

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

**Date:** 3 October 2019

**Title of report:** Application for a definitive map modification order to add a public footpath to the definitive map and statement, Miry Lane to St Mary's Rise, Netherthong.

**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 footpath.

**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 <a href="#">Council's Forward Plan (key decisions and private reports?)</a>	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	Karl Battersby 23 September 2019
Is it also signed off by the Assistant Director for Financial Management, IT, Risk and Performance?	Yes: James Anderson on behalf of Eamonn Croston 23 September 2019
Is it also signed off by the Service Director (Legal Governance and Commissioning)?	Yes: Sandra Haigh on behalf of Julie Muscroft 23 September 2019
Cabinet member <a href="#">portfolio</a>	N/A

**Electoral wards affected:** Holme Valley South

**Ward councillors consulted:** Cllrs. Davies Firth & Patrick.

**Public or private:** Public

## 1. Summary

- 1.1 The council received an application (at App A, with plan) from Mr S Cook in July 2017 for an order to modify the definitive map and statement of public rights of way to record a public footpath between St Mary's Rise and Miry Lane.(DMMO file ref: 200).
- 1.2 The council initially received 27 user evidence forms. These forms are generally used by witnesses to describe their personal knowledge and experience of routes. (App J & K). A number of further responses is described at section 4 below.
- 1.3 The council has received representations from landowners, "Yorkshire Country Properties" (YCP) as well as statements from former owners and occupiers, opposing the application.
- 1.4 Part of the land between Miry Lane and the tarmac carriageway of St Mary's Rise is owned by the owners of 7 St Mary's Rise, Mr & Mrs F. Yorkshire Country Properties, ("YCP") which owns the former field, has identified that the application form plan completed by Mr Cook does not include a route across this land and that it falls short of the extent of public highway 'adopted' by the local highway authority when the estate roads became maintainable at public expense. YCP makes a number of points about this aspect of the application.
- 1.5 Mr & Mrs F, the owners of 7 St Mary's Rise supported the application to record a public footpath and submitted evidence relating to public use. Since planning consent was given for residential development of the neighbouring land, they have withdrawn support for the application, as has the applicant who has sought to withdraw the application. Mr & Mrs F now state that access was taken across their land by permission. The applicant, a number of the 29 witnesses to complete user evidence forms, and another person have recently written to the Council stating that their use of the land between the tarmac road surface and the field was by permission of the landowners. Officers have subsequently interviewed a number of witnesses in relation to permission to cross Mr & Mrs F's land, asking whether they crossed the land, whether they were aware who owned it, and whether permission was sought or granted. (App N)
- 1.6 The plan submitted with the application (App A) does not have a pen stroke over this land between the field wall and the tarmac road. However the evidence of users appears to indicate that the route used was slightly longer and reached the tarmac part of carriageway at St Mary's Rise, via the opening/stile in the boundary wall, i.e. over a slightly different alignment.
- 1.7 Mr Scanlon's NSCL correspondence on behalf of his client Yorkshire Country Properties (appended at App C) cites a number of witnesses.

- 1.8 Mr E of Yorkshire Country Properties has completed a landowner evidence form. Mr C was one of four co-landowners before YCP and has completed a landowner evidence form. Mr B, a former occupier, has completed a former occupier form. Mr E has completed a statutory declaration relating to his submission of a form on behalf of former owner, Mr A. Mr B met officers on site and answered supplementary queries regarding his evidence.
- 1.9 Mr Scanlon of NSCL, states: “the application is vexatious. The WCA8 evidence, the user evidence, is not credible. Based on the evidence submitted and what has arisen since, the Council could not now rationally, or more importantly, lawfully make an order, because a public right of way cannot lawfully exist. The application should be and must now be rejected. There is now no recourse for appeal to the Secretary of State by the applicant, because the application has purported to be ‘withdrawn’. In basic terms, but importantly, ‘as of right’ is established to mean that a way is used without force, without secrecy and without permission. This is often quoted in latin: *nec vi, nec clam, nec precario*. More recently, in more modern parlance, a leading Judge has helpfully put it more basically: not by force, nor stealth, nor the licence of the owner.”
- 1.10 “Where at any point in its history this is not the position and for example a way has been used by stealth, or more blatantly by trespass, then in the absence of information dedicating the way by other means, a public right of way cannot be established. Such a way cannot be deemed a public right of way in accordance with s.31 HA 1980. Case law has also established that ‘without interruption’ means just that. To close a way just once is sufficient to negate it becoming a public right of way.
- 1.11 “Landowners will often close a way just one day a year to preserve the position of their land assets in order to prevent the suggestion of or coming into being of a public right of way.”
- 1.12 Former occupier of the land Mr B states that there has never been a footpath across the land.
- 1.13 Former landowner Mr C states that there was a barbed wire fence around the site when purchased in 2006 and signs saying the land was private property. Mr C also stated that there is no public right of way. Officers were not able to check Mr C’s evidence at this stage. Photos of 2014 and 2017 are appended at App M. There is a barbed wire fence in the 2017 photo but not the 2014 photo, all taken by Council officers.
- 1.14 Former landowner Mr A’s statement, obtained by Mr E of the current owners YCP, identifies that the land was in his family from the early 1950s to 2006. It stresses that there was not ever any right of access across the land. It notes that the estate

was built in the late 1970s. He employed Mr G who worked on the land and was involved in fencing, signing etc. The statement notes that there was no stile or throughway from St Mary's Rise during his ownership, and that there was barbed wire fencing all the way round the field perimeter throughout the family's ownership of the land. He notes that he became aware of trespass in the late 1980s/early 1990s, and was made aware of deliberately cut or damaged fencing. He notes that Mr G made up signs and these were erected along the boundary with St Mary's Rise, including "private", "no public access" etc. Officers were not able to contact Mr A about his evidence statement and regrettably, Mr G is deceased.

- 1.15 Further to matters raised by the landowner and his representative, officers have contacted users who had submitted witness evidence, sending out a number of supplementary questions to try to clarify various points.
- 1.16 Generally, the supplementary questions were:
  - 1.16.1 Did you and the other people you describe seeing using the route take access between the tarmac road at St Mary's Rise and the stile?
  - 1.16.2 If so, where did you/they go to get from the tarmac road to the stile?
  - 1.16.3 Did those people take access from the gate you describe to the tarmac surface of Miry Lane?
- 1.17 It was sent in May 2019 to witnesses to clarify where they went and how far.
- 1.18 No deposit has been made relating to the land under section 31(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.
- 1.19 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, but it is clear that the way was blocked by barbed wire prior to Mr Cook's application.
- 1.20 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.
- 1.21 Even though the applicant and the owners of no 7 have changed their minds about wanting a public footpath, the council must decide what, if any, rights have been shown to satisfy the relevant test(s). This means that the council may make an order, a different order or none at all, after appropriate consideration of the available evidence.

- 1.22 For example, if there is sufficient evidence only to record public footpath rights, then an order should be made for a public footpath.
- 1.23 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.
- 1.24 When considering additions to the definitive map and statement of public rights of way, the council must make an order
  - 1.24.1 If a public right of way is shown to subsist on the balance of probabilities, or
  - 1.24.2 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 In this case, the circumstances may be considered to be quite different from Kotegaonkar for a route between the two roads. In Kotegaonkar, the application was for a route from a public street to a parade of shops via a health centre car park. Bury Council determined that there was no public right of way route demonstrated by the evidence to run over the car park, so made an order showing a route shown in appended App Z plan, which connected at neither end to the public highway or any place to which the public had a right to go. Conversely, in this Netherthong case, the route used and widely described in evidence runs from/to St Mary's Rise and Miry Lane, two public ordinary roads. This is the route shown to Kirklees PROW by the applicant and (the landowner) Mrs F on council officer's first visit before the application was made, running over land from the tarmac road of St Mary's Rise to Miry Lane, including the land immediately before the front garden area of no. 7 St Mary's Rise, that the householders now dispute, now that they have changed their mind about having a footpath. It is the route identified by witnesses both originally and in supplementary responses. It must be considered whether use of the route has been "as of right".
- 2.15 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 would then be on the landowner(s) 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.
- 2.16 Such evidence relied upon may consist of notices or barriers, or by blocking of the way, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under Highways Act 1980, 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.
- 2.17 "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*".
- 2.18 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".*

- 2.19 For a landowner to benefit from the proviso to section 31(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".
- 2.20 Dedication of a public path at Common Law should also be considered. The main principles of establishing a highway under common law are:
- 2.20.1 Use by the public should be as of right; without force, secrecy or permission.
  - 2.20.2 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).
  - 2.20.3 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.
  - 2.20.4 Each case is judged on the facts available.
  - 2.20.5 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.
- 2.21 Interruption – "With regard to Section 31 of the 1980 Act, an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage. Whether any action can be regarded as an interruption is also dependent upon the circumstances of that action; temporary obstructions of a minor nature such as the parking of vehicles on a road (Lewis v Thomas [1950] 1KB 438), or the storage of building materials on a path (Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360) have been held not to amount to relevant interruptions." As noted by DEFRA inspector



Alan Beckett, in his decision for the Secretary of State on order ref: FPS/P2745/7/38.

- 2.22 Although, in this Netherthong case, there has been suggestion of parking of cars and caravans and the presence of items including a bathtub in front of 7 St Mary's Rise, none of the users report finding any obstruction or impediment to their ability to pass and repass along the route during the relevant period. Interruption needs to be meaningful, intended to prevent use, not incidental, and that actually interrupted user.
- 2.23 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*.
- 2.23.1 Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.
- 2.23.2 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.
- 2.24 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.
- 2.25 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.

- 2.26 Government guidance to local authorities is contained in DEFRA'S Rights of Way Circular 1/09, version 2
- 2.27 [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)
- 2.28 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
- 2.29 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517495/Full\\_version\\_February\\_2016\\_consistency\\_guides\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517495/Full_version_February_2016_consistency_guides_2_.pdf)
- 2.30 The user evidence identifies use by 25 original witnesses. Of these, most reported use ending in 2017.
- 2.31 Evidence from users noted seeing others and described use on foot, dog walking, shortcut, access to bus at Oldfield. Such use would be appear open, notorious and of a nature similar to that expected of public rights of way.
- 2.32 The submitted user evidence demonstrates substantial and frequent use over many years. App J and App K shows WCA8 user evidence summary and timeline.
- 2.33 The landholders' statements claim that the way has been blocked, that relevant notices have been posted regarding access by the public. The NSCL statement argues that it is not legally possible for an order to be made, that the evidence of users is not credible, that the evidence against the application is clear.
- 2.34 The various evidence discovered is contradictory and unclear, and members are reminded of the test described at 2.23.2 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.
- 2.35 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 evidence of pedestrian user. If sufficient, and if it is "as of right", the pedestrian user may give rise to an order recording the route as a public footpath, if landowner(s) have not done enough to demonstrate an intention not to dedicate.

- 2.36 None of the user evidence forms describe equestrian or cycle use by witnesses.
- 2.37 Ordnance Survey plans showing the land over the years are appended at App L (1893, 1906, 1933, 1964, 1978, 1994). These are not demonstrative of public rights of way but indicate the physical nature of the site over the years, none is demonstrative of rights existing or not existing. Aerial photos are also at App L (2000-18) showing the land at the date of the photo.
- 2.38 As described at paragraph 1.5 above, officers recently received additional information and interviewed a number of witnesses in relation to permission to cross the land in front of no.7 St Mary's Rise, shown in App B. In summary, the results of this further examination suggest that witnesses 1,5,6,7,9,10,11,12,13,14,15,16,17,18,24,25 & 27 use was not use as of right for the part of the way between Miry Lane and the adopted highway at St Mary's Rise. One of those witnesses stated that they sought and gained permission from landowner Mr A in 1985 to cross the field. Two other witnesses, 2 & 3, did not use the path.
- 2.39 After considering the evidence and the relevant criteria members have a number of options.
- 2.40 The first option for members is to refuse the application and to decide that the council should not make any order based on the available evidence.
- 2.41 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 footpath 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 Holme Valley Parish council.
- 4.3 The Parish Council did not respond.
- 4.4 Some individual witness evidence was subsequently received in 2019, and is as follows.
- 4.5 Witness 28 stated "The footpath used to run from the gate on Miry Lane to St Mary's Rise where there is a stile in the wall, I used to use this footpath on a regular basis as I live on St Mary's Crescent. But the owners of the land put up a barbed wire fence straight across the stile which made it impossible to use. And told that they wasn't an official footpath they. [sic]"
- 4.6 Witness 29 who was informed of the matter by Huddersfield Ramblers stated "The footpath depicted in your plan WCA5 was used in the past and an access stile in the boundary wall at St. Mary's Rise still exists. In recent years the gate to Miry Lane has been secured preventing use. I assume that is why a pedestrian route

was included as shown in plan 1023/90-01 accompanying [Planning Application 2018/62/90192/W.](#)

- 4.7 Witness 30 (no User Evidence Form) stated, “Have walked this path for many years having lived in the vicinity for over 50 years.”

## 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. The applicant has indicated an intention not to pursue this matter. Notwithstanding any presumption about the applicant’s potential future decision, and noting NSCL’s comments at his paragraph 3.11 etc. on application withdrawal and the *Roxlena* case, officers have contacted DEFRA/the Planning Inspectorate to ask if they have any view on whether the applicant has no right of appeal under Schedule 14; no response has been received to date.

## 6. Officer recommendations

- 6.1 **Officers recommend that** members choose option 1 at paragraph 2.40 above and decide not to make a definitive map modification order.

### Reasons

- 6.2 There is conflict in the evidence. There is evidence from user witnesses that they have passed from St Mary’s Rise to Miry Lane. There is evidence that challenges such use. There is conflict between evidence given by different people and even between the same people. There is evidence of varying motivations and changing motivations. There are claims presented about signs and arguments put forward about certain legal cases being relevant.

- 6.3 Clarification provided by a number of witnesses relating to their and their families' evidence has undermined their evidence in terms of public use 'as of right'.
- 6.4 When allowing for the witnesses' use that is suggestive of being by permission, officers consider that there is, on balance, insufficient evidence of use 'as of right' from remaining witnesses of sufficient time duration and quality to require the making of an order on the available evidence, even on the lesser Test B described at paragraph 2.23. There is considered to be insufficient evidence to be able to infer that the landowner of the field, or other land, dedicated a public right of way at common law.
- 6.5 If members determine that there is insufficient credible evidence of public user as of right for a sufficient period of time, nor sufficient evidence to infer dedication at common law, then they should decide to refuse the application and not to authorise the making of an order, as described in option 1 at paragraph 2.40.

#### **Summary of officer recommendation**

- 6.6 Officers recommend that:
- 6.6.1 Members refuse the application and decide that the council should not make any order based on the available evidence.

### **7. Cabinet portfolio holder's recommendations**

- 7.1 Not applicable

### **8. Contact officer**

Giles Cheetham, Definitive Map Officer

01484 221000

[giles.cheetham@kirklees.gov.uk](mailto:giles.cheetham@kirklees.gov.uk)

### **9. Background Papers and History of Decisions**

- 9.1 872/1/MOD/169
- 9.2 Appendices
- 9.2.1 Appendix 1 – guidance for members.
- 9.2.2 App A – DMMO application form and plan (2)
- 9.2.3 App B – Land ownership plans (2)
- 9.2.4 App C – Representations (redacted) from NSCL on behalf of landowner YCP
- 9.2.5 App J - User evidence summary (UEF 1-27) (5)

- 9.2.6 App K – User evidence timeline. (UEF 1-27)
- 9.2.7 App L – Ordnance Survey plans (6) and KC aerial photos (6)
- 9.2.8 App M - photos 2014 and 2017 (3)
- 9.2.9 App N – information regarding use by permission (2)
- 9.2.10 App Z – plan of Bury order in Kotegaonkar case

10. **Assistant Director responsible**

- 10.1 Service Director, Environment