

Name of meeting: Planning sub-committee (Huddersfield Area)

Date: 4 January 2018

Title of report: Application for a definitive map modification order to add a public bridleway to the definitive map and statement, Bridge Lane to Sands, Holmfirth.

Purpose of report: **Members are asked to consider** the evidence and decide on the requisite modification of the definitive map and statement of public rights of way. An application has been received for a definitive map modification order to record a public bridleway.

Members are asked to make a decision on making an order and forwarding any order made to the Secretary of State, if opposed.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Not applicable
Key Decision - Is it in the Council's Forward Plan (key decisions and private reports?)	Not applicable If yes also give date it was registered
The Decision - Is it eligible for call in by Scrutiny?	No – council committee
Date signed off by <u>Director</u> & name	Naz Parkar 19 December 2017
Is it also signed off by the Assistant Director for Financial Management, IT, Risk and Performance?	James Anderson on behalf of Debbie Hogg 19 December
Is it also signed off by the Service Director (Legal Governance and Commissioning)?	Deborah Wilkes on behalf of Julie Muscroft 18 December 2017
Cabinet member portfolio	N/A

Electoral wards affected: Holme Valley South

Ward councillors consulted: Cllrs. Patrick, Sims & Firth.

Public or private: Public

1. Summary

- 1.1 The council received an application (at App A, with plan) from Mr N Charlton in April 2011 for an order to modify the definitive map and statement of public rights of way to record a public bridleway between point A at Bridge Lane and point B on the south side of the bridge crossing the River Holme at Sands (Ordnance Survey grid reference SE 1451 0893. (DMMO file ref: 169). The witnesses writing the emails mentioned in the application form were sent the council's form WCA8, which is a user evidence form. If they did not subsequently complete a form, their email comments are included at the foot of the WCA8 evidence summary at App J.
- 1.2 The council has received 118 user evidence forms. These forms are generally used by witnesses to describe their personal knowledge and experience of routes.
- 1.3 A small number of these witnesses do not consider the route to be public.
- 1.4 The council has received representations from landowners, "Holmfirth Cricket Club" "Holmfirth Bowling Club" and "J & JW Longbottom Ltd (Bridge Foundry)" opposing the application.
- 1.5 Yorkshire Electric has a caution registered against the land, within the 'J & JW Longbottom' Foundry ownership. The majority of the Foundry land is not registered with Land Registry. Longbottom granted a 60-year lease in 2005 concerning land for use associated with an electricity sub-station.
- 1.6 Submissions have been received from the Physical Resources and Procurement (PRP) service, on behalf of the council ("KC") as landowner of Sands Recreation Ground, and from Holmfirth Bowling Club, which owns land near the application route. KC land ownership plans are appended at App B.
- 1.7 Holmfirth Cricket club and Bridge Foundry dispute the existence of public rights over their landholdings and oppose the making of any order. Their submissions are at App C. They have both engaged Mr Andy Dunlop as their representative. Holmfirth Cricket Club contend that public rights could not have been established as public use has been interrupted, physically prevented and/or has been by permission. The Cricket Club also contends that it has communicated an intention not to dedicate public rights over its land. The contentions raised in Mr dunlop's correspondence was repeated in a letter from a long-term committee member of the Cricket Club.
- 1.8 Mr Dunlop's correspondence and the cricket club submissions at App C cite a number of witnesses and proposed declarations; the council has received evidence (the letter) from the one mentioned above.
- 1.9 Mr Dunlop states: "*Having been brought into this late and time pressing for the Councils determination Ill mainly restrict myself to the application as made, whilst*

recognising that your investigation may cover other areas not within the evidence relied upon by the applicant.

With that in mind, this highlights the issue raised already with the Councils current policy in that it does not permit the applicant or potential objector to review evidence obtained by the process or the report until a few days before it goes to Committee for determination. The applicant and potential objectors then only get three minutes to plead their case. This process was challenged successfully as far back as the 1980s and led to most Counties or Authorities changing their practices to take account of natural justice and prevent unnecessary orders being made. A review of Anna O'keefes first case against the Isle of Wight may assist your policy makers. Her first challenge against the decision making body as to the process they used, which is almost exactly as Kirklees do now, was wholly successful, causing the made Order to be quashed and started again. (Her later "assault" on the subsequent Order and the WCA process was not ultimately successful)

Turning to the application; Which appears to be based wholly upon "user" evidence dating back a number of years.

The objectors have been consulted on these matters and are in the process of creating sworn affidavits from two of the cricket clubs longest members, [names redacted] with first hand direct knowledge from 1963 and 1966 to date. These members can and will attest the following:

In 1963 the Cricket club used the now roadway as a seating area. It was not passable except on foot. The current lower seating area was then a grass bank only. Whilst it eventually led to a gate into an enclosed area, that was initially over grown, that area had a fence across it on the northern side and no access out of that area to the field beyond (now a football field). This fact is separately confirmed by [redacted] , the retired President of Huddersfield and District Football League, who can state that the field was a rough field they used in the 1940s for games and again later in the late 70s or early 80s when they formed a football field on it. He confirms there was no way through initially until he formed the way in the 80s.

The Bowls Club members historically only had foot access to the end of the now road but usually used the private foot bridge (after parking on Huddersfield Road as there was none at their site) to walk across the western end of the field and enter via a (now blocked but still visible) gateway in their southern wall.

There was a gate across the entrance to the now road at a point where a metal post now exists by the club house. This was used to control access on match days, events and also as a security measure. It was locked shut when the club was not in use or groundsmen were not present. It was also used to control access to private events.

Circa 1977 the Council constructed Sands Swimming Pool and formed a road to the bridge that leads to the area now used as a football pitch and recreation ground. Bowls Club members made use of this and then started to drive that way, parking adjacent their wall and hopping over. This practice was curtailed by the formation of the football pitch by Laurie Platt and others when they constructed the pitch. Posts were constructed to prevent unlawful use and are still partially extant.

Later, after the construction of the pitch and as there were no changing rooms, Mr [name redacted, of the Huddersfield football league] negotiated with the Cricket club to allow use of clubs changing rooms (for a fee) and an opening was made in the dividing fence for this purpose.

It is acknowledged that people other than football users started to use the route occasionally at this time but a sign was erected stating that the route was private and the gate was locked when the club was not in use. There was one notable occasion in the 80s when the gate was closed because of a private event at the cricket club. To gain access one had to pay an entrance fee, at the gate. [redacted], one of the committee members was in charge of the gate and takings, and he prevented a man from "Power Tool Trades" from coming through. This man claimed he didn't want to go to the function but just to walk through. He was denied access and attempted to climb the gate. He was pushed back and a ruckus ensued. He was informed, in front of many witnesses that the route was not a public right of way. The man said he would report the assault to the Police but nothing came of it.

In 1986 the Bowls club could no longer use the Sands Football Pitch route so they and the Cricket Club constructed the current car park and opened up the now road. The sloping sides of the ground were remodelled to permit seating and the upper seating was removed. The boundary wall and gate were removed but the old line is still visible.

In 1989 the club removed the old gate across their entrance and replaced it with a lockable swing barrier. This was mostly locked shut when the club was not in use or groundsmen were not in attendance. It was also used as a pay line for private events.

The swing barrier was demolished by a Dray Wagon in the middle 90s. This was immediately replaced with a lockable chain across the now road, in the position it still remains. This was locked whenever the club was not occupied or when groundsmen were not present. The payment of entrance fees to private events was replaced by a temporary desk when appropriate.

This chain drew complaints from Mr Nick Charlton repeatedly as it prevented use by many users who were not able to climb over it. He was rebuffed and the chain remained. He was pointed to a sign on the exterior wall that said that the road was private. This has been in existence for many years.

In around 2005 the Club replaced the chain with sturdy metal gates in the position they are now as there had been a number of incidents of vandalism. Mr Charlton came across the club members when they were installing these and he questioned what was going on. He was told in no uncertain terms that it had nothing to do with him, it was a private path and to be on his way.

These metal gates allow access on foot with the clubs permission but are locked completely over the Christmas period when the club is unoccupied and no groundsmen are present, unless there is a paid private event then they are manned.

Over the years, the Cricket Club have specifically granted permissive access outside normal hours to organisers of special events so that access can be gained to their events on Sands Field. This includes Rotary events and similar. Evidence of this permission is being obtained and is supported by the Councils own records that will show that when they sought to extend the path from the playing field along the application route in the last 20 years the club, not wishing to create a public right of way, refused.

The objectors believe that there is no case for a claim of statutory or common law dedication. We say that there is not even a reasonable allegation of public rights on the claimed route or any other. We will resist any such claim.

Your offer of sight of the user evidence maps and claims is acknowledged and welcomed but serves no purpose in light of the above, in particular at such short notice to yourselves as it creates more work for the Council to provide and it is apparent that the claimed route is not the trodden path. It would however be appreciated if the Officers report could be made available to us, for the reasons outlined at the start of this report, so that we may respond fully in writing, if necessary, to the Committee.

I recognise the Councils policy on sharing information and consultation is restrictive. Perhaps it should be brought to the attention of policy makers that the policy is ultra vires as it goes against Judgement set out in O'Keefe (1). Indeed, KMBCs policy seems to cause additional officer time, fails to uncover available facts and restricts land owners to a three minute response (which in turn is likely to lead to wasteful and unnecessary public enquiries).

I sought to meet with you to discuss the application and clarify the "user" claims as on the available paper they make no sense;

- 1. The claimed route is clearly not the trodden path.*
- 2. Mr Charlton refers to it as a footpath but makes a claim for a bridleway. Whilst it is recognised that there have been some users on foot and bicycle, the only horse ever seen was once, recently and ridden by an on duty Police Officer.*

As for fundamentally flawed and without hope, the route has been gated for as many years as it has been in existence. The route was and is closed multiple times per year during sporting events and access is restricted to those with express permission from the bowls club or upon payment. Although I would not be surprised if the claimed users don't mention it, as the Council will be aware that such an acknowledgement or arrangement destroys the claim. To that end, I am obtaining statements from those that have memory back to the 1950s and before. I also hope to provide financial accounts that run from before earliest claimed public user, up to modern times.

I am also interested in the Councils ownership or occupation of the eastern part of the claimed route, along with restrictions attached thereto. If you feel you can share information that would be most useful.

I have received instructions to represent Holmfirth cricket club and their neighbours in relation to the claim across their land. You will receive written confirmation

shortly. Initial investigations suggest that the claim is fundamentally flawed and without hope but I would like to see the application, evidence adduced and to discuss anything you may have turned up.”

- 1.10 The Foundry opposes the recording of any public rights over its land and states that public user would be contrary to their safe operations.
- 1.11 Further to matters raised by the Cricket Club in objection and during a site meeting with the Club and Mr Dunlop, officers have contacted users who had submitted witness evidence, sending out a form of supplementary questions to try to clarify various points.
- 1.12 The supplementary form is appended at App G. It was sent by email to 47 witnesses and 3 ward councillors, and by letter to 37 witnesses. 45 had been returned by 15 December 2017.
- 1.13 PRP’s submissions, on behalf of the council as landowner, are at App D. Sands Recreation Ground is vested in the Streetscene & Housing (Parks & Open Spaces, under deed reference number 1722). The council made deposits in 2012 under s31(6) of the Highways Act 1980 regarding establishment of public rights of way – the deposits were made after the date of the DMMO application and do not have retrospective effect on this application.
- 1.14 Holmfirth Bowling Club submissions are at App E and it considers that “this route has been used as a public right of way for many years.” (WCA 10 landowner evidence form.) The Bowling Club identify a “roadway” 15’6” wide over the council land to the east of the bowling club land, as shown in their property deeds. In 2011 the Bowling club wrote to the council of its objection to the recording of the way as a public right of way.
- 1.15 The applicant, Mr Charlton, has submitted documentary evidence which is appended at App F., as well as user and other personal evidence.
- 1.16 Mr Charlton & family have property at Summervale, and land between Summervale and the council’s landholdings. Some of Mr Charlton’s evidence may relate to the existence and use of potential private rights of way. Even though Mr Charlton is the applicant, the council must consider the available evidence as a whole in reaching its conclusion on the existence of public rights.
- 1.17 The council should identify a date when the use of the route was brought into question. There is a dispute demonstrated by the conflicting evidence regarding this, which may not be settled until after a public inquiry, but it is clear that the erection of a chain in March 2011 prompted Mr Charlton’s application in April 2011, some local concern and media attention, which would lead to consideration of a period of 1991-2011 for the purposes of assessing any potential statutory

presumption of dedication of a public right of way. Security gates were reported in the local press in 2012, but this would be after the date of challenge. (App Y)

- 1.18 The council has to determine the definitive map modification order application. The council must consider the available evidence, before reaching a decision on making any requisite order to modify the definitive map and statement. If the council makes an order, it must be advertised and notice given, with a period for formal objections to be made. If opposed, it would have to be submitted to the Secretary of State at DEFRA to determine.
- 1.19 Even though the application is for a bridleway to be recorded, the council must decide what, if any, rights have been shown to satisfy the relevant test(s). This means that the council may make a different order or none at all, after appropriate consideration of the available evidence.
- 1.20 For example, if there is sufficient evidence only to record public footpath rights, then an order should be made for a public footpath. If bicycle user is sufficient for an order to be made to record those rights, then it would be appropriate to record a bridleway or a restricted byway, depending on the circumstances.
- 1.21 The evidence and comments of the landholders objecting to the application and any recording of any public right of way are to be noted as well as those describing use and wishing to see a way recorded.
- 1.22 When considering additions to the definitive map and statement of public rights of way, the council must make an order
 - 1.22.1 If a public right of way is shown to subsist on the balance of probabilities, or
 - 1.22.2 if the right of way is shown to be reasonably alleged to subsist.

2. Information required to take a decision

- 2.1 Members are asked to consider the report, the available evidence for and against the recording of public rights, and decide what order, if any, to make.
- 2.2 It is the council's statutory duty to maintain the definitive map and statement and make any requisite orders.
- 2.3 Guidance for members is appended (Appendix 1).
- 2.4 The application is made under the Wildlife & Countryside Act 1981.
- 2.5 The council should consider the available evidence and make an order to modify the record of public rights of way when it is requisite in accordance with section 53 of the Wildlife & Countryside Act 1981.
- 2.6 The statutory provision in Section 53(3)(b) (WCA81), requires the Surveying Authority (Kirklees Council) to modify the Definitive Map and Statement following:
"the expiration in relation to any way in the area to which the map relates of any

period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway.”

- 2.7 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 The 20 year period is taken to run backwards from the date when the use of the path was first “brought into question”, whether by a notice or otherwise (HA Section 31 (2)). Section 69 of The Natural Environment and Rural Communities Act 2006 (NERC) clarified that the submission of an application to modify the Definitive Map was sufficient to call the use of the route into question by inserting subsections 7A and 7B into Section 31 HA 1980.
- 2.10 Section 31 states that only ways that are capable of being public highways are able to be considered under the statutory test. In the case of Moser v. Ambleside U.D.C. (1925) 89 J.P. 118, it was determined by Lord Justice Atkins that:
- 2.11 “*One of the first questions that one always has to enquire into in such a case as this is from whence does the highway come and whither does it lead? It has been suggested that you cannot have a highway except in so far as it connects two other highways. That seems to me to be too large a proposition. I think you can have a highway leading to a place of popular resort even though when you have*

got to the place of popular resort which you wish to see you have to return on your tracks by the same highway”.

- 2.12 In *Kotegaonkar v SSEFRA* (2012) EWHC 1976 (Admin), Mr Justice Hickinbottom looked at the establishment of public rights of way, particularly regarding a route not connecting to an existing highway. At paragraph 72 he concluded “*In my judgment, to be a highway, it is insufficient for a way to be linked to a place to which “the public would have a reasonable expectation to go” or “a place to which the public may resort”, as the Inspector considered to be the case: a highway, by definition, requires to be linked to a highway or to other land to which the public have a right of access.*” That decision described the consideration of the existence and establishment of *cul-de-sac* public highways
- 2.13 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2012/1976.html&query=kotegaonkar&method=boolean>
- 2.14 The Committee must consider whether there is sufficient evidence to raise the presumption of dedication. The standard of proof is the civil one that is the balance of probabilities. Members must weigh up the evidence and if, on balance, it is reasonable to allege that there is a public right of way, then the presumption is raised. The onus is then on the landowner to show evidence that there was no intention on his/her part to dedicate. This must be by some overt act on the part of the landowner to show the public at large that there was no such intention.
- 2.15 Such evidence relied upon may consist of notices or barriers, or by locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under HA Section 31 (6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit.
- 2.16 “Intention to dedicate” was considered in *Godmanchester*, which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgment, Lord Hoffmann approved the obiter dicta of Denning LJ in *Fairey v Southampton County Council* [1956] who held “*in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path....that he had no intention to dedicate*”.
- 2.17 Lord Hoffmann held that “*upon the true construction of Section 31(1), ‘intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively*

assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him] of the notion that the way was a public highway".

- 2.18 For a landowner to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify action which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".
- 2.19 Dedication of a public path at Common Law should also be considered. The main principles of establishing a highway under common law are:
- 2.19.1 Use by the public should be as of right; without force, secrecy or permission.
 - 2.19.2 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).
 - 2.19.3 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.
 - 2.19.4 Each case is judged on the facts available.
 - 2.19.5 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.
- 2.20 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.
- 2.20.1 Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.
 - 2.20.2 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.
- 2.21 If the council were to make a decision to make an order adding a public right of way 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.

- 2.22 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.
- 2.23 Government guidance to local authorities is contained in DEFRA’S Rights of Way Circular 1/09, version 2
- 2.24 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69304/pb13553-rowcircular1-09-091103.pdf
- 2.25 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
- 2.26 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517495/Full_version_February_2016_consistency_guides_2_.pdf
- 2.27 Mr Charlton made the application in April 2011, after he reported his concerns about access through the cricket club land.
- 2.28 The council’s land at Sands, identified in App B, was acquired by the predecessor urban district council in the 1960s under the Physical Training and Recreation Act 1937.
- 2.29 <https://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/46/section/4/enacted>

- 2.30 Papers relating to the acquisition of the land by the district council, and now owned by Kirklees Council, are shown at App M. The council's land includes a spur of land to the east of the Bowling Club land which connects to a common boundary with the Cricket Club's land.
- 2.31 The council's land at Sands has been laid out for the use of the public, the public are entitled to use it, so use of this council land is not use "as of right" and public rights of way could not be acquired across it. The council's land managers (Corporate Facilities Manager, Jonathan Quarmby) identify in form WCA 10 form that the land was acquired in September 1969 and is "*retained and managed by the Council as public open space*". The public user of council land described in evidence is user by deemed permission or by right in accordance with that designation from the acquisition by the district council.
- 2.32 Use of the way by those taking a linear route could not be distinguished by the landowner from use of the land for recreation. Only 8 of the 118 witnesses identify their use towards the north as reaching the public highway (e.g. Huddersfield Road). For the large majority, witnesses identify the bridge across the river or other points within the council's Sands landholdings not on the public highway.
- 2.33 This aspect is explored in the Planning Inspectorate order decision of July 2017 (ref: FPS/X1355/7/4M), which considers relevant case law, including Barkas, and is of interest.
- 2.34 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/636720/fps_x1355_7_4m_final_od.pdf
- 2.35 The route in question has been raised in some council correspondence in the past. This is appended at App H.
- 2.36 The spur of land identified in paragraph 2.30 above has been identified by the Bowling Club as carrying a right of way, but is not currently all available for public passage, as after entering the council's land from the south, most of the spur has been left under a pile of earth and stone, which the Cricket Club states is the scrapings from the groundworks preparing for the Bowling Club car park in the mid-1980s. This appears likely to have caused deviation from the line of the KC spur onto the Bowling Club land via the car park to the Sands council land. The spur of land does not appear to have been enclosed or maintained, since the deposit of materials.

- 2.37 The matter of the old spur and the currently available route over the Bowling Club car park was raised in the council's supplementary questions form sent out to witnesses. As identified above, it is possible for a public right of way to have been gained connecting to the council's recreational landholdings. This could be at the southern end of the spur and/or to the main body of the council's land further north across the bowling club car park.
- 2.38 The user evidence identifies use by 118 witnesses nearly all identifying a route from Bridge Lane to the northern extent of the Cricket Club land. Of these, over 60 give evidence of use for the whole period 1991-2011, with many others' evidence including time within that period. (see App J).
- 2.39 Evidence submitted includes 12 witnesses claiming use by bicycle including the whole period 1991-201, with 10 others' evidence including use within that period.. (App J).
- 2.40 Users noted seeing others and described use on foot, dog walking, accessing play area, running, going to doctor's, visiting recreation ground, cycling. Such use would be appear open, notorious and of a nature similar to that expected of public rights of way.
- 2.41 The submitted user evidence demonstrates substantial and frequent use over many years by the public. App J shows WCA8 user evidence, and App K shows responses to the council's supplementary questions.
- 2.42 As well as the Cricket Club's evidence, a small number of witnesses have mentioned incidents such as a table being laid out by the Cricket Club and bonfire night.
- 2.43 The Cricket Club claims that the way has been blocked and that access was not allowed without payment for access to watch cricket matches, and that controls on access occurred in relation to other events. It also claims that relevant notices have been posted regarding access by the public.
- 2.44 The various evidence discovered is contradictory and unclear, and members are reminded of the test described at 2.20.2 above for making an order where the two sides may have credible evidence but there is not incontrovertible evidence to show that no public way subsists.

- 2.45 A decision on the appropriate status of any route alleged to subsist here would have regard to the user evidence. For this route, there is bicycle as well as pedestrian user. If sufficient, the bicycle user would lead to a question of whether to record the route as a bridleway or as a restricted byway. Generally, following the decision in *Whitworth v Secretary of State for Environment, Food and Rural Affairs* [2010], it would be appropriate to record the less burdensome status to the landowner. However in this case, the route is not an historic bridleway, and there is an absence of evidence of equestrian user, so there is no basis from which a less burdensome bridleway can be inferred. If sufficient to satisfy the relevant criteria, the bicycle use would suggest a status of restricted byway in the order.
- 2.46 A 2017 Planning Inspectorate DMMO decision (ref: FPS/E2001/7/30) on this point, subsequent to *Whitworth* and of interest is at this link:
- 2.47 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/608941/fps_e2001_7_30_od.pdf
- 2.48 None of the user evidence forms describe equestrian use by witnesses.
- 2.49 Motor vehicular use in user evidence forms – 4 witnesses describe motor vehicular use (2002-17 and 2004-17 and 2005-11 and 1976-11). This would appear insufficient to be indicative of the existence of public motor vehicular rights.
- 2.50 Ordnance Survey plans showing the land over the years are appended at App X (1893, 1906, 1931, 1967). These are not demonstrative of public rights of way but indicate the physical nature of the site over the years. The physical existence of a route through the Foundry, Cricket club and KC spur of land is clear from these plans. They may indicate the presence of gates at certain years, but this is not evidence that any gate may have been or was locked.
- 2.51 After considering the evidence and the relevant criteria members have a number of options.
- 2.52 The first option for members is to refuse the application and to decide that the council should not make any order.
- 2.53 The second option for members is for the council to make an order to record a public right of way, and either confirm it or forward it to the Secretary of State if it is opposed.

3. Implications for the Council

3.1 Early Intervention and Prevention (EIP)

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

3.2 Economic Resilience (ER)

3.2.1 There is an indirect impact of a welcoming environment which helps promote and retain inward investment

3.3 Improving Outcomes for Children

3.3.1 See 3.1.1

3.4 Reducing demand of services

3.4.1 See 3.5.

3.5 Other (e.g. Legal/Financial or Human Resources)

3.5.1 The Council has a statutory duty to maintain the formal record of public rights of way and to respond to applications and discovery of evidence of unrecorded and mistakenly recorded public rights of way.

3.5.2 The Council must make a decision regarding the order application and any appropriate PROW status of this route, making any order that is requisite further to Wildlife & Countryside Act 1981, e.g. section 53. In accordance with the Council's delegation scheme, this is a decision for the sub-committee.

3.5.3 Any person may make an objection or representation to an order modifying the definitive map and statement. If objections are not withdrawn, any order made would be forwarded to the Secretary of state at DEFRA, and likely considered by an inspector appointed by the Secretary of State, who may or may not confirm the order.

4 Consultees and their opinions

4.1 Ward members have been informed about the public bridleway claims and have been informed of the report being brought to sub-committee.

4.2 Officers have contacted landowners, statutory and local user groups and the Parish council.

4.3 The Parish council response was "*Although the Council has no specific evidence, my Members are aware that the bridleway has been used as a public right of way for at least 50 years.*"

- 4.4 Some individual witness evidence was subsequently received, and is as described elsewhere in this report.
- 4.5 Kirklees Bridleways group (“KBG”) submitted some historic documents in connection with the setting up of the railway serving Holmfirth, which includes the land of the route from Bridge Lane route under reference 104. (App L).
- 4.6 KBG wrote *“photos from the Railway Plan and book of reference. This shows an occupation road up to a field which he informs me belongs to him and it also has an old gateway at the start of his field. The plan and book of reference is available to view at the Parliamentary Archives document reference HL/PO/PB/3/plan1845/H2. The Huddersfield and Sheffield Junction Railway was incorporated with the Manchester and Leeds Railway in an Act of 1846 and the Manchester and Leeds Railway became the Lancashire and Yorkshire Railway”*

5 Next steps

- 5.1 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.
- 5.2 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.
- 5.3 If the Council does not make any 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.

6. Officer recommendations

- 6.1 **Officers recommend that** members authorise the Service Director, Legal, Governance and Commissioning to make a definitive map modification order (“DMMO”) to record a restricted byway between points A & B and between points C & D shown on appended plan 1, under section 53 (3) c (i) of the Wildlife & Countryside Act 1981.

6.2 **Officers further recommend that** if the order recommended at 6.1 above is made, members authorise the Service Director, Legal, Governance and Commissioning to confirm the order or if opposed, to submit it to the Secretary of State at DEFRA to determine.

Reasons

6.3 There is significant evidence regarding public use of the route from Bridge Lane to the northern extent of the Cricket club land and then across the Bowling Club car park land towards Sands.

6.4 Public user over routes within the council's landholdings would not appear to have resulted in the establishment of a public right of way. This is because such user would be by right (or potentially by deemed permission) in accordance with that designation from the acquisition.

6.5 Use over the council land described in the evidence has been to varying terminal points, over various routes, with a small proportion of witnesses identifying any northern end point of the journey on the public highway network. This suggests that the user has not been as a public highway and additionally in this case it would appear difficult to distinguish from the usual activity of people walking throughout the public access land held by the council.

6.6 It has been established that a public right of way may have only one point on the public highway network (e.g. Bridge Lane), if the other terminal point leads to a place of popular resort. (*Moser v Ambleside U.D.C. (1925) 89 J.P. 118*).

6.7 In *Moser v. Ambleside U.D.C. (1925) 89 J.P. 118*, it was determined by Lord Justice Atkins that: *"One of the first questions that one always has to enquire into in such a case as this is from whence does the highway come and whither does it lead? It has been suggested that you cannot have a highway except in so far as it connects two other highways. That seems to me to be too large a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway"*.

6.8 Officers have considered whether it could be appear reasonable to allege that a public highway may subsist between two places of popular resort, such as in a case of a cliff-top path between two busy beaches, or in this case at Holmfirth. Sands recreation ground is considered to be a place of popular resort and a public

right of way could therefore be reasonably alleged to subsist between Bridge Lane and the Sands council-owned land.

- 6.9 Considering *Kotegaonkar*, and noting that the particular circumstances of this matter differ – e.g. the council as landholder states that its land is maintained as a public open space – then one can consider Sands Rec to be land that is not only a place of popular resort, but is also land to which the public have a right of access where, (unlike the health centre and shopping arcade land in *Kotegaonkar*), the public access is not trespass and also it cannot be prevented by the owner. In such circumstances, a public right of way could be reasonably alleged to subsist between two points of this ‘public access’ land, over other land. This is reflected in the officer recommendation to include route C-D over the bowling Club land in Plan 1 in the order, linking two parts of the council land.
- 6.10 At paragraph 2.36 of the Planning Inspectorate’s consistency guidelines for DEFRA inspectors, it states: “*The courts have long recognised that, in certain circumstances, culs-de-sac in rural areas can be highways. (e.g. Eyre v New Forest Highways Board 1892, Moser v Ambleside 1925, A-G and Newton Abbott v Dyer 1947 and Roberts v Webster 1967). Most frequently, such a situation arises where a cul-de-sac is the only way to or from a place of public interest or where changes to the highways network have turned what was part of a through road into a cul-de-sac. Before recognising a cul-de-sac as a highway, Inspectors will need to be persuaded that special circumstances exist.*”
- 6.11 In this case, when considered by the criteria in paragraph 2.20.2 above, there is a conflict of evidence provided, but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist. The appropriate status should be reflected in any order made.
- 6.12 In conclusion, as there is credible evidence on both sides in this case and no incontrovertible evidence that no public right of way subsists then officers consider that an Order to modify the Definitive Map and Statement should be made to record a restricted byway under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 over the Bridge Foundry, Cricket Club and Bowling club lands as shown in appended Plan 1.
- 6.13 If an order is made and objections made and not withdrawn, it must be forwarded to the Secretary of State to make a decision. In that event, a public inquiry may be

considered by his inspector to be the preferred process to assist in a final determination of this matter, allowing for evidence to be given in person, where it would be open to cross-examination.

- 6.14 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;*”.

Summary of officer recommendation

- 6.15 Officers recommend that:

6.15.1 an Order to modify the Definitive Map and Statement should be made to record a restricted byway under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 between points A-B and C-D on Plan 1 **and that**

6.15.2 the said Order should be forwarded to the Secretary of State for determination if opposed, or otherwise confirmed as unopposed by the council.

7. Cabinet portfolio holder’s recommendations

- 7.1 Not applicable

8. Contact officer

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9. Background Papers and History of Decisions

- 9.1 872/1/MOD/169

9.1.1 Appendices -

<https://democracy.kirklees.gov.uk/ecCatDisplay.aspx?sch=doc&cat=13500>

9.1.2 Appendix 1 – guidance for members.

9.1.3 Plan 1 – showing recommended addition

9.1.4 App A – DMMO application form and plan

9.1.5 App B – Land ownership plans

9.1.6 App C – Representations from Holmfirth Cricket Club

9.1.7 App C – Representations from Bridge Foundry

- 9.1.8 App D – Submissions from PRP service for Kirklees Council as landowner.
- 9.1.9 App E – Submissions from Holmfirth Bowling Club
- 9.1.10 App F – Applicant submissions – documentary papers.
- 9.1.11 App G – Supplementary questions for witnesses
- 9.1.12 App H – Kirklees council “PROW general” file records
- 9.1.13 App J - User evidence summary
- 9.1.14 App K - Supplementary form evidence.
- 9.1.15 App L – KBG railway documents
- 9.1.16 App M – Sands council acquisition documents
- 9.1.17 App X – Ordnance Survey plans
- 9.1.18 App Y – Press cutting
- 9.1.19 1937 Act extract

10. **Assistant Director responsible**

- 10.1 Joanne Bartholomew, Service Director, Commercial, Regulatory & Operational Services