matter and in particular our client's application to the Planning Inspectorate for a Direction.

As a result of the Local Authority's stance and actions our clients have been compelled to request the Planning Inspectorate to direct the Council to make a decision upon their application.

Notwithstanding the draconian enforcement action taken (including involvement of the Police) the Local Authority advised the Planning Inspectorate there were no particular issues of concern that merited being given urgent consideration. Pursuant to the representations of both parties a provision for an enquiry to be held within 12 months was made by the Inspector. We have not heard from your Rights of Way Officer since the date of that direction.

As a consequence of the delay in this long running issue/application, we have reviewed our file(s) and engaged consultant, Mr Andrew Dunlop to assist with our client's application.

We believe that the enforcement and as a consequence of the threat of enforcement the contentions of both parties are wholly incorrect.

Our application on behalf of Mr and Mrs Bragg proceeded on the basis that we were to make an addition to footpath 49. Given the matters that follow hereafter it would appear that that application was wholly unnecessary and based on erroneous information in any event (largely from your Rights of Way Officer).

We reserve our position with regard to the possible withdrawal of the application pursuant to you responding in respect of the balance of the points set out herein.

### **Kirklees Enforcement and Current adopted position.**

The action to date is based upon the counties provided definitive map and its interpretation. This has been expanded to compare with earlier OS maps that show a footpath. This approach is flawed.

The map was not drawn magnified but on a smaller scale and as thus created a difficulty in interpreting as to what was originally intended.

1. Its first use is on a DM, page 53 (attached hereto as enclosure 1) is unclear (even with magnification or expansion) where the mark terminates.
2. On the second DM page 54 (enclosure 2) it is clear that the path does not cross over the Bragg's holding but joins the farm track before turning north. I pause there to mention this was in accordance with the original route and the signposts that have been displayed for some three decades.
3. On the current DM page 38 (enclosure 3) it is not completely clear if it crosses the holding or runs the farm track.

We accept that it has to be borne in mind that a line indicating the route of the path is drawn with a thick pencil. If scaled that would be approximately 10 metres wide. This scale with the slightest slip of the pencil can move the path many meters to a new location.

Your Rights of Way Officer, Mr Cheetham has taken this into account and referred to the earliest large scale maps justified the location of the path on his view as running through the Braggs. He has however failed to establish that path was a public footpath and instead presuming that it was and thus concluding that the DM route must cross the Braggs land.

The whole enforcement action has been based on this incorrect assumption rather than fact.

### **Basis for Kirklees assumption and correct position**

In 1984 the Braggs purchased the plot adjacent to the contested site. They sought rights of way information from Kirklees. The search that they received confirmed no public rights of way crossed the combined plot.

Later in 1984 they sought planning permission for building upon the newly acquired plot. The Council failed again to identify a public right of way crossing the land.

In 1992 the neighbouring land owners sought and eventually gained a Section 119 Highway Diversion Order from Kirklees Council. This Order was objected to by our clients but following a statutory process and Public Inquiry, the Order was confirmed. The effect of the Order was to divert the public footpath (Batley 49) to a new road as shown on the new route as shown on the Order Map. That diversion was advertised and gave all persons a chance to object and complain to the High Court if they felt aggrieved by its confirmation. No one did and once the requisite timescale had expired the confirmation became unchallengeable.



Whilst the order does not follow the route in Mr Cheetham's current presumed interpretation of the old maps (or his magnified/blowing up interpretation of 10 metre wide pencil mark) it does fit with both the opinions of the Council in 1984 and importantly no one challenged the Order in 1992.

Accordingly the effect of the 1992 Order was to divert Batley 49 from its previous location to a new location. This was a legal decision and cannot now be challenged at this point in time.

Perhaps the most serious feature caused for our client's legitimate complaint is that the Local Authority's own definitive map was not updated upon confirmation of the 1992 Order. Indeed apparently it still isn't. Both the paper and electronic version failed to show your alterations confirmed by the Council's own Order. This is an offence in itself.

It follows from that that it is reasonable to infer that the Local Authority failed to inform the Ordnance Survey of the Order.

### **The Proposed Solution**

We require your immediate confirmation that the Local Authority will alter the map using a Legal Event Order. This will be authorised by Section 53 of the Wildlife and Countryside Act. Whilst this would be at the public expense, it takes approximately an hour and takes effect immediately.

Consequent to that you will correct your paper copy map and the electronic version.

It will then be necessary to inform the Ordnance Survey.

We then require arrangements to be made to reinstate our clients land and fence and rectify the enforcement work undertaken in providing our client with a full integrity in respect of the same.

### **Conclusion**

If you are not persuaded that the confirmed Order shows footpath 49 the Council may submit its own Section 53 modification Order to add a footpath upon the route you now seem to think it should run.

In the interim our clients will deny access to Council Officers or any member of the public pending your decision. The Council may, as a consequence of the foregoing conclude on its own to amend the route now.

Our clients reserve their position entirely with regard to costs incurred and effects upon their quiet enjoyment of the property particularly given the aggravated feature of involving the police.

Please acknowledge receipt by return and let us have your substantive response within 5 working days.

- 2.32 Before moving onto the application, a summary timeline may assist. Public footpath Batley 49 was recorded in the first definitive map and statement of public rights of way produced by West Riding County Council with a relevant date in 1952. The route of the path is shown in Ordnance Survey plans going back over a century, and is also shown on documents used in the production of the DMS. Appendices L, M & N.

- 2.33 Mr & Mrs Bragg purchased 75 Hey Beck Lane in 1981. It had previously been owned by Mr & Mrs Buckley, who had extended their land ownership in 1966, buying a triangle of land from Savile Estate. The triangle of land over time had a stable on (1965 planning application papers appended at R, with peck lines marked on). The bungalow subsequently became a garage serving 75 Hey Beck Lane and has subsequently become a bungalow further to a planning consent granted to Mr & Mrs Bragg. That bungalow planning application included submissions to the council from the applicant's agent showing the footpath Batley 49 across the Braggs' land. (Submitted plan appended at S). Mr & Mrs Bragg have sold 75 Hey Beck Lane since the application, but retain ownership of the bungalow (now 75A Hey Beck Lane) and the land carrying Batley footpath 49, before it enters Mr Rod Lilley's land to the south at the point where fence and brick wall meet.
- 2.34 The land to the rear (south) of Mr & Mrs Bragg's property is owned by Mr Rod Lilley. The route of path 49 across the Braggs' land was not open and available to the public for a considerable period of time. The Braggs state that it has not been open since they bought the property in 1981, and for many years previously. People appear to have walked over a route over Mr Lilley's land directly from the farm access track to the field.
- 2.35 Mr Lilley applied for a public path diversion order in August 1991 to move the public footpath across his lawn to the northern edge of his land. An order was made by Kirklees council in 1992 which referred to the diversion of Batley public footpath 49. The order and plan is shown at Appendix C. This is the diversion proposal mentioned above in the Braggs January 2016 letter submissions. The diversion order was opposed by Mr & Mrs Bragg (Appendix U) and others, mainly regarding the negative effect of the change on their own property, security and privacy. After a public inquiry into the merits of diverting the route shown in the order plan X-Y onto the route shown X-Z-Y, the objectors' case was successful when the order was not confirmed by the Secretary of State's inspector by letter in April 1994. The inspector's decision letter is at appendix D.
- 2.36 As it was not confirmed, the 1992 diversion order had no effect on the public footpath 49 or any other path. Proposals to divert the footpath 49 continued to be subject of discussions over the following years and in 2003 another application to divert 'path 49' was made to the council.
- 2.37 In late 2003, after changes in PROW staff responsibilities, officers informed Mr Lilley and Mr Bragg that the current and past proposals to divert the footpath 49, including those shown in the unconfirmed 1992-4 diversion order process did not actually show the definitive recorded route of Batley 49, instead showing the route that was available and used by the public on the ground at the time; whereas the definitive route was not available, being obstructed at the Braggs' property. A schematic of approximate routes with coloured lines identifying the complications (drawn up in 2003) is appended.
- 2.38 The application to divert was placed in abeyance by Mr Lilley, and there was no public complaint about the obstruction, so the situation was effectively paused. Officers met on site with Mr Bragg in December 2003 and he made it clear that he did not accept the officer view, but did not provide any information to the council to support his doubts about the alignment of footpath 49 across his land. This situation continued for some years, with the council not taking any action as a legal process was in abeyance and no public complaint about obstruction was received.

- 2.39 This changed when Mr Lilley withdrew his diversion application and blocked off the route on the ground in summer 2012 at his boundary with the track (footpath 55). This new blockage was at point X on the 1992 order plan.
- 2.40 This new situation prompted numerous public reports about obstructions preventing public passage to/from Leeds Road over Batley footpath 49. Officers considered, (just as the two landowners had been told over a decade earlier), that Batley 49 actually passes over Mr Bragg's land before reaching Mr Lilley's land. Informal requests failed to clear the whole route so the council took enforcement action and re-opened the definitive footpath to public passage.
- 2.41 The route of path 49 from the field boundary, north east across Mr Lilley's lawn, then along the north western boundary of the 1966 Savile/Buckley triangle of land, next to the brick wall, which marked the original boundary of no. 75, (before Mr Buckley bought the triangle of land from Savile Estate in 1966 for a stable) was re-opened along its length to public use.
- 2.42 Mr Bragg has disputed the existence of Batley 49 over his land, claiming that it was diverted by Batley Borough Council at the behest of Mr Buckley, so no longer runs over his land, but leaves the track (path 55) to cross Mr Lilley's land straight to the field. He also claims that as well as the footpath running across the Lilley land being a public footpath because of the 1990s diversion process, it is also a public footpath because it has been used by people for a long time.
- 2.43 Faced with the enforcement action and a future with path 49 being open to the public across their land for the first time since purchase in 1981, Mr & Mrs Bragg made a DMMO application to the council submitted by their solicitors, Ramsdens Whitfield Hallam.
- 2.44 Despite the apparent change of tack in January 2016, Mr & Mrs Bragg have not withdrawn the DMMO application to delete. Of course, the application also seeks an addition, the recording of a public footpath route across Mr Lilley's land, for which a decision is also required further to the Secretary of State's direction, as well as the council's duties under WCA 1981.
- 2.45 Since 2003 the council officers have clearly and freely expressed the view that the council's actions and correspondence in regard to the Batley public footpath 49 in the vicinity in the 1990s were based on an incorrect stance on the alignment of the recorded public footpath. Mr Lilley applied formally to move the footpath apparently available to the public across his lawn. This line appears to have been mistaken to be Batley 49 and referred to thereafter for some years. This includes the depiction of an incorrect route in the 1992-4 diversion application and order process, which ended with an unconfirmed order. As the diversion order was not confirmed by the SoS, the order had no legal effect whatsoever on Batley 49 and/or the path used across Mr Lilley's lawn to the track (path 55).
- 2.46 Mr Simon Bowett, when he lived at Heybeck Cottage, wrote a letter to the council in July 1988 about path 49. He wrote another in January 1989 that queried the council's response to the first letter about the alignment of path 49. He marked up a plan showing what he considered to be the correct alignment, going through the Bragg's property, along the northwest boundary of the triangle of land purchased by the Buckleys in 1966 from Savile. Mr Bowett was the Buckleys' son-in-law. The letters are appended at T and other evidence received from him are noted later in this report.

- 2.47 The council's path files show that between at least August 1992 and March 1993, Mr Lilley obstructed the route across his lawn from the stile at the field edge to the track. He had obstructed the route that he had applied to divert and provided a fence-enclosed route at his northern boundary along the proposed diversionary line. The council served formal notice for removal of obstructions over this unrecorded route during this time. The council's path files also note the concerns at the time about these obstructions, including from the Braggs' representatives. This obstruction occurred during the diversion order process, just after the order was made, but before the Secretary of State's 1994 decision on the 1992 diversion order. Mr Lilley had apparently acted prematurely when he had blocked off the path on the ground to public use and provided access along a fenced in route along the proposed diversionary route next to the rear wall of the gardens on Hey Beck Lane.
- 2.48 **The DMMO application.** The application was made in December 2010 by Ramsdens Whitfield Hallam on behalf of their clients Mr and Mrs Bragg, after officers responded to public requests and contacted Mr & Mrs Bragg about action to secure the removal of obstructions to the recorded public footpath 49 at Hey Beck Lane. Mr & Mrs Bragg dispute the existence of the public footpath over their land. The DMMO application form and plan are appended at E.
- 2.49 The application papers claims that the definitive map and statement incorrectly record(s) a public footpath, as shown by a bold dashed line between points C & D on Plan 1 attached to this report. The plans submitted with the application indicate a deletion just over that part of the footpath within the applicant's landholding (points C-D, i.e. would potentially leave a *cul-de-sac* path). The plan submitted shows the request for an addition of a public footpath over A-B. i.e. running over the edge of the track from Hey Beck Lane south easterly (which already carries footpath Batley 55), then turning southwest leaving the track and crossing into Mr Lilley's land to point B at Mr Lilley's western land ownership boundary.
- 2.50 The council has received or otherwise discovered or holds various pieces of evidence regarding pedestrian routes and public use at Heybeck, including submissions made by the applicant and other information submitted, which includes:
- 2.51 Application documents listed in an "index", shown here as submitted:

#### Index

A) Statement of Ian Christopher Bragg

B) Land Registry documents:

1) Official copy Title and plan for Title number WYK268995 dated 15 March 2013

2) Conveyance dated 5 January 1966

C) Photographic evidence of the footpath:

1) First photograph shows a garden fence and Ian Bragg's Property taken from the field at the south.

2) Second photograph shows a public footpath signpost which shows the eastern end of the footpath.

D) Letters from Kirklees Council

1) Letter with attached plan dated 26 November 2003 stating that footpath 49 runs across Mr Bragg's Property.

2) Letter dated 20 May 2013 with 2 attached plans and a statement.

E) Statutory Declaration of Margaret Hallas signed and dated 6 September 2013.

F) Statutory Declaration of Simon John Bowett signed and dated 12' November 2013.

G) Borough of Batley documents:

1) Copy resolution passed by the General Works Committee;

2) Memorandum from the Borough Engineer Batley to The Town Clerk dated 30 September 1971;

3) Letter from Blythe Town Clerk dated 1 October 1971.;

4) Note for Mr I Longbottom dated 27 October 1971;

- H) Statement of Alan Firth dated 9 March 1972;
- D) Kirklees Council letters.
- 1) Letter from Kirklees Council dated 5 August 1992 regarding a proposed diversion of footpath 49.
- 2) Public Path Diversion Order, Highways Act 1980.
- 3) Kirklees Council plan for the proposed diversion of footpath 49.
- J) Letter from The Planning Inspectorate dated 26 April 1994.
- K) Letter with a plan attached from Kirklees Council dated 28 June 1994 and signed by Sandra J. Haigh.
- L) Extinguishment and Diversion Orders made by Batley Borough Council (3 pages) plus four records copied on to one page.
- M) Letter from Kirklees Council dated 11 November 2013.
- N) Photograph showing the footpath in the background.

2.52 These documents are appended in full at Appendix E for members to consider. Item A on the index is Mr Bragg's statement, which is as follows:

"I Ian Christopher Bragg of 75 Hey Beck Lane, Woodkirk, Dewsbury WF12 7QU make this statement in support of my application pursuant to the Wildlife and Countryside Act 1981 for a modification of the footpath No.49 on the Definitive Map and Statement of Kirklees Metropolitan District.

1. I confirm that the contents of this statement are true to the best of my knowledge and belief All matters set out in this statement are within my own knowledge unless indicated otherwise. There is attached to this statement an exhibit marked ICB1. All page numbers in this statement relate to pages of the exhibit unless otherwise stated.

2. I am the freehold owner of the above property which is registered with title number WYK268995 (Land Registry office copy: pages 1 to 5).

3. Part of my title on the East side of the property consists of a small triangular section of land upon which there is located a garage and outbuildings. I understand that this triangle of land, like much of the land around it, was once part of the Savile Estate. I have been provided with a copy of a conveyance dated 5\* January 1966 by which the Savile estate sold this small triangle to Stanley Brian Buckley who was then the owner of the house and land to the West, which is now my house at 75, Hey Beck Lane. (1966 conveyance at pages 6 to 11).

4. Clause 1 of the 1966 conveyance states that the land is sold subject "(c) to the footpath crossing the entire length of the North Western boundary of the property hereby conveyed as indicated on the plan annexed hereto". The attached plan clearly shows what I now know to be public path No.49 as it was then located, which cut up from the opposite field boundary to the South and then passed along the edge of the small triangle which was purchased by Mr Buckley in 1966 until it met the highway at the front of the property. It is this section of the path which I now seek to have deleted from the Definitive Map and Statement because I believe that, in the circumstances described below, there was a Modification Order made in respect the path in the late 1960s or early 1970s by Batley Borough Council and the records for that order have been lost or destroyed.

5. There is at page 12 of the exhibit a photograph of my property taken from field to the South. This shows the route of the footpath which is referred to in the 1966 conveyance. The South boundary of my property is fenced, as it has

been ever since I acquired the property in 1981. The former route of the footpath now forms an integral part of my garden and it has always formed an integral part of the garden ever since I moved in.

6. For as long as I have lived at the property, the route of the public path has passed along the Southern boundary of the field which is to the South of my property. The line of the path is approximately straight and it joins the highway adjacent to the Eastern corner of the additional triangle that was acquired by Mr Buckley in 1966. This is the line which I wish to have added to the Definitive Map and Statement because I believe that this was the realigned route that was authorised by a Modification Order made in the late 1960s or early 1970s by Batley Borough Council, although the records for that order have been lost or destroyed.

7. The photograph at page 13 shows the Eastern end of the line which I contend should be the line of footpath No.49 where it meets the highway. As can be seen, there is a formal green Highway Authority "footpath" sign at the end of the path and for as long as I have known the property, this has always been there.

8. I was not aware that there has ever historically been a footpath through what is now our land until Kirklees Council wrote to me on 26<sup>th</sup> November 2003. This was in connection with an application which had been made by a neighbour for the diversion of another part of footpath No.49 pursuant to section 119 of the Highways Act 1980. The Council informed me that "in the course of investigating the above application, it has come to [the Council's] attention that public footpath Batley 49 runs across your property as shown on the attached plan.". The attached plan showed the old route which had been shown on the 1966 conveyance. The letter only asked me to discuss the matter with the Definitive Map Officer; it did not suggest that any action was going to be taken as a result of the view taken by the Council at the time and no action was in fact taken. A copy of the letter is attached at pages 14-15.

9. Nothing then happened for another 10 years and I assumed that the anomaly identified by the Council in their records was just an anomaly and that no action would be taken because it was obvious that the path ran across the field at the back of my property on the route which I now contend for and this had been the situation for many years. The existing and established route had indeed for many years been officially sanctioned by the Council's own sign being placed at the Eastern end of the path and the sign remained in place after 2003.

10. In 2012 I applied for planning permission to convert the existing garage into a single storey flat. Planning permission was granted but when the approved plan was returned to my architects it had the old route of the footpath marked on it. I attempted to discuss the matter with the Council but ultimately by letter dated 20<sup>th</sup> May 2013 the Council informed me that they would require me to remove the existing boundary fence so as to allow public access along the route of the path that had been shown on the 1966 conveyance and which was still shown as the official route of the path on the Council's records. A copy of this letter is at pages 16-18.

11. The Council has informed me that it has no record of the footpath having been formally re-routed and therefore I have made my own enquiries as to how the route of the path came to be changed from that which is shown on the 1966

conveyance to that which has been actually in existence ever since I bought my property.

12. There is produced at pages 22 to 25 a statutory declaration of Margaret Hallas of Scargill Farm, 58 Hey Beck Lane, Woodkirk. She says that she was a close friend of Mr and Mrs Buckley and that she remembers them purchasing the additional triangle of land so that Mrs Buckley could keep horses on it and with the intention of building a stable on the land. Mrs Hallas can specifically recall being told of the reason why Mr and Mrs Buckley decided to have the footpath formally re-routed, and being kept informed of the formal process of re-routing which had been pursued with the local council and finally being informed that official approval had been given. She believes that this occurred in the early 1970s, which she is able to establish approximately from the ages that their children would have been at the time.

13. I also attach at pages 26 to 31 a statutory declaration of Simon John Bowett who was married to one of Mr and Mrs Buckley's daughters and who lived in Heybeck Cottage, Hey Beck Lane, from 1980. He believes that the footpath will have been diverted in the late 1960s when Mr Buckley built his stables on the triangle of land that he had acquired in 1966. He describes Mr Buckley as being " a very particular and methodical man" who will always have done everything by the book. He therefore concludes that if the footpath was diverted around the side of the triangle of land, which it clearly was, then this will have been done legally and officially by Mr Buckley at the time.

14. Within the documents supplied to me by the Council, I have seen a copy of a resolution dated 1<sup>st</sup> December 1971 by the Council of the Borough of Batley (page 32). This relates to the unlawful stopping up of footpath No.49 further to the West. The resolution describes the path as "leading from "the Farm", Heybeck Lane". This is a description of the starting point to the East which has been in use since the re-routing that was made by Mr Buckley. It is not a description which could be used for the original starting point adjacent to 75 Hey Beck Lane, which was the old route shown on the 1966 conveyance. It therefore appears that as early as 1971 the Borough of Batley, which had responsibility at the time for maintaining the Definitive Map and Statement, was satisfied that the official route for the path is the one for which I now contend. This strongly supports the evidence of the above two witnesses that in the late 1960s or early 1970s Mr Buckley not only re-routed path No.49 on the ground but also obtained official sanction for the re-routing.

15. The description of the path in the above resolution is the same as a description contained in a memorandum from the Borough Engineer dated 30<sup>th</sup> September 1971 (page 33) and in a letter from the Town Clerk of Batley Borough Council dated 1<sup>st</sup> October 1971 (page 34) and in a note to the General Works Committee dated 27<sup>th</sup> October 1971 (page 35). This therefore dates Mr Buckley's re-routing to no later than [September 1971. The memorandum confirms that there had been an inspection of the path for its whole length from "the Farm". Since the purpose of the inspection was evidently to investigate signs of closure along the route, and since Mr Buckley's diversion had to have been carried out after January 1966 at the earliest, it is difficult to understand why the relatively recent stopping up of the route shown in the 1966 conveyance was not referred to at this time unless, as I believe to be the case, the diversion had been officially sanctioned by the Borough of Batley.

16. At pages 36-37 there is a statement dated 9<sup>th</sup> March 1972 from Alan Firth who

was the Building Inspector for Batley Corporation. This statement appears to relate to the same complaint which was the subject matter of the resolution referred to in the above paragraphs. The footpath here is described as running "from roughly to the rear of 75 Hey Beck Lane". This is again a good description of the current route for which I now contend but it is not a description of the path shown on the 1966 conveyance, since that route would either be described as passing to the side of 75 Hey Beck Lane or through 75 Heybeck Lane (depending on whether the triangle was seen as part of the property at the time or separate).

17. By letter dated 5\* August 1992 Kirklees Metropolitan Council, as successor to the Batley Borough Council, notified me that they had made a footpath modification order in respect of footpath No.49 (pages 38 to 41). This would have the effect of diverting the path from the Southern boundary of the field adjacent to my property to the Southern boundary of my property itself. I therefore objected to the order. By a decision letter dated 26\* April 1994 the Planning Inspectorate refused to uphold the order. At no stage during this process was it suggested that the actual route of path No.49 should run up through my property rather than along the Southern boundary of the adjacent field, (a copy of the decision letter is at pages 42 to 51).

18. By a letter dated 28\* June 1994 (page 52) I was informed by the Solicitor for Kirklees Council that the footpath had been inspected and the sign at the East end had been re-aligned so as to indicate the precise route of path No.49. There was again no suggestion at this time that the official route was anything other than that which was in existence on the ground at the time.

19. The Council has not been able to produce any evidence that an official diversion order was made at the time that Mr Buckley re-routed the footpath in the late 1960s or early 1970s. However, my solicitor has made further enquiries of the Council in regard to its records and as a result of those enquiries I would contend that the absence of any record of a formal diversion order having been made is not decisive in this case. I would therefore argue that the circumstantial evidence suggesting that an official diversion order was made should carry more weight than the mere absence of documentary records for such an order.

20. I believe that Kirklees took over as Highway Authority from Batley Borough Council in 1986. The current records of Kirklees includes a pro-forma list of various "Extinguishment /Diversion Orders" made by Batley Borough Council, (pages 54 to 56 ). Two of the three pages which have been provided contain lists of orders in reverse chronological order and one page is in chronological order. There is a handwritten note on the top of one page saying that there should be "5 pages", but only three have been supplied. In view of the absence of any consistent chronological sequencing, it is impossible to tell if anything might be missing from the records or what periods or what geographical areas might be covered by any missing records.

21. Kirklees has been unable to inform my solicitor why the records have been maintained in this way, who prepared them, when they were prepared or for what purpose. If Batley Borough Council ever made its own contemporaneous records of orders actually made by it, then such records have not been retained. The Kirklees list might therefore only include lists of orders for which copies could be found when the lists were compiled or it might just be a list of orders made under particular statutory provisions. It is



simply not possible to deduce anything from these lists except that the specific orders identified on the lists were in fact made on the dates attributed to them.

22. There is no reason at all to believe that the list which has been provided by Kirklees was intended at the time that it was made to be a complete record of all diversion orders that were made by Batley Borough Council. There is no basis on which it can be assumed that it was even possible at the time to compile such a complete list from the available information. Even if the Kirklees lists were complete when they were made, there is no reason to believe that all of the pro-forma pages which were originally created for this purpose have in fact been archived and retained. The circumstantial evidence would suggest otherwise.

23. The Council's records also contain four separate cards relating to the orders that are held in their strong room (copied onto a single page, at page 57). It will be noted that the Council does not have the original of any order made before 1974. Therefore if a diversion order was made as a result of an application by Mr Buckley before this date then the Council will not have a copy of it.

24. My solicitors wrote to the Council on 5<sup>th</sup> November 2013 asking for clarification of the origin and purpose of the above records and one other page from the Council's records which they had also produced but which was largely illegible and which is in any event irrelevant to the present case. The Council's response dated 11<sup>th</sup> November 2013 (pages 58 to 60) confirms that they are unable to provide any information which would be capable of demonstrating that the limited records that they hold are in fact conclusive as to the totality of orders made in respect of all footpaths in the Batley Borough Area in the 1960s and 1970s.

25. A photograph showing the path in the background is also attached at page 61."

- 2.53 Also submitted with the application were two WCA8 user evidence forms ("UEF") from Mrs Margaret Hallas and Mr Simon Bowett.
- 2.54 The council has received 6 other WCA UEFs, and a number of other pieces of correspondence from various parties, including letters and emails. A summary of landowner and user witness evidence is appended at Appendix Q.
- 2.55 H Morrissey sent a letter to the council which noted living at Leeds Road between 1952 and 1981 and recounted as a child walking from Leeds Road to Hey Beck, with the path coming out onto a track between High Barn and some stables about 100 feet from Heybeck Lane.
- 2.56 Ann Leach, 33 years use dog-walking from Soothill, wrote to the council to state that she had walked from the track at A between Heybeck Cottage and High Barn (i.e. Mr Lilley's house) and that walking through "76" was "*ludicrous*".
- 2.57 Stephen Brook of Heybeck Lane wrote in August 2014 to state that he had lived locally and walked his dogs on the claimed addition route for 22 years, but it had recently been blocked. Mr Brook also filled in a WCA8 user evidence form, with only scant responses.

- 2.58 Mrs H Boothroyd of Heybeck Lane for 28 years, recalls use of route A-B and no use of the route through the Bragg property, where she states no-one has ever walked.
- 2.59 Dr Richard Child of County Durham, wrote in a letter passed to the council by Mr Bragg that he lived at Leeds Road from 1956 to 1977. He recalls walks to Heybeck Lane, where they reached the track (footpath 55) 50 yards before HBL. He does not remember going through 75 HBL during these walks, mainly in the late-50s to mid-60s. He visited the area again in February 2014 and did not recognise the footpath through the Bragg's land, and the path he remembered was blocked. Dr child filled in a UEF in which he noted his use of the claimed addition path from 1960 to 1977.
- 2.60 Derek Brooksbank, a contractor working at the Braggs' property over 28 years prior to 2014 wrote to state that the path had always gone from the track over Mr Lilley's property and had gone through 75 HBL. He also noted the presence of a sign. He also completed a WCA8 UEF to the same effect.
- 2.61 Mr B Taylor of Leeds Road wrote to state that he knew of the path for sixty years and had used it weekly 1974-2014, and that it went to the track some 30 yards from HBL. Mr Taylor also stated that he had bought Ordnance Survey map 288 which showed the route as he recalled. He recalled walking the route as a child with his parents in the 1950s, to the track then along to HBL. Mr Taylor also completed a WCA8 evidence form. (OS Explorer 288 is attached at Appendix J and does show the route of the path in green dashes across the Bragg land)
- 2.62 Janet Blackledge completed a user evidence form, stating that she had used route A-B over Mr Lilley's land between 2003 and 2012 but not the route C-D over Mr Bragg's land.
- 2.63 Evidence has also been submitted from various landowners, including some who have completed the council's questionnaire for landowners.
- 2.64 Savile Estate submitted a plan showing the land, including coloured sections where their land was sold. This includes land sold to S B Buckley at 75 HBL, coloured blue – the base map used by Savile again indicates a path by peck lines across the north west side of the triangle of land sold. Savile provided some conveyance papers for the triangle of land but provided no information regarding any path diversion by Mr Buckley, either formal or informal. *"I attach a conveyance for Hey Lane to Mr Hyde. There is mention of a right of way but it is not marked on the plan. The Savile Estate Office was moved from Savile Town to Thornhill 1967. The files around this period have been destroyed. So we cannot shed any further light on the footpath history."* Appended at F.
- 2.65 Mrs Spurr of Hey Beck Lane filled in a landowner form WCA10 and answered 'no' to just about every question.
- 2.66 Mr Barker of Hey Beck Lane filled in landowner evidence form. He notes obstruction of the route by Mr Bragg and that the "correct route" has been "diverted" over Mr Lilley's land.
- 2.67 Mr Rod Lilley filled in a landowner evidence form. He owns the land that carries Batley 49 once it leaves Mr Bragg's property and also owns the land carrying the lawn part of the alleged public footpath for addition A-B. He disputes the claim that A-B is a public footpath. He notes obstructions of the path 49 by Mr Bragg.

- 2.68 Timeline summaries of the presented user and landowner witness evidence are shown at Appendix Q.
- 2.69 There have been numerous other submissions on behalf of the applicants, Mr & Mrs Bragg, including letters from Ramsdens, their legal representatives, presenting their clients' contentions and reasoning in support of their clients' case. Correspondence with officers regarding these submissions is at appendix G.
- 2.70 The papers submitted with the Ramsdens letters/emails include copies of a number of documents associated with 75 Hey Beck Lane, in connection with local searches, planning applications and other matters that have been subject of their enquiries and investigation on behalf of the Braggs. Papers have been cited in correspondence by Ramsdens which have not subsequently been provided to the council for consideration.
- 2.71 Documents provided to the council form Appendix H. It has been put to the council that the submitted papers are sufficient to conclude that no public right of way subsists over the Braggs' land.
- 2.72 Officers have considered the possibility that Batley Borough council went to the courts for an order to divert the footpath 49. Officer enquiries with the courts system has been unable to provide any evidence to support the application claim that an order was made to move the footpath by/for Batley Borough Council, further to Mr Buckley's actions. Officers have undertaken enquiries with the Batley court's successors, now in Huddersfield. The courts have provided no information to support the contention that a diversion order was made.
- 2.73 The council has searched the available London Gazette records for any evidence to support the claim that the path was diverted by order by or on behalf of Batley Borough council. Officers have not discovered any formal notification in the London Gazette of any relevant legal order to support the Bragg application claims that the footpath 49 was diverted or otherwise subject to a relevant public path order. Orders made under various statutes were required to be advertised in the London Gazette.
- 2.74 There is no apparent evidence to indicate that West Yorkshire Metropolitan County Council, the relevant surveying authority for public rights of way until 1986, were aware of, or reflected the alleged Batley council diversion order, when considering the production of the modified definitive map and statement, published in 1985. A small selection of review process maps is appended at O.
- 2.75 The DMMO applicants also served notice of the application on various landowners, and certified serving of this notice to the council.

### **Human Rights**

- 2.76 Consideration of public rights sometimes leads to questions about human rights; such as concerns that both the existence of the footpath and the council's actions with regards to a recorded public footpath may infringe the right to respect for private and family life and the right to peaceful enjoyment of property.
- 2.77 These rights are both "qualified rights", and require a balance between the rights of the individual and the needs of the wider community. Interference with qualified rights is permissible only if:
- 2.77.1 There is a clear legal basis for the interference with the qualified right that people can find out about and understand,

- 2.77.2 The action seeks to achieve a legitimate aim and is necessary in a democratic society.
- 2.78 The Ministry of Justice publish “Making sense of Human Rights – A short introduction” (DCA45/06 2006) – attached at Appendix 2
- <http://www.justice.gov.uk/downloads/guidance/freedom-and-rights/human-rights/human-rights-making-sense-human-rights.pdf>
- 2.79 Article 8 of the First Schedule of the Human Rights Act 1998 aims to protect private and family life. Article 1 of the First Protocol refers to property protection. Section 2 of Article 8 states “...*There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary... for the protection of the rights and freedoms of others...*”. Article 1 of the First Protocol is a similar qualified right. Aware of its duty and the need to balance such competing rights, in the case of this public footpath, the council recognised its statutory duty to protect and assert the public’s rights under Section 130 of the Highways Act 1980 over a definitive public footpath, conclusively shown to exist as recognised in section 56 of the Wildlife & Countryside Act 1981. Similarly in dealing with this DMMO application, the council recognises it must comply with human rights legislation.
- 2.80 The landowner questioned the existence of the footpath 49 across their land and thereafter made this DMMO application to delete the path from the public record. They consider that there is, instead, a path along the track (path 55) then solely across the neighbour’s land, across from footpath 55 (the track) to the field.
- 2.81 The jurisprudence of the European Court of Human Rights (ECHR) recognises and takes account of the fact that the ECHR machinery is subsidiary to the national systems of various Member states safeguarding human rights, leaving to those national systems, in the first place, the task of securing the Convention rights and freedoms. Section 6(1) of the 1998 Act makes it unlawful for an Authority to act in a way which is incompatible with a Convention right.
- 2.82 Therefore in this case, officers advise that this Authority must determine this application in accordance with the primary legislation contained within Section 53 of the Wildlife and Countryside Act 1981. However, since the decision-making under Section 53 is based solely on evidence, in doing so the Authority is acting within the parameters as laid out in Section 6(2) of the 1998 Act. Section 6(2) relates to the discretion of an Authority to give effect to primary legislation, therefore a decision based on the evidence, either making or not making an order deleting a public right of way through the curtilage of Shaw Carr, would not be incompatible with the 1998 Act.
- 2.83 **Evidence of the physical existence of the route.** Prior to the long-term obstruction of the footpath 49 at 75 Hey Beck Lane, a physical route from the field towards Hey Beck Lane has existed. This was accepted by the applicants, although they disputed its current public status in the application. More latterly they have disputed any historic recorded public status. It is also acknowledged by other witnesses and documentary evidence, both now and in the first definitive map process.
- 2.84 **Ordnance Survey maps:** Ordnance survey sheets are mainly representations of the physical world. Copy extracts of Ordnance Surveys and other mapping from the

1840s to today are at appendix J. The deletion application route is shown on these plans as physically existing for over 100 years. A route from the track (footpath 55) directly to the field (like A-B in the DMMO application) can also be seen on Ordnance Survey plans over more recent decades.

### **The first definitive map and statement**

- 2.85 This was prepared by the former West Riding County Council (WRCC) as required by the National Parks and Access to the Countryside Act 1949. The relevant date for the first definitive map was determined as 22 September 1952. This means that the map showed public rights of way which existed on that date, not that it was published on that date.
- 2.86 The County Council had a duty to survey and map all public rights of way in their area, also classifying their status. The survey took three stages, draft, provisional and definitive. After local surveys took place a draft map and statement was published, this was open to all for objection/representation. After investigation of these, a provisional map and statement was published, this was open to further objection/representation by those with a legal interest. Finally the definitive map and statement was published. The definitive map and statement was therefore the result of a long and detailed survey process open to public consultation and scrutiny which took many years and involved investigation by local and county authorities as well as the courts.

### **2.87 Summary of process to produce the first definitive map: the “1952” process.**

- 2.87.1 Local surveys
- 2.87.2 Publishing of draft map
- 2.87.3 Objections and representations
- 2.87.4 Publishing of provisional map
- 2.87.5 Objections and representations by those with a legal interest only
- 2.87.6 Publishing of the definitive map

### **First definitive map process regarding footpath 49**

- 2.88 1950 - Batley Borough council undertook surveys in 1950 for use by WRCC prior to the production of a draft map. The survey forms for Batley are still available. Copies of two original survey sheets for definitive footpath 49 and 55 are appended to this report at K. The papers are dated 29 December 1950, signed/stamped by the town clerk. The surveys appear to have taken place in around July 1950 and to have been undertaken by Wainwright and Saxton.
- 2.89 The application route was recorded on the draft map as a footpath. Appended at L.
- 2.90 Provisional map published. Appended at M
- 2.91 First definitive map published. Appended at N.

- 2.92 Public footpath 49 was shown on the first definitive map, which has a relevant date of 22 September 1952; this means that the evidence required to delete any part of the path must:
- 2.92.1 be new, and not available to those that produced the map
  - 2.92.2 show that the path was included on that document in error
  - 2.92.3 show that no public right of way existed over the application route at that time.
- 2.93 It is important to note that any alleged lack of use of the footpath 49 during any time since 1952 would not affect its status as a public footpath. The 1985 DM&S published by WYMCC was produced further to a review of both those legal changes that had taken place since 1952 and also consideration of any additional evidence that would require modification of the DMS, e.g. leading to the recording of unrecorded PROWs, changes to recorded status etc.
- 2.94 For information, following a review process, the modified definitive map was published in 1985, with a relevant date of 30 April 1985. A copy DM extract for the area is appended with Plan 1. Officers are not aware of any subsequent order to change the footpath or modify the definitive map for the footpath. Appendix O has some extracts of maps from the process, including the draft map and a map marked up with some proposed review changes to the DMS prior to its publishing in 1985.
- 2.95 Land ownership plans of the land affected by this link of footpath 49 are appended at P.
- 2.96 A location plan is appended at P.
- 2.97 Officers asked local representatives of user groups if they had any information or comment on the application. Informal notices were posted on site to garner information about the routes involved.
- 2.98 Members have a number of options to consider, whether to add and/or delete a public footpath to/from the DMS, and on what basis such a decision is made. Any order made would have to satisfy the relevant criteria, with the relevant legislation then cited in the order. A council decision is required on both aspects of the DMMO application – “add” and “delete”, so more than one of the options below may be chosen.
- 2.99 Members are asked to consider what should be shown in the formal record after considering the available evidence, whether that is any different from what is currently shown, and make a decision on what order(s), if any, should be made to produce a correct formal record of public rights of way.
- 2.100 Option A The DELETE1 option for the sub-committee is to decide not to make an order to delete footpath Batley 49 (part), on the basis that the evidence does not demonstrate that, on the balance of probability, no way existed over the application route when it was added to the definitive map and statement and also on the basis that there is insufficient evidence that any relevant legal event has occurred which requires modification of the definitive map and statement.
- 2.101 Option B The DELETE2 option for the sub-committees is to decide to make an order to delete part of Batley 49 (part), on the basis that the evidence does demonstrate

that, on the balance of probability, no way existed over the application route when it was added to the definitive map and statement.

2.102 Option C The ADD1 option is to decide not to make an order to add a public footpath because the evidence (i) does not demonstrate that, on the balance of probability, public rights have been shown to subsist, and that (ii) it does not demonstrate that they have been reasonably alleged to subsist. (i.e. that both Tests A& B described above at paragraph 2.10 are not satisfied).

2.103 Option D The ADD2 option is to make an order to add a footpath, because the evidence does demonstrate that, on the balance of probability, public rights have been shown to subsist.

2.104 Option E The ADD3 option is to make an order to add a footpath, because the evidence does demonstrate that public rights have been shown to be reasonably alleged to subsist.

### **3 Implications for the Council**

3.1 The public rights of way network is part of the Council's Green Network. Improving the public rights of way network contributes to the Council's green ambitions by encouraging people to walk and ride rather than use the car. This can help to reduce traffic congestion and carbon emissions.

3.2 Providing better facilities for physical activity works towards local and national aims of healthy living.

3.3 The West Yorkshire Local Transport Plan highlights maintenance and improvements to rights of way within its Delivering Accessibility, Tackling Congestion and Effective Asset Management themes.

3.4 The Council has a statutory duty to consider the application in line with the legal requirements outlined above and within the guidance notes, and to determine whether to make an order. There is no power to recharge for the costs of processing the application or making and advertising a definitive map modification order.

### **4. Consultees and their opinions**

4.1 Ward members have made no comment on the application but previously noted support of the council's enforcement action on Batley public 49. This is noted for information but does not carry evidential weight in the DMMO consideration.

4.2 The blocking of public access in 2010, public report of blockages, the application for DMMO and the council's informal notices led to a number of people contacting the council and offering comments about the public pedestrian access. The DMMO process is one for evidential consideration. Most people that officers communicated with were unaware of the definitive alignment of Batley 49. Some gave information regarding their use of the path that had been blocked in 2012, across from the track to the field edge stile. This is included in the appended summaries at Q. Officers did have some telephone communication with a local resident, Mr Lumb, who reported that he disputed the blockage of the path with/by the Buckley family and he noted that no formal notices had been posted in connection with the Buckley's actions to prevent public use.

### **5 Next steps**

- 5.1 If the Council does not make an order, then the applicant may appeal by way of representations to the Secretary of State who may direct the Council to make an order. [WCA 1981, Schedule 14, 3 (4)]. The applicant has 28 days to appeal after notice is served by the council of its refusal decision..
- 5.2 If an order is made, it will be advertised on site and in the local newspaper. All owners and occupiers will receive a copy of the order as well as other statutory consultees. Anyone may submit written objections to the order during the relevant notice period.
- 5.3 If no one makes an objection the Council could confirm the order. If objections are made, and not withdrawn, the order has to be referred to Secretary of State DEFRA who will decide if the order should be confirmed. This usually involves appointing an inspector to consider the evidence from all parties at a public inquiry, hearing or by exchange of correspondence.
- 5.4 Public rights of way provisions contained within the Deregulation Act 2015 are yet to be commenced, and any relevant, associated ministerial guidance and regulations are also yet to be published. These may affect ongoing DMMO processes.

## 6 Officer recommendations and reasons

- 6.1 **Summary: Officers recommend** options A and C, that is:
  - 6.1.1 DELETE1 at paragraph 2.100 above, namely not to delete part of public footpath 49, because the evidence does not support deletion AND
  - 6.1.2 ADD1 at paragraph 2.102 above because the available evidence does not support the making of an order for addition. Full reasons and the formal recommendation are set out below in paragraphs 6.2 to 6.41.

### Reasons for recommendation

- 6.2 As highlighted in section 2 above, the council must consider whether the evidence shows that the relevant part of the recorded route of Batley footpath 49 was included as a public right of way in the first definitive map in error or if the route was included in the 1985 definitive map in error due to an omission to reflect a relevant legal order made between 1952 and 1985.. The formal processes to produce the first definitive map ran from surveys in 1950 to the published final map, and included widespread public consultation and notice, as well as formal proceedings to determine objections. Alternatively the council may consider whether a relevant legal event has taken place which requires a formal change to the record of public rights of way.
- 6.3 Officers have examined the witness and documentary evidence provided by the applicant and gathered during the investigation.
- 6.4 The applicants' own first-hand knowledge of the land only dates from 1981. **Officers believe** that their personal experience does not provide any evidence to question the inclusion of the footpath in the first definitive map.
- 6.5 **Officers believe** that the various WCA8 witness forms and WCA10 landowner forms support the claim that public use of the Batley footpath 49 (part), across the Bragg's land, subject of the deletion part of the application has not taken place for some decades. This lack of use would not extinguish this path and would not alter any recording of the public footpath.



- 6.6 **Officers consider** that the public has used a path directly from the track (path 55) to the field across Mr Lilley's lawn for some considerable period of time. Mr Lilley bought the property High Barn in 1989 and applied to divert this path in 1991 to a line along the boundaries at the back of properties on Hey Beck Lane. This diversion proposal failed, after objections from the Braggs and others after the order was made. Although the route was used, its use by the public appears to have been interrupted in 1992-3 and in 2012, effectively preventing continued public use, which was only reinstated after enforcement action by the council. The Braggs wrote to the council to report this blockage on 3 August 1992 after their return from holiday. (KC PROW files). The council secured re-opening in March 1993. The same "Lilley lawn" application addition path has been blocked to public use since August 2012.
- 6.7 In the January 2016 letter to the council (Appendix G), officers' approach to mapping data when determining the existence and alignment of public paths was criticised. The original definitive map was described as "*unclear (even with magnification or expansion) where the mark ends*" (enclosure 1), that enclosure 2 shows that the route "*does not cross over the Bragg's holding*" and that on enclosure 3 "*it is not completely clear if it crosses the holding or runs to the farm track*". The letter continues by describing the limitations of the definitive map, of its scale and of the pen strokes used to mark up the paths thereon. **Officers would note** that the enclosed documents were not necessarily precisely as described by Ramsdens, and that the Braggs' property is not shown on enclosure 3 at all. Members have before them documents from the 1952 DMS process, Ordnance Survey plans of the physical features surveyed and published in their product maps from 1894 to the 1950s, conveyancing documents, planning applications and the papers of the formal DMS which support the views formed by officers regarding the alignment of Batley footpath 49 across the Braggs property. In addition, the Braggs main contemporaneous witness presented in their DMMO application, Mrs Hallas, also supported this officer view in her statutory declaration (Appendix E). She noted the presence of the footpath, its use by the public and that the Buckleys wanted that use to cease.
- 6.8 **Officers note that** Mrs Hallas' statutory declaration makes numerous points that clarify that the footpath was as suggested by officers and appear to negate the claims of January 2016 by Mr Bragg's representatives. Mrs Hallas confirms that the path ran between the land and the house and separately notes that a gentleman, Mr Woolin, had been using the path "at the side of the field between the house", which led Mrs Hallas to believe that the Buckleys would seek to move the footpath. Officers accept that the definitive map is at a scale of 1:10000 and 1:10560, which is why officers would refer to additional material, including the source data provided in the 1952 WRCC/BBC surveys and the physical history depicted in Ordnance Survey plans. This is completely appropriate in accordance with section 32 of Highways Act 1980, (see paragraph 2.14 above). The applicants also criticise comparison of plans, but again, it is appropriate to consider the history of the physical path and compare the various documents. The OS plans are not conclusive of public status but they are supportive of other documents and the officer view in this case, as are other documents as described above. It is a commonplace tactic to raise questions about the scale and interpretation of mapping including the definitive map. It is the council's role to interpret and decide when faced with questions of enforcement and public path alignment. It is part of members' consideration of this report and officers would highlight to committee the variety of submitted plans and their depiction of path before, during and after 1952 DMS process, across what became the Braggs' property. Circumstantial evidence of path blockage and subsequent deviation by the public is not considered by officers to be sufficient in this case to demonstrate formal

movement of the path, in conflict with the WYMCC 1985 DM process and in the absence of any formal record or note of diversion. Ramsdens also make note in their letter of 16 September 2013 of Mr Fountain's recollections being similar to Mrs Hallas, presumably regarding the change to the path by the Buckleys, but no evidence to support this has been adduced. Mr Fountain's recollections are therefore not strong evidence that the path was legally diverted but are further evidence presented by the applicants of repute of a footpath within the Buckley/Bragg holdings.

- 6.9 The January 2016 letter claims that the diversion of the path by order in the early 1990s takes precedence and is unchallengeable. **Officers note** that the path in the diversion order was not diverted because the order was not confirmed. The error of this argument is focused by the applicants' claim that "*importantly, no one challenged the order in 1992*". The Braggs themselves challenged the order, formally objecting to it, like others did, and their case was supported by the inspector when he decided not to confirm the order. The Braggs' objection letter from their solicitors (Hewison & Nixon) of 14 September 1992 is appended at U. Almost as an aside, the path in Mr Lilley's application depicted in that order, to be diverted, was the path on the ground at the time and not Batley 49.
- 6.10 The Braggs' apparent confusion expressed in the January 2016 letter and previously, may be because of the opportunity for challenge available at the time to the confirmation of an order or to the inspector's decision – in this case the order was not confirmed and the inspector's decision was not challenged. The end result of this is that the order itself had no effect on any path. It is important to note that a diversion proposal, even at the opposed order determination stage, is not an investigation or determination of public status like a DMMO process.
- 6.11 As regards the documentary evidence supplied with the application and elsewhere. Much of the volume adduced has little weight in considering the existence of public paths. Members' attention is drawn to correspondence at Appendix G.
- 6.12 As explained in Section 2 above, in the case of an application to delete a definitive footpath it is not necessary for the council or anyone else to show that the map is correct. However, during investigation into this application, officers gathered a number of documents from the first definitive map process which are worthy of note as follows:
- 6.13 Each gathered document, produced over more than a decade from the first days of that process in 1950, (the survey schedule dated December 1950 app K) through to the publishing of the definitive map and statement itself (appendix N) includes reference to the existence of public footpath 49, and do not add weight to the assertions of the applicants, including
- the survey sheets,
  - the draft map,
  - the provisional map and,
  - the first definitive map itself.
- 6.14 The modified definitive map published in 1985 also included path 49 at Hey Beck Lane. When considered together, **officers' view** is that this documentation is strong

evidence that the application route was properly considered and was correctly identified and recorded as a public footpath.

- 6.15 **Officers' comment** on Ordnance survey plans (appendix J): there is a continuity in the depiction of the physical route in plans produced to depict the physical state of the land at time of survey. Depiction of a route is not proof that it is a public right of way, but does provide evidence that supports the later records in connection with the formal recording of the 1952 and 1985 DMS. This is also backed up by the depictions of the route evident in base maps and other plans for planning applications, conveyance documents, ownership papers etc.
- 6.16 Documentation in connection with property transfer/sales is largely dealt with in previous officer replies to the applicants (Appendix G). Officers do not agree with many of the contentions put forward on behalf of the Braggs or with the alleged weight to attach to such papers in this process. Local land charge searches over some years, including one prior to the property purchase by the Braggs did not ask the relevant PROW question so did not garner a PROW response and in any case would not change the position of a path if mis-reported, as in 1998. The granting of planning permission would not divert a public footpath or in any way formalise a previous physical change of the path on the ground. In common with various dealings in the 1990s, including the erroneous depiction of path 49 in the unconfirmed diversion order, the Braggs received an incorrect local land charge response regarding the path in 1998. Again, this is dealt with in appendix G correspondence.
- 6.17 Mr Bragg's submitted application statement. **Officers note** that: Mr Bragg accepts the existence of the footpath and notes several times that this path used to be on what became his land but has allegedly been moved. This case is similar to that put forward by his legal representatives before the application was made. Mr Bragg notes that the evidence to support his diversion claim is circumstantial. There is no documentary evidence adduced or discovered from archive material, newspaper notices, the courts or the 1985 DMS process undertaken by WYMCC to support the claim that an order was made by or for Batley council. Mr Bragg's acceptance of the existence of the footpath and its subsequent movement is completely at odds with his representatives' claims of January 2016 that a public footpath has never existed within his land, i.e. over the deletion application route.
- 6.18 1966 Savile conveyance of triangle of land: **Officers note** that this document refers to the footpath that is to be retained along the north western boundary of the triangle of land. Mr Bragg's own statement notes at 4 that "*clause 1 of the 1966 conveyance states that the land is sold subject to "the footpath crossing the entire length of the north western boundary [...]"*". This is the footpath that in application, Mr Bragg claimed had been diverted by Mr Buckley so should be deleted, yet in January 2016 argued that it was not a recorded public right of way. The conveyance paper has a base OS plan which shows the peck lines of the footpath across the Buckley purchase triangle. Savile also submitted a map of sales, which also identifies the Buckley triangle sale and the base map from OS used also shows the peck .line footpath as officers describe. (Appendix F)
- 6.19 Photos at application C1 - **officers note** the continuation of the brick wall around the south east corner of the original plot of 75 HBL. The path, shown on many plans over many years including formal documentation of PROW records, runs where the camera is pointing to Hey Beck Lane. The wall to the left shows the original extent of 75 Hey Beck Lane before purchase of the Savile triangle by Mr Buckley. The distinctive shape of the wall corner replicates the distinctive shape of the original

shape of the plot of 75 and the distinctive shape reappears many times in documentation before members.

- 6.20 Application - Statutory declaration of Mrs Hallas - Mrs Hallas' statutory declaration makes numerous points that clarify that the footpath was as suggested by officers and appear to negate the claims of January 2016 by Mr Bragg's representatives. Mrs Hallas notes that the land outside the curtilage of 75 Hey Beck Lane was "simply open land." Mrs Hallas confirms that the path ran between the land and the house and separately notes that a gentleman, Mr Woolin, had been using the path "at the side of the field between the house", a day that led her to believe that the Buckley's were going to move the public footpath. Mrs Hallas mentions planning permissions and objections but not any order process to move the path. Mrs Hallas asserts that people she assumed to be from the Batley council put up a footpath sign down the track, sometime in the early 1970s, after Mrs Buckley had told her that they had been successful in doing so. She states that Mr & Mrs Buckley moved in 1979 and their daughter and son-in-law moved into 75 Hey Beck Lane.
- 6.21 *Simon Bowett's* statutory declaration was submitted with the application, along with a UEF. **Officers note** that Mr Simon Bowett was that son-in-law, a discovery made by officers during an interview. Mr Bowett states at paragraph 8 and 19 that in all his time there he understood the path to run along "the Lane" at the side of the Bragg's property, then cut across the field. These assertions are apparently contradicted by his own letters to Kirklees Council of 1988 and 1989 (appended at T) which identify and mark (in red ink) the route of the public footpath through Mr Bragg's land, and note that the council's position on alignment at that time is incorrect. When interviewed, Mr Bowett admitted the 1980s letters were from him but could not recall what had caused him to send them. In view of the available evidence, officers would agree with Mr Bowett's letter of January 1989; he knew the Buckley family very well, indeed was a family member, and would appear most unlikely to be truly confused about the path location.
- 6.22 Simon Bowett letters with the council July 1988 – January 1989. Mr Bowett writes to the council to report a problem on the footpath, indicating that "*the footpath sign should be some 25 yards nearer the road. This would mean that it would be nowhere near my home.*" After a reply council letter, Mr Bowett then writes to correct the council's "*incorrect*" response regarding the alignment of path Batley 49, marking up and returning a plan to show "*where the footpath goes or should go*". This marked up line is through the Braggs' property, along the boundary beside the original 75 Hey Beck Lane and in the triangle of land bought from Savile Estate for the stable. Mr Bowett knew this area well as he describes in his evidence, particularly his statutory declaration. He was the son-in-law of Mr & Mrs Buckley, the owners of 75 Hey Beck Lane until the Braggs bought it in 1981. The letters support officers current view on path 49 alignment being through the Braggs property.
- 6.23 Application submissions - Batley papers, resolution, memo, letter and note. **Officers note** that in their significant and lengthy attempts to discover evidence to support the deletion application claims, the legal representatives of the Braggs found just a few pages of Batley council records about path 49. This concerned an obstruction hundreds of metres away which left the way impassable and attracted complaint. Officers do not consider that this is significant or weighty evidence to demonstrate that the public footpath 49 at 75 Hey Beck Lane had been diverted formally. It is also noted that a public footpath sign was in place at the track (path 55), behind 75 Hey Beck Lane, pointing across what became the Lilley lawn, for some decades. There is no council record of the path sign being put up, Mrs Hallas' evidence is

noted. The placement of a path sign would not appear to be sufficient evidence to demonstrate formal diversion.

- 6.24 No evidence has been adduced from committee records, published notices, court records or other documentation, (such as that concerned with the WYMCC review of the DMS up to 1985) that may be expected to support the “diversion by Buckley” argument. **Officers note** that the Braggs’ circumstantial argument is that Kirklees council does not have a full record of all Batley council files and their claim that records held by legal and PROW may omit orders that have been made. There are a number of issues with this point. The absence of a record is no evidence that something has happened, particularly when any associated evidence of a legal event’s passing is also absent. WYMCC reviewed the DMS in the 1970s and 1980s, published the modified DMS in 1985. WYMCC do not reflect any alleged order. The courts do not have any record of an order. The London Gazette does not make any notification of an order. Officers have not and cannot reasonably be expected to check every council record from every current and predecessor authority in this matter. Officers have not claimed, as alleged by Ramsdens, to have done so. Officers do not know what may be missing and would not claim that there is a complete record of all Batley council papers currently held by Kirklees council, but the DMMO question is an evidential one and what is available shows no sign of the alleged public path diversion by Mr Buckley or anyone else in the time prior to the Bragg’s purchase in 1981 of 75 Hey Beck Lane and the land carrying the “deletion” part of Batley footpath 49. The council does not attempt to prove that it has never happened, that is not necessary; it is the modification of the DMS that requires proof. This, in the absence of any corroborating documentation of diversion and with the 1985 DMS process, is too high a hurdle for the evidence before the council, including that submitted by Ramsdens allegedly after months of investigation. KC records of changes to Batley routes by order are at Appendix V.
- 6.25 Similar comments would apply to the criticism levelled at the council’s records of orders for the Batley area.
- 6.26 **Officers’ view** is that the evidence supplied in favour of the application (witness statements and documentary,) is insufficient for an order to be made to delete the footpath 49 at Hey Beck Lane.
- 6.27 **Officers would note** that even if members consider that the footpath 49 has been obstructed since the late 1960s and has not been used by the public, this is not evidence that the path was wrongly recorded in the 1952 definitive map process, and is not evidence that the path was formally diverted by Batley Borough council; therefore it is not evidence that an order deleting the footpath should be made.
- 6.28 **Officers’ view** is that the additional documentary evidence gathered by officers and now available to sub-committee does not offer any support to any claim that this part of footpath 49 was incorrectly recorded in the first definitive map process and does not offer sufficient evidence to conclude that the footpath Batley 49 should be deleted in any part from the DMS.
- 6.29 **Officers’ view** is that the additional evidence indicates that the part of path 49 subject to the deletion application is a public footpath.
- 6.30 Although it is recognised that public use may have taken place on the addition route over several decades subsequent to actions of Mr Buckley, there is evidence in the council’s own path file records of both interruption and challenge in 1992-3 and 2012-present by Mr Lilley, the landowner of this unrecorded route. As we need to

consider the period before public use was brought into question for the purposes of statutory presumption under section 31 of the highways Act 1980, we then go back from the 1992 blockage (ended after the council served a formal section 143 notice on “Batley 49”) to 1992. In this period 1972 to 1992 there is little evidence from users, there is some evidence of its notoriety from landowners, as noted in appendices and above in section 2. For the purposes of dedication further to a statutory presumption, then **the officer view** is that there is inadequate evidence before the council to conclude that even a reasonable allegation has been made that use as of right has taken place by the public at large, throughout the relevant period. No person has given evidence of the full 20 year period 1972-1992.

- 6.31 When considering common law dedication, there again appears to be a lack of evidential weight of user, particularly prior to the ownership of Mr Lilley in 1989. Mr Lilley has stated that he does not consider that the ‘addition’ route is a public right of way.
- 6.32 This view is not a statement from officers that the addition route across Mr Lilley’s lawn is not and could not be a public footpath, but rather a view that there is insufficient evidence before members to demonstrate even a reasonable allegation that it is a public footpath. Similarly, officers would note that it is possible that the footpath 49 was diverted formally years ago, but there is little evidence to suggest or demonstrate that it was other than the physical relocation, such that it would justify a deletion modification order for the DMS, either as sought in the application or otherwise.
- 6.33 Even if members of the public used the application addition route over Mr Lilley’s lawn for a requisite period without challenge, leading to a presumption of dedication over that route of a public footpath – such use would not in itself mean that the public footpath Batley 49 across the Braggs’ land has been extinguished or should be deleted from the DMS for some other reason. If members consider that an adequate case has been made solely for the addition of a public footpath, then there would be two recorded paths should such an order be confirmed.
- 6.34 Mr & Mrs Bragg’s representative’s letter of January 2016 present their latest arguments – but they are at odds both with the Braggs’ application that has been made and with their previous arguments, which, like the DMMO application (that they now view as “*wholly unnecessary*”), have not been withdrawn.
- 6.35 The submitted Ramsdens view that the DMMO application is “*wholly unnecessary*” is based on an allegation that there is no public right of way shown on the Braggs’ land in the council’s formal records of public rights of way. The letter continues with claims both that council officers are to blame for providing erroneous information and that the council’s enforcement action against their client was “*wholly incorrect*”. They dispute mapping evidence from e.g. the 1952 DMS process and specifically dispute the views of the council’s definitive map officer, Giles Cheetham. The reasoning put forward variously criticises the use by officers of “*expanded*” plans (i.e. enlarged), comparison with other plans and an officer reliance on other non-definitive plans. The letter then notes the Braggs’ purchase of land in 1984 and the failure of the council to correctly answer local land charge searches. They also relate a planning application of 1984 not recognising the existence of public rights. They then continue for some paragraphs about the council failing to reflect the confirmed diversion order of 1994 in various allegations of council failure. They propose a solution whereby the council is to make a legal event modification order (“LEMO”, as described at paragraph 2.6 of the report).

- 6.36 However, **officers note** that the Braggs bought the property in 1981 and their solicitors did not ask the PROW question in the local search. The diversion order actually made in 1992 was not confirmed and therefore has had no legal effect on any path, nor required any modification of the DMS or any update to Ordnance Survey to use in its products. Officers are not aware of any relevant diversion order made in 1994. Officers do not accept the claims and allegations regarding the mapping of path 49, dating back to before it was recorded in the 1952 DMS. The use and consideration in these processes of plans and other documentation dating back over many years is backed by section 32 of the Highways Act 1980, indeed it is required. It is common practice to consider such documentation in determination of PROW issues by the inspectors appointed by the Secretary of State at DEFRA. Officers would use historic mapping as well as information from any other relevant available sources to form views and consider the right approach to PROW issues, whether for information, enforcement or consideration of applications to the council. Officers are satisfied that the available evidence supports the view that the footpath Batley 49 was and is recorded over what later became Mr Buckley's land, the triangle he bought from Savile Estate in 1966, subsequently purchased by the Braggs and carrying path 49 to this day.
- 6.37 Members may consider the mapping information over the last 100+ years appended to the report, including that from the formal recording of public rights of way in the 1952 and 1985 DMS processes. The outline of 75 Hey Beck Lane as originally laid out before the purchase of the additional triangle of land by Mr Buckley is a distinctive shape, different from the rectangles of the other plots fronting Hey Beck Lane. This plot shape and the angle of its boundary with the triangle matches the path shown in pre and post 1952 mapping, and is clearly identifiable on maps and plans and documents produced for various purposes over many decades, including the production of formal records of public rights of way. The angle of the path 49 alignment considered by officers matches these documents and is quite different from the angle of the path 49 alignment favoured by the Braggs in the application, i.e. the addition route not within their property. The definitive statements, final and as prepared at various stages of the DMS processes, refer to path 49 terminating at Hey Beck Lane (early documents refer to its old name "Batley Road"). Again, the distinctive shape of pieces of land and the north easterly direction of the route after it leaves the field would be more likely to be described so, rather than the addition route, or any other direct route across the Lilley lawn to the track. The Braggs' professional legal representatives earlier argued that the path had been "relocated" "altered" "re-aligned", and they made formal application for a DMMO to reflect their conviction that a formal change to the path 49 alignment had taken place.
- 6.38 When considering the application and taking into account the *Leicestershire* decision, (see 2.24 above) the council should decide which is the correct route. **Officers view** is that the definitive map shows the route as recorded in the 1952 process, supported by documentation and mapping over many years, including papers submitted by the applicants.
- 6.39 Mr & Mrs Bragg and more latterly their representatives have informally challenged the views of officers on many aspects of this path since 2003's Mr Bragg's fax response to PROW of 1 December. Ramsdens have disputed officers' views and actions and have noted to the council on numerous occasions their dissatisfaction and willingness to undertake various legal actions on behalf of their clients against the council in light of Hey Beck Lane PROW matters. The council received a direction from the Secretary of State to decide this DMMO application, whose inspector identified the investigations already undertaken by officers in enforcement processes. Officers have previously noted to the applicants (e.g. letter of 28 March

2014 at appendix G) that the evidence in support of their case appeared inadequate and that they may wish to seek and adduce further supporting evidence. Further evidence may exist which may have led to a different recommendation particularly in regard to the addition, but officers consider that insufficient evidence is currently before members to make a DMMO.

- 6.40 Officers would note to members (see 5.1 above) that if the council (sub-committee) decides not to make an order the applicants would have a right to make representations to the Secretary of State. If the officer recommendations on the DMMO application are accepted and supported by members, the applicants have a right to challenge that decision formally within 28 days of notification.

### **Formal recommendation**

#### **6.41 Officers recommend to members:**

6.41.1 **option A at paragraph 2.100** above, to not make an order to delete part of public footpath Batley 49 because the available evidence does not demonstrate that, on the balance of probability, no public right of way exists over the application route **and also**

6.41.2 **option C at paragraph 2.102** above to not make an order to add a footpath because the available evidence does not support the making of an order for addition whether on the basis that a public right of way subsists, or is reasonably alleged to subsist.

## **7 Cabinet portfolio holder recommendation**

7.1 Not applicable

## **8 Contact officer and relevant papers**

Giles Cheetham: Telephone 01484 221000 (74205)

### **Relevant background papers:**

PROW file 872/Mod/1/181/GC

Appendices

<https://democracy.kirklees.gov.uk/ecCatDisplay.aspx?sch=doc&cat=13403>

Plan 1 and 1985 Definitive map copy extract

1985 definitive statement extract for Batley footpath 49

Schematic plan of routes prepared in 2003

1 – Guidance notes for members on Definitive Map Modification Order applications

Plan A – shows the application route for deletion

2 – Human rights making sense extract

A – Paragraphs from DEFRA circular rights of Way 1/09

B – Planning Inspectorate DMMO Consistency guidelines for Inspectors

C – Unconfirmed 1992 diversion order

D – 1994 Planning inspectorate decision letter from the inspector appointed to decide the opposed 1992 diversion order. Decision is not to confirm.

E – Mr & Mrs Bragg DMMO application submissions

F – Savile Estate papers

G - Bragg/Ramsdens/KC correspondence including supporting case and responses

H - Bragg documentation further submissions

J - Ordnance Survey extracts from 1893 onwards plus other maps dating back to 1840s

K – WRCC 1952 DMS process Batley survey papers



Batley borough council footpath 49 and 55 (track) survey sheet

L – WRCC 1952 process draft map papers

M – WRCC 1952 process provisional map

N – WRCC 1952 process definitive map and statement

O – 1985 DMS review process draft review map & other extracts (one with notes of changes)

P - landownership and location plan

Q – user and landowner table summaries

R - 1966 Buckley stables planning papers

S - Bragg 2011/92466 planning application submission showing path 49

T – Simon Bowett letters to/from KC 1988-89

U – Bragg objection to 1992 diversion order

V – Batley order records

9 **Assistant director responsible**

Paul Kemp, Acting Assistant Director, Investment & Regeneration